



SEVENTH ITEM ON THE AGENDA

**337th Report of the Committee
on Freedom of Association***Contents*

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Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951) met at the International Labour Office, Geneva on 26, 27 May and 3 June 2005, under the chairmanship of Professor Paul van der Heijden.
 2. The members of Mexican, Salvadorian, Guatemalan and Venezuelan nationality were not present during the examination of the cases relating to Mexico (Case No. 2346), El Salvador (Cases Nos. 2360, 2368), Guatemala (Cases Nos. 2241, 2341) and Venezuela (Cases Nos. 2249, 2254, 2357) respectively.
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3. Currently, there are 120 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 35 cases on the merits, reaching definitive conclusions in 22 cases and interim conclusions in 13 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos. 1787 (Colombia), 2268 (Myanmar), 2318 (Cambodia), 2323 (Islamic Republic of Iran) and 2365 (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. 2413 (Guatemala), 2414 (Argentina), 2415 (Serbia and Montenegro), 2416 (Morocco), 2417 (Argentina), 2418 (El Salvador), 2419 (Sri Lanka), 2420 (Argentina), 2421 (Guatemala) and 2422 (Venezuela) since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted to the last meeting of the Committee.

Observations requested from governments

6. The Committee is still awaiting observations or information from the governments concerned in the following cases: Nos. 2068 (Colombia), 2265 (Switzerland), 2270 (Uruguay), 2317 (Republic of Moldova), 2321 (Haiti), 2343 (Canada), 2354 (Nicaragua), 2380 (Sri Lanka), 2393 (Mexico), 2394 (Nicaragua), 2397 (Guatemala), 2401 (Canada), 2403 (Canada), 2405 (Canada), 2406 (South Africa), 2407 (Benin), 2408 (Cape Verde), 2409 (Costa Rica) and 2411 (Venezuela).

Observations requested from governments and/or complainants

7. The Committee is still awaiting observations or information from the governments and the complainants in the following cases: Nos. 2292 (United States) and 2319 (Japan). The

Committee is still awaiting observations or information from the complainants in the following cases: Nos. 2313 (Zimbabwe), 2322 (Venezuela) and 2351 (Turkey).

Partial information received from governments

- 8.** In Cases Nos. 1865 (Republic of Korea), 2203 (Guatemala), 2259 (Guatemala), 2279 (Peru), 2295 (Guatemala), 2298 (Guatemala), 2314 (Canada), 2329 (Turkey), 2333 (Canada), 2339 (Guatemala), 2341 (Guatemala), 2342 (Panama), 2372 (Panama), 2384 (Colombia), 2390 (Guatemala), 2396 (El Salvador), 2399 (Pakistan), 2400 (Peru) and 2412 (Nepal), the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

Observations received from governments

- 9.** As regards Cases Nos. 2177 (Japan), 2183 (Japan), 2248 (Peru), 2264 (Nicaragua), 2275 (Nicaragua), 2302 (Argentina), 2326 (Australia), 2352 (Chile), 2361 (Guatemala), 2363 (Colombia), 2366 (Turkey), 2373 (Argentina), 2377 (Argentina), 2382 (Cameroon), 2385 (Costa Rica), 2392 (Chile), 2398 (Mauritius), 2402 (Bangladesh) and 2404 (Morocco), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

Urgent appeals

- 10.** As regards Cases Nos. 2348 (Iraq), 2350 (Republic of Moldova), 2364 (India), 2374 (Cambodia), 2375 (Peru), 2376 (Côte d'Ivoire), 2378 (Uganda), 2386 (Peru), 2387 (Georgia) and 2391 (Madagascar), the Committee observes that despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

Suspension of complaint

- 11.** The Committee suspended the examination of Case No. 2379 (Netherlands) at the request of the complainant organization. The Committee is awaiting the comments announced by that organization.

Withdrawal of complaint

- 12.** The Committee takes due note of the request of the complainant, Union Network International (UNI), to withdraw its complaint in Case No. 2309 (United States).

Receivability of a complaint

13. The Committee considered a complaint against the Government of Mexico submitted by the chairperson of the Committee of Control and Surveillance of the National Organization of the Oil Industry Workers of Trust (Case No. 2410) not to be receivable.

Transmission of cases to the Committee of Experts

14. 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: Bangladesh (Case No. 2327), Portugal (Case No. 2334) and the Russian Federation (Cases Nos. 2216 and 2251).

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

15. In its previous report, in accordance with the decision taken by the Governing Body at its 291st Session (November 2004), the Committee requested the Government to transmit its observations and information relating to the measures taken to implement the recommendations of the Commission of Inquiry as soon as possible, taking due account of the deadline set by the Commission in respect of a number of its recommendations. The Committee has received partial observations from the Government. Noting that the deadline set by the Commission for action to be taken on some of its recommendations was 1 June 2005, the Committee urges the Government to send any additional observations and information on the measures taken to implement these recommendations as soon as possible so that it may examine this case in full knowledge of the facts at its next meeting.

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

Case No. 2197 (South Africa)

16. The Committee last examined this case, which concerns the alleged refusal of the South African Embassy to Ireland to meet and negotiate with the union chosen by the locally recruited personnel to represent them, at its June 2004 meeting. On that occasion, the Committee recalled that locally recruited embassy personnel are covered by the provisions of Conventions Nos. 87 and 98 and requested the Government to indicate the actual duties of the five locally recruited personnel at the South African Embassy in Ireland who are members of the complainant trade union [see 334th Report, approved by the Governing Body at its 290th Session (June 2004), paras. 95-131].
17. In communications dated 28 September and 31 October 2004, the Government provided the list of duties of the locally recruited personnel and informed the Committee that it had always supported and endorsed social dialogue, fair labour relations and the principles of freedom of association and collective bargaining, as evidenced by its labour relations legislation and its Constitution, as well as the ratification of Conventions Nos. 87 and 98. The Government added that it did not endorse the attitude adopted by the Embassy in Ireland in its policy “not to negotiate or work through a third party, in relation to issues of labour relations” and was currently in discussions with the Embassy on this issue. Employees in its embassies were entitled to representation in respect of work-related issues

and the Government recommended and encouraged its embassies to establish policies and procedures for the resolution of work-related disputes, such as grievances and discipline. The Government finally stated that it would endeavour through the principles of social dialogue to arrive at an amicable solution to this case.

18. In a communication dated 24 March 2005, the complainant, Mandate Trade Union (MTU), indicated that it had concluded an agreement with the Government of South Africa to formalize the relationship between the parties and secure the effective observance of Conventions Nos. 87 and 98. The complainant attached to the communication a copy of the Recognition and Procedural Agreement between the Government of South Africa and the MTU, dated 2 March 2005. The complainant finally stated that it wished to withdraw its complaint, given that the Government had undertaken to fully implement the agreement.
19. *The Committee takes note with satisfaction of the Recognition and Procedural Agreement between the Government of South Africa and the MTU, dated 2 March 2005, which put an end to the dispute concerning the locally recruited personnel at the South African Embassy in Ireland by formalizing the relationship between the parties and securing the effective observance of Conventions Nos. 87 and 98. The Committee commends the parties for their successful efforts. The Committee also takes note of the complainant's wish to withdraw the complaint pursuant to the resolution of this case.*

Case No. 2221 (Argentina)

20. In its March 2004 meeting, the Committee requested the Government to keep it informed of all new measures adopted in order to remedy the imbalance in the composition of the Supervisory Commission of the National Register of Newspaper and Magazine Vendors and Distributors [see 333rd Report, para. 16].
21. In its communication of 18 October 2004, the Government states that the Supervisory Commission has an essentially consultative function and that all the sectors have equal rights, ensuring that there is no imbalance between the different parties. The Government explains that the Supervisory Commission in no way assumes the functions of the appellate authority (the Ministry of Labour), which carries on those functions in full, and that the objective of the legislation in force is to protect workers' rights. The Government states that the Supervisory Commission is made up, on the one hand, of representatives of the publishing sector and, on the other, of representatives of the Trade Union of Newspaper and Magazine Vendors of the Federal Capital, the National Guild Federation and the Society of Newspaper and Magazine Distributors; it is chaired by an official of the Ministry of Labour, Employment and Social Security with the rank of Secretary.

22. *The Committee takes note of these observations.*

Case No. 2188 (Bangladesh)

23. During its last examination of the case at its November 2004 meeting [see 335th Report, paras. 23-27], the Committee had: (a) requested the Government to clarify whether the case of Ms. Taposh Bhattacharjee had been finally determined by the Appellate Division of the Supreme Court of Bangladesh or whether the Government's appeal against the High Court Division's decision of reinstatement was still pending and in the event of the case still pending, requested the Government to provide it with a copy of the decision once it was issued and to keep it informed in this regard; (b) in relation to the warnings issued to the ten union officials, the Committee had noted that it had not been provided with any further details and urged the Government to give appropriate directions to the management

of the Shahid Sorwardi Hospital so that these warnings are withdrawn and to keep it informed in this respect.

24. In its communication of 2 May 2005, the Government has clarified that Ms. Taposhi Bhattacharjee has been reinstated in service in accordance with the decision of the High Court and has also been paid her back salaries and outstanding benefits as per the service rules. The Government has also indicated that its appeal against the decision of the reinstatement of Ms. Taposhi Bhattacharjee is pending before the High Court (Appellate Division) and that the decision of the Appellate Division will be transmitted to the Committee as soon as it is given. The Government has, however, not furnished any further information in respect of the warnings issued to the ten union officials by the management of the Shahid Sorwardi Hospital.
25. *The Committee takes note of the information that Ms. Taposhi Bhattacharjee has been reinstated in service and also paid her back salaries and other outstanding benefits. The Committee also notes that the appeal of the Government against the decision of the reinstatement of Ms. Taposhi Bhattacharjee is pending before the High Court (Appellate Division). As in its previous recommendations [332nd Report, para. 15], the Committee strongly hopes that the Appellate Division will issue a judgment in conformity with freedom of association principles confirming the High Court decision reinstating her in her job with full benefits. The Committee requests the Government to keep it informed in this regard and to provide it with a copy of the decision of the Appellate Division once it is issued.*
26. *Noting that the Government has not furnished any further information in respect of the warnings issued to the ten union officials, the Committee once again requests the Government to give appropriate directions to the management of Shahid Sorwardi Hospital so that these warnings are withdrawn and to keep it informed in this respect.*

Case No. 2182 (Canada/Ontario)

27. The Committee last examined this case, which concerns legislative provisions that encouraged decertification of workers' organizations, at its March 2004 meeting, where it requested to be kept informed of developments [see 333rd Report, paras. 20-22].
28. In a communication of 24 January 2005, the Government of Ontario informed the Committee that, on 3 November 2004, the new Government introduced the Labour Relations Statute Law Amendment Act, 2004 (Bill 144) into the legislature. If passed, Bill 144 would repeal the provision that requires the posting and distribution of decertification information in unionized workplaces (section 63.1 of the LRA), and a related provision (section 63 (16.1)) concerning employers.
29. *Noting this information with interest, the Committee requests the Government to keep it informed of developments concerning the enactment of Bill 144 and to provide it with a copy of the Act once it is adopted.*

Case No. 2305 (Canada/Ontario)

30. The Committee examined this case on the merits at its November 2004 session, where it made the following recommendations [see 335th Report, para. 512]. The Committee: once again urges the Government to take measures to consider establishing a voluntary and effective dispute prevention and resolution mechanism rather than having recourse to back-to-work legislation; once again urges the Government to ensure that recourse to arbitration for the settlement of disputes concerning teachers in Ontario be voluntary and that such

arbitration, once freely chosen by the parties be truly independent and in line with freedom of association principles; requests the Government to ensure in future that full and good faith consultations are undertaken on any question affecting trade union rights; requests the Government to keep it informed of developments on all the above issues, in particular as regards the results of the Education Partnership Table. The Committee also requested the Government to keep it informed of developments in all these respects.

31. In a communication dated 24 January 2005, the Government of Ontario stated that, while there were no new specific developments to report, it continued to work with stakeholders to bring peace and stability in the education sector. Among other initiatives, the Government recently passed legislation (Professional Learning Program Cancellation Act) ending the “teacher testing program” which had been a contentious issue in the education sector; its elimination was welcomed by teachers’ unions. The issue of professional development for teachers will be addressed as part of the Education Partnership Table Project, and is the subject of a recently released discussion paper that seeks input from interested parties. Teachers’ unions have indicated that some provincial policy and/or funding actions are required as regards some issues, e.g. preparation time for elementary teachers, and average number of classes taught by secondary teachers. In response, the Minister of Education, school board trustees and teachers’ federations have recently begun a new dialogue on workload issues.
32. *The Committee notes with interest the information provided by the Government, from which it appears that social dialogue has resumed and is being pursued between the Government and stakeholders in the education sector. The Committee requests the Government to continue to keep it informed of developments, in particular, as regards results achieved at the education partnership table, including as concerns the establishment of a voluntary and effective dispute-prevention and resolution mechanism.*

Case No. 2215 (Chile)

33. At its meeting in May-June 2004, the Committee made the following recommendations on certain questions that remained pending [see 334th Report, para. 241]:
 - (a) In view of the circumstances of this case, the Committee once again requests the Government to adopt the necessary measures to ensure that the trade union official, Mr. Yapur Ruiz, is reinstated in his post at least until the last appeal brought before the courts is settled and requests the Government to keep it informed of developments.
 - (b) With regard to the allegations concerning the Trade Union of the Sanitation Works Company of the Vth Region, (ESVAL S.A.), the Committee requests the Government to carry out an investigation in this respect and keep it informed of its result.
34. In a communication dated 21 February 2005, the Government sends abundant information on the four rulings ordering the reinstatement of the trade union official, Erik Dusan Yapur Ruiz, and on a new legal action by the employer before the appellate court concerning the implementation of the ruling of the Court of First Instance.
35. As regards the alleged anti-union practices by the Sanitation Works Company of the Vth Region (ESVAL S.A.) against the union and its president and sole member, Mr. Aquiles Mercado, the Government states that the trade union in question is currently inactive as a result of the ruling of the Regional Electoral Tribunal of the Vth Region which annulled all official acts carried out by Mr. Aquiles Mercado as representative of the trade union after 20 March 2003, especially those relating to amendments to the union’s by-laws. This inactivity will continue as long as the minimum quorum of members required for it to become active again is not achieved and the union is not formally dissolved by a competent court. The Government states, however, that, Mr. Aquiles

Mercado terminated his employment with the Sanitation Works Company of the Vth Region (ESVAL S.A.), and both parties were entirely satisfied with the settlement which they signed.

- 36.** *The Committee takes note of all the Government's observations. It requests the Government to communicate the text of the final ruling given concerning the dismissal of the trade union official, Mr. Yapur Ruiz, and again requests the Government to take all measures in its power to ensure that he is reinstated until such time as a decision is given on the latest legal action after the successive judicial decisions ordering his reinstatement. The Committee deplores the delay that has occurred in the proceedings.*
- 37.** *As regards the allegations concerning the Trade Union of the Sanitation Works Company of the Vth Region (ESVAL S.A.), the Committee notes the Government's statements to the effect that the union is currently inactive for want of the legal minimum membership, and that the union's president, Mr. Aquiles Mercado, signed an agreement terminating his employment. Under these conditions, the Committee will not pursue its examination of the case.*

Case No. 2217 (Chile)

- 38.** At its November 2004 meeting, the Committee made the following recommendations concerning the issues that remained pending [see 335th Report, para. 528]:

Sopral S.A.

- Noting that the two legal proceedings for anti-union practices are awaiting decisions, the Committee requests the Government to keep it informed of the decisions handed down with regard to the allegations relating to 2000 (threats to freedom of association of the members of the trade union, harassment and dismissal of the former trade union official Nelson Orellana Ramírez, interference by the company in a vote of censure of the former executive committee of the trade union).
- With regard to the allegations of acts of intimidation and violence by the police during a gathering of striking workers outside the company's buildings on 1 and 2 May 2000 (resulting in workers being injured and detained), the Committee once again requests the Government to send the report which it promised to request from the Governor of the Province without delay and to ensure that investigations begin into the allegations and, if appropriate, that the sanctions provided for in legislation are applied.

Cecinas San Jorge S.A.

- With regard to the dismissal of trade union official Álvaro Zamorano Miranda, the Committee requests the Government to keep it informed of any new administrative or judicial decisions taken and expects that the trade union official will be reinstated in his post shortly. The Committee regrets to note that the Government has not sent its observations on the other allegations according to which the company began slander proceedings against union officer Álvaro Zamorano Miranda. In this respect, the Committee requests the Government to keep it informed of any judicial decision in this respect, and of any administrative or judicial decision on the alleged promotion by the company of a trade union.

Electroerosión Japax Chile S.A.

- With regard to the dismissal of nine workers enjoying trade union protection, the Committee notes that according to the Government's statements no final decision has been issued on this matter and it requests the Government to keep it informed in this respect.

- 39.** In its communication dated 11 April 2005, the Government states with respect to Sopral S.A. that case No. 12.616 concerning a complaint of anti-union practices filed by the Sopral enterprise trade union against Sopral S.A. in the Court of La Calera was closed

with the judgement of 14 March 2003, which dismissed the allegation of anti-union practices. The case was archived on 3 March 2004.

40. With regard to the Committee's recommendations: (1) concerning the report that the Government undertook to request from the Governor of the Province of Quillota in relation to the allegations of intimidation and violence by the police; and (2) that the Government should ensure that investigations are made into the allegations and, if appropriate, that the sanctions provided for in law are applied, the Government states that an official letter concerning these issues was sent to the Governor on 31 January 2005, but no reply has been received to date.
41. With regard to Cecinas San Jorge S.A., the Government indicates that an administrative investigation was undertaken in this case but it was concluded that there were insufficient grounds for the Ministry of Labour to make a judicial complaint regarding anti-union practices and request the reinstatement of union official Mr. Álvaro Zamorano. In fact, the employment relationship had actually been terminated by mutual agreement of the parties, and consequently any reinstatement of the official in question was no longer an issue.
42. With regard to the legal action for slander which Cecinas San Jorge S.A. had reportedly initiated against the official, the Government indicates that information was obtained through the competent labour inspector on whether the action, which had been prompted by statements that the official allegedly made on the radio, was actually being brought. Nevertheless, since the enterprise had agreed with the official in question to the termination of his employment relationship, the enterprise discontinued the legal action.
43. The Government also sends a communication from the Confederation of Production and Trade (CPC), which attaches comments by Cecinas San Jorge S.A.. The enterprise denies the allegations, indicating that there are three unions at the enterprise and a collective agreement is in force which will be renewed at the end of 2005. It also declares that there is no interference in the formation of trade unions or in union membership and that Mr. Álvaro Zamorano Miranda (a former trade union official) resigned voluntarily from his post at the enterprise on 10 December 2001 and received the statutory severance pay. The enterprise dropped its slander action against the former worker since, according to the enterprise, he had made a deposition to a notary that his statements on the radio which had prompted the proceedings "were erroneous and based on malicious and unfounded comments made by third parties". The enterprise management also indicated that it was untrue that any incentive had been offered to workers at the enterprise to join a specific union, adding that "on the contrary, I have been able to ascertain hitherto that there are three trade unions currently operating at the enterprise, each under its respective leadership, and there were no irregularities of any kind at the time they were formed".
44. As regards Electroerosión Japax Chile S.A., the Government states that in the case before the 6th Labour Court of Santiago, the Court accepted the complaint and its decision was implemented. According to the ruling sent by the Government, the judicial proceedings concerning anti-union practices against union official Mr. Jorge Murua Saavedra were deemed admissible, his reinstatement was ordered, and heavy fines were imposed on the enterprise for unfair practices in collective bargaining. In addition, pursuant to the legal provision requiring publication on a half-yearly basis of the names of enterprises found guilty of anti-union practices, the Ministry of Labour placed Electroerosión Japax Chile S.A. on the list published in the second half of 2004.
45. *With regard to the allegations against Sopralval S.A. concerning threats to the freedom of association of members of the trade union, harassment and dismissal of the former trade union official Mr. Nelson Orellana Ramírez, and interference by the company in a vote of censure of the former executive committee of the trade union, the Committee notes that the*

judicial authority rejected the complaint concerning anti-union practices and the case was archived on 3 March 2004.

46. *As regards the allegations of acts of intimidation and violence by the police during a gathering of striking workers outside the company's buildings on 1 and 2 May 2000 (resulting in workers being injured and detained), the Committee notes that the Government has written to the Governor of the Province of Quillota and is waiting for a reply. The Committee requests the Government to send the Governor's report on these allegations as soon as it receives it.*
47. *With regard to the dismissal of trade union official Mr. Álvaro Zamorano Miranda by Cecinas San Jorge S.A., the Committee notes the Government's statement that an administrative investigation was undertaken in this case but it was concluded that there were insufficient grounds for the Ministry of Labour to file a judicial complaint of anti-union practices and request the reinstatement of union official Mr. Álvaro Zamorano Miranda. The Committee also notes the Government's statement that Mr. Álvaro Zamorano Miranda's employment relationship was in fact terminated by mutual agreement of the parties and the legal action against this official ended when the enterprise dropped the action. The Committee notes the enterprise's statements which confirm the above information.*
48. *With regard to the dismissal of workers enjoying trade union immunity at Electroerosión Japax Chile S.A., the Committee notes the Government's statement that the court admitted the judicial proceedings concerning anti-union practices against union official Mr. Jorge Murua Saavedra, ordered his reinstatement, imposed heavy fines on the enterprise for unfair practices in collective bargaining and placed it on the list of enterprises found guilty of anti-union practices. The Committee requests the Government to keep it informed of the effective reinstatement of Mr. Saavedra.*

Case No. 2296 (Chile)

49. At its meeting in June 2004, the Committee made the following recommendations on questions that remained pending [see 334th Report, para. 274]:
 - (a) Regarding the failure to deduct from wages of non-unionized employees sums corresponding to the advantages derived from the collective agreements of 1999 and 2001, the Committee points out to the trade union of the Empresa Distribuidora de Industrias Nacionales S.A. that it rests with the union to lodge an official complaint with the labour courts for payment of said deductions, if it so desires; the Committee also calls upon the Government to clarify the discrepancies between its own statements regarding deductions and the enterprise's communication on this subject, and to send it a copy of the decision handed down by the Labour Inspectorate to the effect that the enterprise has been fined, which the enterprise denies.
 - (b) Regarding the alleged dismissal of 102 workers of Distribuidora de Industrias Nacionales S.A. that had been brought before the Freedom of Association Office of the Labour Directorate, the Committee calls on the Government to keep it informed of any decision taken by the said Office.
 - (c) Regarding the alleged dismissal of all the workers of Andonaegui S.A., including the union officials, after the conclusion of the collective bargaining process, the Committee calls on the Government to keep it informed of the decision handed down by the judicial authority.
50. In its communication of 10 February 2005, the Government states with regard to the company Distribuidora de Industrias Nacionales S.A. that the Labour Inspectorate confirmed a contravention of section 346 of the Labour Code and the company was fined

the equivalent of 14 monthly units of taxation for failing to deduct trade union dues from wages, failing to deduct amounts equivalent to 75 per cent of those dues, and failing to hand over those sums to the union. As regards the dismissal of 102 workers, the company's anti-union conduct was confirmed. Subsequently, through the offices of the Unit for the Defence of Freedom of Association, a complaint was made to the labour courts and was examined by the Eighth Labour Court of First Instance. As regards any judicial proceedings initiated by the trade union to challenge a decision of the Labour Directorate, the Government states that the workers' trade union at the company has not initiated any such proceedings in the labour courts, as the decision in question is considered to be favourable to them.

51. As regards the company Adonaegui S.A., the Government states that in the case examined by the Santiago First Labour Court of First Instance, a ruling handed down on 25 November 2003 imposed a fine equivalent to one monthly unit of taxation and ordered the reinstatement of the union officials in their normal posts, and cautioned the legal representative.
52. *The Committee takes note of the Government's information, and notes with interest that the administrative and judicial authorities have imposed penalties for the anti-union conduct of the companies Distribuidora de Industrias Nacionales S.A. and Adonaegui S.A. The Committee requests the Government to communicate the ruling handed down on the dismissal of the 102 workers at the company Distribuidora de Industrias Nacionales S.A.*

Case No. 2097 (Colombia)

53. At its November 2004 meeting, the Committee stated that it was awaiting the outcome of the administrative inquiry into the allegations made by the trade union organization SINTRAVI regarding the enterprise AVINCO S.A. (concerning pressure put on workers to conclude a collective agreement outside the union and the consequent withdrawal of non-statutory services for unionized workers, and the pressure put on workers to leave the union), and also waiting to receive copies of documents confirming that the former trade union official, Héctor de Jesús Gómez, had received the compensation provided for under the terms of the collective agreement [see 335th Report, paras. 46-49].
54. In its communication of 27 January 2005, the Government provides a copy of a communication sent to it by the company Cementos del Nare S.A. confirming that it has paid Héctor de Jesús Gómez the compensation required by the collective agreement, although he has refused it and consequently the compensation has been formally deposited with a court (the Government provides a copy of the relevant certificate).
55. *The Committee notes this information with interest. As regards the allegations made by SINTRAVI, the Committee regrets that the Government has not sent any information as to whether an administrative inquiry has actually been carried out. The Committee requests the Government to inform it without delay of any such inquiry and whether or not it has begun and, if not, to initiate one and keep it informed in this regard.*

Case No. 2297 (Colombia)

56. The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 77-81]. On that occasion, the Committee requested the Government to inform it whether, following the dismissals and transfers alleged to have taken place during the process of restructuring at the General Directorate of Taxation Support of the Ministry of Finance and Public Credit, any legal action had been taken as a consequence of anti-union

discrimination and to transmit its observations regarding the communication of the Trade Union of Communications Workers (USTC) dated 16 June 2004.

57. These allegations refer to: (1) the voluntary retirement plan implemented by the Government in 1995, which involved the termination of more than 3,230 contracts of employment; (2) the removal of the USTC executive board in Maica, Guajira District; and (3) successive collective dismissals through the retirement, liquidation and closure of the TELECOM company, involving the dismissal of more than 7,000 workers and the consequent weakening of the union. The dismissed workers included trade union officials, and in these cases necessary steps were taken to suspend their trade union immunity before the dismissals took place. The complainant also makes other allegations concerning murders and threats against union members and officials, which have already been examined in the context of Case No. 1787 and are therefore not dealt with here.
58. In its communication of 1 April 2005, the Government states with regard to the restructuring of TELECOM that the President of the Republic has the power to eliminate, merge or liquidate national bodies. The Government reiterates the explanations given during the previous examination of the case, stating that the restructuring became necessary because the company had ceased to be viable in terms of pensions, finances and trading, and that Decrees Nos. 1615 and 2062 of 2003 ordered the elimination of public sector posts. The Government adds that, with regard to the union officials, in accordance with section 405 of the Substantive Labour Code, applications to suspend the trade union immunity of the officials concerned were made to the courts.
59. *The Committee takes note of this information. As regards the process of restructuring at TELECOM, the Committee notes that, according to the statements of the complainant and of the Government, these measures were general in nature and affected all the workers, whether or not they were union members, and that their trade union immunity was suspended before dismissal took place. Under these circumstances, while it is true that the liquidation of the company weakened the trade union as a result of the considerable reduction in membership, the Committee is unable to determine whether the restructuring was carried out solely with the aim of rationalization, or whether it was a cover for acts of anti-union discrimination.*
60. *As regards the process of restructuring of the General Directorate of Taxation Support of the Ministry of Finance and Public Credit, the Committee regrets that the Government has not informed it whether or not any legal proceedings have been initiated for anti-union discrimination, and requests it to do so without delay.*

Case No. 2208 (El Salvador)

61. The Committee last examined this case at its March 2004 meeting and on that occasion requested the Government to keep it informed of the rulings handed down on the dismissals of 11 union officers at Lido S.A. [see 333rd Report, para. 52, approved by the Governing Body at its 289th Session (March 2004)].
62. The trade union of the company Lido. S.A. (SELSA), in its communications of 23 November 2004 and 3 February 2005, states that the company continues to refuse the union's executive body access to its premises. The union adds that the company had reinstated a certain number of union officials, but still refused to reinstate five others. The company refuses to meet with the union on official premises or to reactivate the joint committee provided for under the terms of the collective agreement.
63. The Government, in communications dated 8 October 2004 and 28 January and 28 February 2005, states that the company has complied with the conciliation agreement

signed by the parties on 3 July 2002, given that it deposits the wages of the 11 union officials once a fortnight with the Ministry of Labour, and those wages have been withdrawn by the officials without any problem. The Government adds that a number of meetings were arranged between the employer and workers to persuade the former to reinstate the officials. The Government states that, as no favourable reply was forthcoming from the employer at these meetings, the Ministry fined the company Lido S.A. the sum of US\$77,000 for infringing section 251 of the Labour Code by obstructing the freedom of association of the union officials and disrupting the union with the aim of ensuring that the union could not continue to exist legally for want of the legal minimum membership as required by the Labour Code. The Government also states that the company has allowed the reinstatement of five union officials and that the company and the union have agreed to discuss the reinstatement of the remaining five within a short period of time. The Government will take follow-up action with regard to the agreements in question. The Government invites the complainant to file its new allegations with the Ministry of Labour.

- 64.** In its communication dated 6 May 2005, the Government adds that one more trade union official has been reintegrated (Mr. Ernesto Hernández Castillo); with regard to the remaining four trade union officials, the company has indicated that it will look for the appropriate mechanism for their reintegration and the two parties have agreed to meet in order to find a satisfactory solution. The Government indicates that the company has indicated that it will verify the situation with regard to the alleged refusal to meet with the union and that the representative of the company refused knowledge of these facts; the company has a positive attitude towards resolving the problems. The company stated that there is good will to reactivate the joint committee through dialogue, and that its non-operation was due to external factors and changes in its membership on behalf of the company.
- 65.** *The Committee takes due note of these observations, and in particular of the large fine imposed on the company Lido S.A. for obstructing the freedom and association and reinstatement of six union officials. The Committee hopes that the remaining four officials will be reinstated in the company in the near future and notes that the company will meet with the trade union with regard to this issue and will look for an appropriate mechanism for their reintegration. The Committee requests the Government to keep it informed of developments including any ruling handed down with regard to the four dismissed officials. With regard to the alleged refusal of the company to meet with the union on official premises or to reactivate the joint committee provided for under the terms of the collective agreement, the Committee takes note of the company's statements and requests the Government to keep it informed of developments on these issues.*

Case No. 2299 (*El Salvador*)

- 66.** The Committee last examined this case at its March 2004 meeting and, on that occasion, requested the Government to take steps urgently to ensure that the competent authorities carry out an investigation into the alleged death threats against five trade union officials from STITAS by one of the owners of the J.R.C. Manufacturing S.A. of C.V. company and, if the alleged facts were confirmed, to punish those responsible and to guarantee adequate protection to these officials. The Committee considered that the trade union official, José Alirio Pérez Cañenguez, should be reinstated in his post without loss of pay and be authorized to exercise his trade union activities, and requested the Government to keep it informed of any new legal ruling handed down relating to the accusation of robbery against this trade union officer which, to date, had been provisionally put aside in the absence of sufficient evidence. The Committee considered that the denial of legal personality for the Private Security Services Industry Workers' Trade Union of El Salvador (SITRASEPRIES) was a violation of freedom of association, and urged the Government to recognize this trade union and to keep it informed in this respect. Lastly,

the Committee requested the Government to provide without delay information on the specific facts that led to the dismissal of 17 trade union officials from the J.R.C. Manufacturing S.A. of C.V. company in October 2003 and to indicate whether these trade union members remained dismissed; the Committee also requested the Government to indicate the reasons for the dismissal of trade union official, Juana Ramírez, in February 2002, and, if it were proven that any of these officials had been dismissed by reason of their trade union activities, to ensure that they were reinstated in their posts without loss of pay [see 333rd Report, para. 564, approved by the Governing Body at its 289th Session (March 2004)].

67. In its communication of 10 March 2005, the complainant (FENASTRAS) sent a copy of the Ministry of Labour resolution of 29 October 2004 according to which the appeal by SITRASEPRIES was not admissible.
68. In its communications of 8 October 2004 and 20 January 2005, the Government states that the J.R.C. Manufacturing S.A. of C.V. company closed down its operations definitively in February 2004. As regards the workers laid off, the parties agreed to a settlement regarding payment of compensation at the General Labour Directorate on 15 and 23 June 2004.
69. With regard to the case of SITRASEPRIES, the Government maintains that two fundamental principles are at stake: the principle of legality, and the principle that the law must be respected to the letter. Both of these principles have contributed to what is known as the “rule of law”, according to which any judicial authority, executive power and activities of individuals must be consistent with the law. It is therefore claimed, quite properly, that the essential characteristic of a state based on the rule of law is the fact that the law is above the government and the governed. The Government maintains that the Department of Labour and Social Security, in denying legal personality for SITRASEPRIES, was only adopting a constitutionally valid decision, given that article 7, paragraph 3, of the Constitution expressly “prohibits the existence of armed groups of a political, religious or professional nature”; it is clear that a trade union falls into the last of these categories, and the union in the present case is indeed a professional body formed by persons who use and possess firearms and thus come expressly within the terms of the constitutional prohibition. The Government adds that, in this context, it decided on 28 October to declare inadmissible the application by Juan José Huezo, General Secretary of the complainant organization, to rescind the resolution declaring null and void the application for legal personality made by SITRASEPRIES, for the legal reasons set out in a note dated 29 October 2003. The Government adds that the Act concerning the organization and functions of the labour and social security sector and the Labour Code do not provide for any administrative mechanisms for challenging such resolutions and, given that an application to acquire legal personality for a trade union is a unilateral petition to the public administration and does not involve any dispute between the parties, section 602 of the Labour Code is not applicable. If no appeal is considered, the administrative channel is deemed to be exhausted once the resolution rejecting the petition is adopted. Consequently, it would be for the complainant to initiate the appropriate judicial proceedings to challenge the supposed violation. The final paragraph of article 86 of the Constitution stipulates that public officials have no powers other than those expressly accorded to them by law; consequently, admitting an appeal not provided for under the terms of the relevant legislation would constitute a violation of that legislation. The Government finally gives its assurance that freedom of association is protected in El Salvador by the laws in force.
70. In its communication of 22 April 2005, the Government again urges the complainant to use existing legal mechanisms for obtaining redress.

- 71.** *The Committee takes note of the Government's observations to the effect that that the Department of Labour and Social Security, in denying legal personality for SITRASEPRIES, was only adopting a constitutionally valid decision, given that article 7, paragraph 3, of the Constitution expressly "prohibits the existence of armed groups of a political, religious or professional nature"; it is clear that a trade union falls into the last of these categories, and the union in the present case is indeed a professional body formed by persons who use and possess firearms. The Committee notes that, according to the Government, the administrative decision can be challenged before the judicial authority. In this regard, the Committee reiterates that, in accordance with the principles of freedom of association, only the armed forces and the police can be excluded from the right to establish trade unions – which is a fundamental right. Consequently, all other workers, including private security agents should freely be able to establish trade union organizations of their own choosing. Under these circumstances, the Committee emphasizes once again that the denial of legal personality for the trade union SITRASEPRIES is a serious violation of freedom of association, and urges the Government to recognize that legal personality without delay and keep it informed of developments. The Committee also requests the Government to inform it of any future judicial ruling on this matter.*
- 72.** *The Committee notes that the Government has not sent any information on the dismissal of the trade union official, José Alirio Pérez Cañenguez, and once again requests the Government to keep it informed of any new decision handed down concerning the charge of robbery brought against him. As regards the allegations regarding the company J.R.C. Manufacturing S.A. of C.V. company, the Committee notes that the questions still pending relate above all to the dismissal of the trade union official, Juana Ramirez, in February 2002, the dismissal of 17 union officials in October 2003, the dismissal of the union official, José Alirio Pérez Cañenguez, and the accusation of robbery made against him. The Committee notes the Government's statement to the effect that the company closed down its operations definitively in February 2004, and adds that the dismissed workers agreed on a settlement regarding compensation. The Committee notes that the Government's communication does not indicate which workers are referred to. It also notes that the Government does not give any response regarding the accusation of robbery made against the trade union official, José Alirio Pérez Cañenguez. In this regard, the Committee requests the Government to ensure that the dismissed trade union officials receive the statutory compensation, and to communicate any judicial ruling handed down concerning the criminal charge brought against José Alirio Pérez Cañenguez.*
- 73.** *As regards the alleged death threats against five officials of the union STITAS by one of the owners of the J.R.C. Manufacturing S.A. of C.V. company, the Committee notes that the Government has not sent any observations and again requests it, as a matter of urgency, to take measures to ensure that the competent authorities carry out an inquiry into the matter and, if the allegations are shown to be true, to punish those responsible.*

Case No. 2138 (Ecuador)

- 74.** At its November 2004 meeting the Committee requested the Government to ensure that no person would be prejudiced in his or her employment by reason of their trade union membership or legitimate trade union activities, whether past or present. In particular, referring to the COSMAG company, the Committee requested the Government to undertake all necessary efforts to locate the workers who had been victims of acts of discrimination, so that they could be reinstated or, if that were impossible, so that they could receive adequate compensation. Furthermore, the Committee requested the Government to amend section 190 of the Promotion of Investment and Citizen Participation Act (which has been ruled unconstitutional by the Constitutional Court) so as

to bring it into conformity with Conventions Nos. 87 and 98, ratified by Ecuador [see 335th Report, para. 856].

75. In its communication of 21 January 2005 the Government states that the workers in question were legally compensated and refers in this respect to the settlement documents they signed with the company and that the Government attaches. Furthermore, with respect to section 190 of the Promotion of Investment and Citizen Participation Act that was ruled unconstitutional by the Constitutional Court (section 190 of this Act replaced former section 224 of the Labour Code with the following: Section 224 – A collective agreement or accord is an agreement between one or more employers and one or more legally constituted workers' associations, as the case may be, for the purpose of establishing the conditions or basic principles in accordance with which subsequent individual employment contracts must be drawn up), the Government states that it was ruled unconstitutional by the Constitutional Court, and therefore that legal rule is not part of the Labour Code of Ecuador. The Government adds that the Committee's observations will be transmitted to the Legislative Power so that conformity with Conventions Nos. 87 and 98 will be taken into consideration in future discussions of legislation.

76. *The Committee notes this information.*

Cases Nos. 2017 and 2050 (Guatemala)

77. The Committee last examined these cases at its November 2004 meeting [see 335th Report, paras. 93-106]. On that occasion, the Committee made the following recommendations:

- With regard to the La Exacta and/or San Juan El Horizonte farm, the Committee observes that the Government has not specified whether the new amicable settlement concluded on 24 October 2003 includes the reinstatement of the dismissed workers in respect of whom the courts had ordered reinstatement and requests the Government to keep it informed in this respect.
- With regard to the Tamport S.A. company, in respect of which the Committee had requested the Government to inform it concerning the legal proceedings under way to protect the money owed to UNSITRAGUA members who were dismissed because of the company's closure, the Committee requests the Government to inform it of the results of those proceedings.
- With regard to the murder of Mr. Baudillo Amado Cermeño Ramírez in December 2001, the Committee requests the Government to send it the ruling handed down in that respect.
- With regard to the dispute at the La Aurora National Zoological Park, which was lodged with the Arbitration Court, the Committee requests the Government to keep it informed of the legal ruling with regard to the arbitrator's decision issued in December 2003, which was appealed by the company.
- With regard to the allegations of the dissent from SITRACOBSA over the decision by the Ministry of Labour to cancel the suspension of the contracts of workers belonging to the legitimate trade union (SITECOBSA) of the Corporación Bananera S.A. company, the Committee requests the Government to send its observations with regard to the alleged suspension of employment contracts for workers belonging to the other trade union (SITECOBSA) without delay.
- With regard to the allegations concerning the kidnapping, assaults and threats against the trade unionists of the Santa María de Lourdes farm, Mr. Walter Oswaldo Apen Ruiz and his family, the Committee requests the Government to send its observations and to ensure that the safety of the trade union member, which has been threatened, is guaranteed.

- With regard to the allegations relating to the murder of trade union members, Messrs. Efraín Recinos, Basilio Guzmán, Diego Orozco and José García González, the injuries to 11 workers and the detention of 45 workers of the La Exacta and/or San Juan El Horizonte farm, the Committee urges the Government to send information in this respect without delay.
- With regard to the dispute involving the Banco de Crédito Hipotecario Nacional, the Committee requests the Government to keep it informed of progress in the negotiating committee on all the ongoing issues and on the new allegations presented by UNSITRAGUA.

78. In communications dated 4 November and 2 December 2004 and 19 January and 16 March 2005, the Government states:

- With respect to the allegations concerning the Crédito Hipotecario Nacional, the Trade Union of Workers of the Crédito Hipotecario Nacional de Guatemala sent a summary of the labour dispute that had taken place between the Crédito Hipotecario Nacional de Guatemala and its workers, represented by the Trade Union of Workers of the same institution. *The Committee recalls that the Government had provided information about action being taken by the negotiating committee in respect of these allegations. The Committee requests the Government to keep it informed of the progress made by that committee.*
- With respect to the allegations relating to the Tampart S.A. company, Labour and Social Security Court No. 7 set a deadline of 24 hours for both parties, workers and employers, to appoint three delegates so as to be able to set up the conciliation tribunal and, should they not do so, the tribunal would appoint them officially. It is worthwhile stating that in this case neither of the parties promoted the group, so the tribunal did so officially. *The Committee requests the Government to keep it informed of the final result of this proceeding.*
- With regard to the dispute at the La Aurora National Zoological Park, the judicial authority confirmed the arbitrator's decision which had been appealed by the company. The arbitrator's decision is currently in the implementation phase, waiting for the joint commission, established in accordance with the arbitrator's decision, to issue the respective report. *The Committee requests the Government to keep it informed of the report of the joint commission mentioned.*
- With regard to the alleged suspension of the contracts of employment of workers belonging to the trade union SITRACOBSA, the decision to cancel the suspension of the contracts of employment is a matter for the judicial authority. Furthermore, the Government states that at the end of 1998 the trade union organization SITECOBASA had no members and can no longer legally exist. *In view of this information, the Committee will not pursue its examination of these allegations.*
- With regard to the dismissals from the La Exacta and/or San Juan El Horizonte farm, in respect of which reinstatement had been ordered, in September 2004 the acceleration committee, in which the Ministry of Labour and Social Welfare and UNSITRAGUA participate, was set up to serve as a conciliation body. The committee met on two occasions. During the second meeting, the reported dismissals were addressed, together with other matters. It was taken into account that immediately after the events that gave rise to the present complaint occurred, steps were taken to obtain the respective ordinary reinstatement judgements. The first level ruling favourable to the workers was contested by the employers and the second level ruling also ordered the reinstatement of the affected workers, as well as the payment of the respective labour benefits. To date it has not been possible to implement the second level ruling, given that the entity has been absorbed by other limited liability

companies, which have so far not been identified, as the business register certifications are unavailable. It was therefore agreed that they would be transmitted through UNSITRAGUA for subsequent analysis, together with the representative of the Ministry of Labour. It was also agreed to convene a conciliation hearing for the employers' side, who would be summoned through the Ministry of Labour and Social Welfare. *The Committee requests the Government to keep it informed of the reinstatement proceedings under way.*

79. *Lastly, the Committee regrets that the Government has not sent the requested information on the other pending issues. The Committee asks the Government to send the following information without delay:*

- *With regard to the murder of Mr. Baudillo Amado Cermeño Ramírez in December 2001, the Committee requests the Government to send it the ruling handed down in that respect.*
- *With regard to the allegations concerning the kidnapping, assaults and threats against the trade unionists of the Santa María de Lourdes farm, Mr. Walter Oswaldo Apen Ruiz and his family, the Committee requests the Government to send its observations and to ensure that the safety of the trade union member, which has been threatened, is guaranteed.*
- *With regard to the allegations relating to the murder of trade union members, Messrs. Efraín Recinos, Basilio Guzmán, Diego Orozco and José García González, the injuries to 11 workers and the detention of 45 workers of the La Exacta and/or San Juan El Horizonte farm, the Committee urges the Government to send information in this respect without delay.*

Case No. 2330 (Honduras)

80. In its November 2004 meeting, the Committee made the following recommendations regarding the questions that remained pending [see 335th Report, para. 880]:

- (a) While noting with interest the settlement reached on 10 July 2004 between the Government and the complainant organizations and in particular its clauses on salaries and deduction of trade union dues, the Committee requests the Government to indicate whether by virtue of that non-reprisal clause the sanctions (fines) on the president of COPEMH and against COPEMH and COPRUMH and the application for suspension of these organizations' legal personality have been abandoned or set aside.
- (b) The Committee also requests the Government to keep it informed of the result of the lawsuit by the Minister of Education against the official Nelson Edgardo Cálix for slander, libel and defamation.
- (c) Finally, the Committee requests the Government to keep it informed of the result of the application for protection of constitutional rights entered by the complainant organizations against the judgements, which, it is alleged, deny the right of these organizations to represent their members.

81. In its communication dated 9 March 2005, the Government states that the Court of Tegucigalpa acquitted Mr. Nelson Cálix of the offences of slander and libel and that this ruling was subject to an appeal for review for a procedural flaw and violation of the law before the Criminal Chamber of the Supreme Court of Justice which has still not issued a decision on the matter. With regard to the right of the teachers' associations to represent their members, the Government states that a ruling is pending on an *amparo* (enforcement of constitution rights) appeal lodged with the Constitutional Chamber of the Supreme Court by representatives of the Association of Secondary Teachers of Honduras

(COPEMH) and the Professional Association of School Teachers of Honduras (COPRUMH) against the ruling issued by the Administrative Disputes Appeal Court on 12 September 2003 which upheld the decision handed down by the Administrative Disputes Court concerning the setting aside of an administrative act applied for by the abovementioned teachers' associations.

- 82.** *The Committee takes note of this information and requests the Government to communicate the result of the abovementioned ongoing proceedings before the Criminal Chamber and the Constitutional Chamber of the Supreme Court of Justice. The Committee also reminds the Government of its previous recommendation requesting it to indicate whether, by virtue of the non-reprisal clause contained in the settlement reached between the Government and the complainant organizations on 10 July 2004, the sanctions (fines) on the president of COPEMH and against COPRUMH and the application for suspension of these organizations' legal personality have been abandoned or set aside.*

Case No. 2118 (Hungary)

- 83.** During its last examination of the case in its November 2004 meeting [see 335th Report, paras. 119-120], the Committee repeated its earlier request that the Government take all necessary steps to amend section 33 of the Labour Code so as to lower the minimum threshold requirements for recognition as a bargaining agent and ensure that where no trade union reaches these thresholds, collective bargaining rights are granted to all unions, at least on behalf of their own members.
- 84.** In its communication of 4 February 2005, the Government explained that the 50 per cent threshold requirement for the purpose of collective bargaining did not have to be reached by a single trade union but could be reached jointly by more than one trade union. Furthermore, when trade unions, either individually or jointly, did not meet this requirement, a collective agreement could be concluded if more than 50 per cent of the workers vote for such collective agreement. The Government explained that, thus, even if the concerned trade union or unions has/have a very small percentage of representativity, with the agreement of the majority of the workers, it/they would be entitled to conclude the collective agreement. According to the Government, these facts distinguished the system prevailing in Hungary from the situation described in paragraph 241 of the General Survey of the Committee of Experts on the Application of Conventions and Recommendations, 81st Session, 1994, referred to by the Committee in paragraph 119 of its 335th Report. The Government further explained that according to the prevailing system, only one collective agreement can be concluded with an employer which would cover all employees of the same employer and therefore it was obvious that at least 50 per cent of the workers should directly or indirectly support the one or more trade unions concluding the collective agreement.
- 85.** *The Committee takes note of this information. The information provided by the Government indicates that in the absence of the direct or indirect support of 50 per cent of the workers of an employer, no collective agreement may be reached by the trade unions in an establishment even on behalf of their own members. In other words, in the absence of such support, the trade unions in an establishment, either individually or jointly, would altogether be denied the right to bargain collectively with the employer. The Committee is of the view that this position is analogous to the one where a single union would be denied the right to bargain collectively with the employer if it does not have the support of 50 per cent of the workers. The Committee recalls that, if there is no union covering more than 50 per cent of the workers in a unit, collective bargaining rights should nevertheless be granted to the unions in this unit, at least on behalf of their own members [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 833]. By analogy, when the unions in a unit do not jointly have the support of 50 per*

cent of the workers either directly or indirectly, they should similarly have the right to bargain collectively with the employer at least on behalf of their own members.

- 86.** *The Committee therefore reiterates its earlier request that the Government take all necessary steps to amend section 33 of the Labour Code so as to lower the minimum threshold requirements for recognition as a bargaining agent and ensure that where no trade union reaches these thresholds, collective bargaining rights are granted to all unions, at least on behalf of their own members. The Committee also requests to be kept informed of the developments in this respect.*

Case No. 2301 (Malaysia)

- 87.** This case concerns the Malaysian labour legislation and its application which, for many years, have resulted for workers in serious violations of the right to organize and bargain collectively: discretionary and excessive powers granted to authorities as regards trade unions' registration and scope of membership; denial of workers' right to establish and join organizations of their own choosing, including federations and confederations; refusal to recognize independent trade unions; interference of authorities in internal unions' activities, including free elections of trade unions' representatives; establishment of employer-dominated unions; arbitrary denial of collective bargaining. The Committee formulated extensive recommendations at its March 2004 meeting [see 333rd Report, para. 599] and last examined the follow-up to this case at its November 2004 meeting [see 335th Report, approved by the Governing Body at its 291st Session, paras. 130-132].
- 88.** In a communication dated 14 February 2005, the Government reiterates the same comments it had made in its communication dated 19 August 2004, which were examined by the Committee at its November 2004 meeting.
- 89.** *The Committee notes with deep regret that the Government has not provided any new information in reply to its previous recommendations. In these circumstances, the Committee can only reiterate its previous conclusions which read as follows:*

The Committee notes the Government's reply, its stated intention (without any specifics, however) to amend "certain provisions" in the labour laws, and the data provided. The Committee recalls that the matters complained of in the present case are extremely serious ones, and that it has been called to comment upon them in no less than seven cases over a period of more than 15 years, without any progress whatsoever. The Committee strongly deplores, once again, the continued total lack of cooperation of the Government, which merely repeats previous statements and arguments, does not provide a substantive reply or fails to respond altogether. In these circumstances, the Committee must reiterate its initial recommendations according to which:

...

- (b) *The Committee urges once again the Government to introduce in the near future legislation to amend the Trade Unions Act, 1959 and the Industrial Relations Act, 1967, to bring them into full conformity with freedom of association principles, by ensuring:*
 - that all workers without distinction whatsoever, enjoy the right to establish and join organizations of their own choosing, both at primary and other levels, and for the establishment of federations and confederations;*
 - that no obstacles are placed, in law or in practice, to the recognitions and registration of workers' organizations, in particular through the granting of discretionary powers to the responsible official;*
 - that workers' organizations have the right to adopt freely their internal rules, including the right to elect their representatives in full freedom; and*

- *that workers and their organizations enjoy appropriate judicial redress avenues over the decisions of the minister or administrative authorities affecting them.*
- (c) *The Committee requests the Government to amend its legislation so as to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to regulating terms and conditions of employment by means of collective agreements.*
- (d) *The Committee requests the Government to take rapidly appropriate measures and give instructions to the competent administrative authority, so that the 8,000 workers denied representational and collective bargaining rights in 23 named companies may effectively enjoy these rights, in accordance with freedom of association principles.*
- (e) *The Committee requests the complainant and the Government to keep it informed on the court challenges filed by some employers and affecting some 2,000 workers, so that it may make an informed decision in full knowledge of the facts.*
- (g) *The Committee suggests once again that the Government avail itself of the ILO's technical assistance, to help it bring its law and practice into full conformity with freedom of association principles.*

90. *The Committee urges the Government to address rapidly the issues raised in its recommendations and to keep it informed of developments thereon.*

Case No. 2048 (Morocco)

- 91.** The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 133-135]. On several occasions, it has requested the Government to provide copies of three decisions: first, the decision of the Rabat Court of Appeal concerning the sentences handed down against 21 striking farm workers at the Avitema farm; and, second, the two decisions of the Rabat Court of the First Instance and of the Rabat Court of Appeal concerning the criminal proceedings that resulted from certain events during the collective labour dispute at the Avitema farm in 1999 and the charges of "abuse of power" brought against Messrs. Abderrazzak Challaoui, Bouazza Maâch and Abdeslam Talha.
- 92.** In a communication dated 28 January 2005, the Government sent the text of the Rabat Court of Appeal ruling of 26 December 2001 concerning proceedings against the 21 Avitema farm workers.
- 93.** *The Committee takes note of the ruling of the Court of Appeal, which upheld the ruling handed down by the lower court in respect of the workers at the Avitema farm but reduced the sentence on the grounds that it was too severe in the light of mitigating circumstances. The Committee again urges the Government to provide, without delay, copies of the two decisions of the Rabat Court of Appeal and Court of First Instance concerning the criminal proceedings that resulted from certain events during the collective dispute in 1999 at the farm and the charges of "abuse of power" brought against Messrs. Abderrazzak Challaoui, Bouazza Maâch and Abdeslam Talha.*

Case No. 2308 (Mexico)

- 94.** At its meeting in November 2004, the Committee requested the Government to take steps to register the amendments to the trade union by-laws requested by the complainant (the National Trade Union of Electrical and Allied Workers of the Mexican Republic), and to keep it informed in this regard [see 335th Report, para. 1042]. The purpose of these amendments was to enable the union to extend its coverage to workers in the cable television sector, radio broadcasting, and the manufacturing of radios, televisions, light bulbs and electronics in general, rather than being restricted to the electrical industry as such. The Government had stated that, as was clear from the administrative decisions and

the ruling handed down in this case, the sectors to which the complainant organization wished to extend its coverage fell within the remit of local government, according to section 527 of the Federal Labour Act, while the complainant organization belongs to the electrical industry, which falls within the federal remit, and different jurisdictions cannot be combined. The Committee had noted that the last judicial decision denied the complainant organization constitutional protection (*amparo*) and the protection of the justice system [see 335th Report, paras. 1039 and 1040].

95. In its communication of 9 February 2005, the Government reiterates that the National Trade Union of Electrical and Allied Workers of the Mexican Republic had gone through all the available administrative and judicial means provided for in national legislation regarding the request to register the amendments to its by-laws, without obtaining a favourable ruling. The collegiate circuit labour court accordingly ordered the case to be filed as definitively closed on 20 February 2004. The national tribunals ruled in accordance with the applicable legislation, with full autonomy, in accordance with law and with due regard to the procedural safeguards protecting the union. The union was able to make use of all the available legal means of defence. The Government adds that, given that the matter is now deemed to be *res judicata*, the Government cannot now take steps to register the amendments as requested by the Committee in its recommendation, as this would invalidate the rulings handed down by the competent judicial bodies. The union appears to be demanding that the Committee on Freedom of Association assume the role of a higher judicial or review body to re-examine previous rulings, which would be outside its remit.
96. The Government states that the trade union in question has the right to apply again for registration of the amendments to its by-laws, provided that the legal requirements are met; this does not imply any interference by the authorities with the union's right to organize its administration and activities.
97. *The Committee takes note of the Government's information. It had already noted in its previous examination of the case that the legislation in force prevented the complainant from extending its coverage, and this was confirmed by the administrative and judicial authorities. The Committee therefore reiterates its previous recommendations, and requests the Government to take steps – including steps to amend legislation – with a view to ensuring that, in situations like the one described by the complainant, trade unions can amend their by-laws in order to broaden their coverage.*

Case No. 2267 (Nigeria)

98. During its examination of the case at its June 2004 meeting [see 334th Report, paras. 658-660], the Committee had: (a) indicated that it expected the Government to ensure that the complaint concerning the 49 academic lecturers, including five trade union officials, dismissed for having exercised the right to strike was resolved by the competent labour institutions, including the National Industrial Court, in conformity with freedom of association principles, and to keep it informed rapidly of developments in this respect; and (b) requested the Government to ensure that the Academic Staff Union of Universities (ASUU) may recover its property and use its premises, and to keep it informed of developments in this respect.
99. The ASUU thereafter sent additional information in communications dated 1 July, 9 and 11 August, and 20 September 2004 indicating that the award of the Industrial Arbitration Panel that handled the dispute between the Government and the ASUU concerning the dismissed lecturers was notified by the Federal Minister of Labour and Productivity on 31 March 2004 and on the same day, a notice of objection was given by the ASUU to the Minister. The ASUU states that as per section 13(1) of the Trade Disputes Act (Cap 432), 1990, if notice of objection to the award of an arbitration tribunal is given to the Minister

within the time and in the manner specified in the notice under section 12(2) of the Act, the Minister shall forthwith refer the dispute to the National Industrial Court. However, instead of referring the dispute to the National Industrial Court in compliance with the law, the Minister, in a letter dated 2 August 2004, indicated that the matter was being referred back to the Industrial Arbitration Panel for reconsideration. The ASUU states that such referral is contrary to section 12(3) of the Act as per which Minister shall not exercise his powers under section 12(2) until the award has been reconsidered by the tribunal.

- 100.** In its communication of 27 August 2004, the Government indicated that the University neither denied the ASUU access to the secretariat nor took over the premises, as claimed. Instead, it was the former executive of the union under the chairmanship of Dr. Taiwo Oloruntoba-Oju that made way with the ASUU's property and locked up the secretariat.
- 101.** *The Committee takes note of the information provided by the Government. However, noting that no information has been provided by the Government in respect of the complaint concerning the 49 dismissed academic lecturers and noting that they were dismissed as far back as in May 2001, the Committee reiterates its previous recommendation that it firmly expects the Government to ensure that the complaint concerning the 49 academic lecturers, including five trade union officials, dismissed for having exercised the right to strike, is resolved by the competent labour institutions, including the National Industrial Court, in conformity with freedom of association principles and to keep it informed rapidly of developments in this respect.*

Case No. 2006 (Pakistan)

- 102.** The Committee last examined this case at its November 2002 meeting when it urged once again the Government to lift the ban on trade union activities at the Karachi Electric Supply Corporation (KESC) and requested it to restore without delay the rights of the KESC Democratic Mazdoor Union as collective bargaining agent. It further requested the Government to keep it informed of developments in the process of KESC privatization, in particular as regards the preservation of workers' rights, and to provide it with a copy of the agreement between the ministries and the All Pakistan State Workers Action Committee (APSWAC), once it was concluded [329th Report, paras. 106-108].
- 103.** In a communication of 19 January 2005, the Government indicated that the Privatisation Commission for the privatization of KESC held a meeting in December 2004, during which it considered the various issues concerning KESC. The Government indicated that, as concerns this case, the following recommendation was adopted by the Commission: "under the Industrial Relations Ordinance (IRO), which will be applicable to KESC as well, ban on unions in KESC may be lifted six months after the closure of KESC".
- 104.** *While noting that the IRO is applicable to KESC workers, the Committee notes that the ban on unions in KESC may be lifted only six months after the privatization of KESC. It is not clear to the Committee whether this decision was reached in agreement with the unions concerned. The Committee emphasizes that it is important that governments consult with trade union organizations concerned to discuss the consequences of restructuring which could affect employment and working conditions of employees. The Committee urges the Government to ensure that the ban on trade union activities at KESC is lifted immediately and the rights of the KESC Democratic Mazdoor Union as collective bargaining agent is restored as soon as possible. The Committee requests the Government to continue to keep it informed of the developments in the process of privatization, in particular as regards the preservation of workers' rights.*

Case No. 2134 (Panama)

- 105.** At its meeting in March 2004 [see 333rd Report, paras. 113-115], the Committee recalled that the issues pending in the case referred mainly to the allegations of dismissal of trade union officials in the context of mass dismissals of public servants for partisan political reasons, which have affected thousands of public servants since the new Government took over (in September 1999), and the Committee at its March 2003 meeting had made the following recommendations:
- The Committee requests the Government to examine the possibility of offering new posts to the union officers dismissed, on the understanding that it is for the complainant to demonstrate the status of the 60 persons concerned as union officers. The Committee requests the Government to keep it informed in this respect.
 - The Committee requests the Government to send it a copy of the ruling given in the criminal trial of the union officer, Alberto Ibarra, for offences against honour.
- 106.** In its March 2004 meeting, the Committee took note of the Government's communication of 30 October 2003, in which it stated, with regard to the 60 persons mentioned by the complainant organization as being trade union officials, that in the documents submitted it had not noted that any of these were accredited as trade union officials, and that the complainant organization had also not provided proof to uphold the allegation, as requested by the Committee. With regard to the information requested on the ruling given in the criminal trial of Alberto Ibarra, the Government stated that the hearing set for April 2003 had been held but that the decision relating to this was pending. The Committee requested the Government to send it a copy of the ruling in the criminal trial of the union officer, Alberto Ibarra, for offences against honour, when this was handed down.
- 107.** Subsequently, the National Federation of Associations and Organizations of Public Servants (FENASEP) sent a communication dated 6 February 2004 referring to the Government's previous reply and containing list of 14 senior managers of the Banco Hipotecario Nacional, whose status as senior managers was publicly known and legally certified. It also sends an attestation from the National Council of Unionized Workers (CONATO) stating that Ms. Xiomara Ita de Ambulo has been a FENASEP representative since 1993. FENASEP claims the status of trade union official for a number of other individuals, but the corroborating evidence to which it refers has not been forthcoming.
- 108.** In its communication of 27 December 2004, the Government states that the alleged dismissals in this case were carried out by the previous Government for political reasons, and that the present Government will assess each case on its own merits. In its communication of 24 May 2004, the Government states that there has still been no ruling on the criminal proceedings against trade union official, Alberto Ibarra, for offences against honour, and that it will transmit the text of that ruling as soon as it is handed down. In its communication of 25 February 2005, the Government states that it is more than willing to comply with the ILO Conventions ratified by Panama, and has for that reason, and with a view to resolving these cases, proposed the establishment of a joint commission with FENASEP to seek, through dialogue and consultation, solutions which will as far as possible give effect to the recommendations of the Committee on Freedom of Association. To that end, the Government is planning the next phase of the commission to take place in the second week in March, and representatives of the ILO and of the PSI will be invited to attend these meetings as observers. The Government states that it will in due course report on any progress made and results achieved. In its communication dated 20 May 2005, the Government states that the bipartite commission has been established and studies the possibility to resolve the pending questions through negotiation.

109. *The Committee is still awaiting the ruling in the criminal proceedings against Alberto Ibarra for offences against honour. At the same time, the Committee notes with interest the Government's indication that it has established a joint commission with FENASEP to seek, through dialogue and consultation, solutions to problems raised by that organization and that the commission studies the possibility to resolve the pending questions through negotiation. The Committee recalls that on previous occasions, it had requested the Government to examine, with FENASEP, the possibility of offering new posts to the union officers (whose status as union officers must be duly accredited) dismissed for political reasons in September 1999. The Committee requests the Government to keep it informed in this regard.*

Case No. 2111 (Peru)

110. The Committee last examined this case at its meeting in November 2004, when it made the following recommendations [see the Committee's 335th Report, paras. 1164-1172]:

- (a) The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprise concerned.
- (b) The Committee deplores the fact that the Government has not sent the information requested by it at its March 2003 meeting regarding the allegations that remained pending.
- (c) The Committee urges the Government once again to send it a copy of the final ruling on the dismissal of trade union officer Mr. Víctor Taype Zúñiga and hopes that the judicial authority will give a ruling on the matter without delay.
- (d) Regarding the allegation relating to the criminal case for alleged aggravated defamation brought by the Southern Peru Copper Corporation against the Toquepala Mineworkers' Union and others, the Committee urges the Government to inform it of the judicial authority's ruling.
- (e) With regard to the FNTMMSP's allegations dated 5 September and 1 October 2002 (the dismissal from Iscaycruz of union officers Mr. Tomás Castro, Mr. Edwin Espinoza Martínez and Mr. Jesús Vázquez Ampuero, union members Mr. Rafael Pardo Velarde, Mr. Nicolás Cano Richard Arturo and three others; the reduction in the number of union members from 126 to 36 as a consequence of the company's threats to make workers resign from the union; and the company's request to the Ministry of Labour for the union to be dissolved for not having the legal minimum number of members), the Committee regrets that the Government has not sent its observations and requests it to carry out an investigation immediately into these serious allegations and, should the alleged anti-union acts be proven, to take the necessary measures to rectify the situation. The Committee requests the Government to keep it informed in this respect.
- (f) Lastly, the Committee again requests the Government to send it a copy of the ruling on the dismissal of trade union officer Mr. José Castañeda Espejo.

111. In its communication of 18 January 2005, the Government states that:

- as regards (a), it has asked the employers' organizations and companies involved in the case to provide further information;
- as regards (b), it has reiterated its request to the judicial authority to send the texts of rulings requested by the Committee;
- as regards (c), it has asked the President of the Supreme Court, in letter No. 024-2005 MTPE/OAJ, to forward the text of the definitive ruling on the dismissal of the trade union official Víctor Taype Zúñiga;

- as regards (d), the criminal division of the Tacna Superior Court confirmed, in a ruling of 18 July 2002, that it had rejected the criminal case in question;
- as regards (e), a resolution 08-03-DRTPSL-DPSC-SDRG in 2002 annulled the registration of the Single Union of Mining and Metal Workers of Iscaycruz on the grounds that it did not meet statutory membership requirements. The Government adds that in 2003, Act No. 27912 was adopted to amend the Collective Labour Relations Act, according to which a trade union must have at least 20 members (in the case of enterprise unions) or at least 50 members (in the case of other unions), and that a union's registration is deemed to have been cancelled once it has been dissolved by a decision of an absolute majority of its members, if the conditions for this as set out in the union's by-laws are met or the conditions for its existence are no longer satisfied, subject to a court ruling to that effect, in accordance with previous observations of the Committee;
- as regards (f), the Government states that it has requested the judicial branch to send a copy of the definitive ruling regarding the annulment of the dismissal of José Castañeda Espejo.

112. *The Committee takes note of this information. The Committee is still waiting to receive information from the employers' organizations concerned in this case, in order to know their position, as well as that of the Government. The Committee regrets that, despite the time that has elapsed, it still does not have the information requested in its previous examinations of the case. In this regard, the Committee is still waiting for the final ruling concerning the dismissal of the union official Víctor Taype Zúñiga and that of the final ruling on the annulment of the dismissal of José Castañeda Espejo. As regards the allegations made by the National Federation of Miners, Metalworkers and Steelworkers of Peru (FNTMMSP) regarding: the dismissal at the Iscaycruz Mining Company of the trade union officials Tomás Castro, Edwin Espinosa Martínez and Jesús Richard Arturo, plus another three individuals; the reduction from 126 to 36 of the number of members as a result of the threats made by the company to force workers to leave the union; and the company's requests to the Ministry of Labour to dissolve the union on the grounds that it does not have the requisite number of members, the Committee takes note of the Government's information. It is nevertheless bound to regret the fact that the Government has not carried out an investigation into the dismissals and the pressure exerted by the company on workers to leave the union, as it had requested in its previous examination of the case, and requests that it do so immediately and keep it informed in this regard.*

Case No. 2211 (Peru)

113. The Committee last examined this case at its June 2004 meeting, and on that occasion made the following recommendations [see 334th Report, paras. 661-680]:

- (a) The Committee requests the Government to confirm the reinstatement of the 574 workers of the telecommunications sector who were dismissed, including the five workers of the subcontractor, Telefónica de Gestión de Servicios Compartidos S.A. TGSC, according to the court ruling. The Committee requests the Government to keep it informed in this respect.
- (b) Regarding the allegations presented by the ICFTU concerning police repression in the framework of the strike that took place from July to September 2002 and in which many unionists were arrested and many others injured and two union headquarters damaged, the Committee expresses its concern at the gravity of the allegations. It requests the Government to carry out an independent investigation without delay into the allegations and if proven to be guilty, to punish the guilty parties and ensure that such interference does not occur in the future. The Committee requests the Government to keep it informed in this respect.

- 114.** The Government sent its observations in communications dated 28 January, 16 and 21 February, 3 March and 19 April 2005, referring to a number of legal actions initiated by workers at the Telefónica del Perú enterprise who were dismissed for participating in or supporting a strike that took place between July and September 2002.
- 115.** *The Committee takes note of this information. It also notes, however, that the dismissals to which the Government refers resulted from the strike called in response to the collective dismissal of 574 workers in the telephone sector. The Committee recalls that the Constitutional Court, in its ruling of July 2002, ordered the reinstatement of the 574 worker, and that, in its previous examination of the case, it had requested the Government to inform it whether these workers had been reinstated. The Committee observes that the Government does not provide this information. The Committee accordingly requests the Government once again to inform it whether the 574 workers dismissed from the telephone sector have been reinstated, as the Constitutional Court ordered, and whether an independent inquiry has been held into the allegations made by the ICFTU concerning police repression during the strike that took place between July and September 2002, and to send the results of the inquiry.*

Case No. 2284 (Peru)

- 116.** The Committee last examined this case at its meeting in March 2004 [see 333rd Report, paras. 849-862]. On that occasion the Committee observed that: (1) the complainants had alleged that the decision made by the Lima Water and Sewerage Company (Servicio de Agua Potable y Alcantarillado de Lima, SEDAPAL S.A.) to end its contract with CONCYSSA S.A. would lead to mass dismissals and the dissolution of the Single Trade Union of Water and Sewerage Control Workers (SUTOPEC); (2) the complainants and the Government agreed that the contract between SEDAPAL S.A. and CONCYSSA S.A. would have ended; (3) the complainants had not alleged that the legal relationship between the enterprises was ended for anti-union purposes. The Committee considered in these conditions that the information in the Committee's possession did not allow it to determine whether the case concerned a matter of freedom of association, and requested the Government to transmit all eventual decisions taken by the authorities concerning violations of freedom of association.
- 117.** In its communication of 9 February 2005, the Government states that SEDAPAL S.A. indicated that it had concluded contracts in connection with maintenance work on the water and sewerage systems and pumping station operations with the company CONCYSSA S.A., the latter being responsible for providing trained workers, materials, equipment and anything else that might be necessary. CONCYSSA S.A. assumed exclusive responsibility for the workers it hired. The Government also states that more than 200 workers at CONCYSSA S.A. have initiated legal proceedings against that company and against SEDAPAL S.A. in relation to alleged contraventions of labour law, and that no final ruling has yet been handed down.
- 118.** *The Committee takes note of this information. In these conditions, given that in the light of the Government's new observations, it is unable to determine whether this case concerns a matter of freedom of association, the Committee will not proceed with an examination of these allegations.*

Case No. 2289 (Peru)

- 119.** The Committee last examined this case at its November 2004 meeting [see 335th Report, approved by the Governing Body at its 291st Session, paras. 1186-1215]. On that occasion, the Committee made the following recommendations:

- (a) The Committee urges the Government to carry out an investigation without delay into the allegation that state enterprise Electro Sur Este S.A.A. violated the terms of an arbitral award by using threats of dismissal and other sanctions in order to insist that trade union travel expenses should be accounted for. The Committee requests that the Government keep it informed in this respect.
 - (b) The Committee requests the Government to send additional observations concerning the allegation that over 50 per cent of the permanent workforce at Luz del Sur has been dismissed.
 - (c) The Committee expresses the hope that the judicial authority will come to a quick decision on the dismissal of the general secretary of SUTREL, Mr. Luis Martín del Río Reátegui, from the Luz del Sur S.A.A. company and, should it order that Mr. Reátegui be reinstated, asks the Government to ensure that the judicial decision is put into effect immediately and that he is paid any outstanding wages. The Committee requests the Government to keep it informed of the judicial decision and to send it a copy of the judgement handed down.
 - (d) Regarding the registration of the executive committee of the Peruvian Union of Folklore Artists (SITAFP), the Committee requests the Government to keep it informed of the result of the pending administrative appeals, as well as of the outcome of any legal proceeding initiated in this respect.
- 120.** With regard to the demand that accounts be provided and the alleged violation of the terms of an arbitral award by the state enterprise Electro Sur Este S.A.A., the Government considers, in its communication of 13 January 2005, that the purpose of the arbitral award decided by the collective agreement between the Federation of Peruvian Light and Power Workers (FTLFP) and Electro Sur Este was to grant an amount of money to cover the travel of union members undertaking union activities outside the workplace. The Government considers that the enterprise has been complying with the terms of the arbitral award and is not distorting them by asking for the amounts granted to be accounted for, inasmuch as the money allocated for this purpose forms part of the public state budget. The Government also considers that the application of the directives on management and budgeting of the organizations coming under the National Fund for Financing State Enterprise Activity (FONAFE) and its regulations at Electro Sur Este neither distorts nor violates the benefit enjoyed by the trade unions of having their travel expenses paid by the enterprise, inasmuch as the only thing required is that those expenses be justified. The Government also recalls that the collective agreement which establishes the travel expenses benefit as a mandatory provision is of a permanent nature and may only be modified by the same parties that signed it. Hence the FONAFE directives and regulations within the enterprise do not seek to modify the content of the abovementioned mandatory provision; on the contrary, they reaffirm the existence of the benefit but require that the expenses incurred by union officials be specified in order to justify the use of those funds. In another communication dated 17 January 2005, the Government reaffirms that justification of trade union travel expenses does not contravene any fundamental collective right, but merely complies with official policy on actual public expenditure in all state offices and public enterprises.
- 121.** With regard to the dismissal of over 50 per cent of the permanent workforce at Luz del Sur, the Government indicates in its communication of 18 February 2005 that Luz del Sur, in a letter dated 19 January 2005, stated that the allegations made were totally false, malicious and unfounded, that there had never been any arbitrary dismissals without justification of over 50 per cent of the workforce, and that no complaint or legal proceedings had been brought against the enterprise in this connection. The Government states that the investigatory proceedings available to any worker who considers that his labour rights have been violated are covered by the relevant regulations in Peruvian law.
- 122.** As regards the dismissal of the SUTREL general secretary, Mr. Luis Martín del Río Reátegui, from Luz del Sur S.A.A., the Government indicates that the first-level ruling

dated 25 October 2004 quashed the dismissal and ordered the reinstatement of the worker and the payment of all outstanding wages. The Government states that an appeal has been lodged against the ruling and is currently before the higher judicial body, the Duty Labour Chamber.

- 123.** Finally, with regard to the alleged refusal to register the executive committee of the Peruvian Union of Folklore Artists (SITAFP), the Government indicates that the first instance of the Labour Administrative Authority dismissed the request to recognize the executive committee elected by the complainants and the second instance confirmed the first-level decision. By directorial order of 26 January 2005, the appeal lodged by SITAFP against the second-level decision was dismissed. With this last ruling, the Government indicates that the administrative processes are deemed to be exhausted and that no civil or labour action by SITAFP has been registered.
- 124.** *The Committee notes the information provided by the Government. The Committee requests the Government to keep it informed of the outcome of the judicial proceedings concerning the dismissal of the SUTREL general secretary, Mr. Luis Martín del Río Reátegui and, should the first-level ruling ordering the reinstatement of the union official in question be confirmed, to take the necessary steps to ensure that he is reinstated immediately.*

Case No. 2291 (Poland)

- 125.** The case concerns numerous acts of anti-union intimidation and discrimination including dismissals, by the management of two companies (Hetman Limited and SIPMA S.A.) as well as partiality by the Public Prosecutor's Office, lengthy proceedings and non-execution of judicial decisions. During its last examination of the case, the Committee urged the Government to reiterate and intensify its efforts, under the auspices of the tripartite Regional Social Dialogue Commission, to bring the parties back to the bargaining table and resume social dialogue, and ensure that the principles of freedom of association and collective bargaining are applied, particularly as regards recognition of unions and effective protection against acts of anti-union discrimination and interference [see 333rd Report, approved by the Governing Body at its 289th Session (March 2004), paras. 878-919].
- 126.** In a communication dated 2 November 2004 the complainant union NSZZ "Solidarnosc" provided further information with regard to the dispute in the SIPMA S.A. enterprise. The complainant alleged that the employer had tried to avoid cooperation with the enterprise-level trade union ever since its authorities were elected in February 2002. Thus, on 22 November 2002, the employer brought a civil lawsuit before the Lublin District Court alleging that the trade union lacked legal personality as the registration procedure in the National Court Register had not been completed due to the union's inadvertence. In reply to this, the complainant stated that according to the legislation in force, the enterprise branches of NSZZ "Solidarnosc" were subject to registration in the regional sections of NSZZ "Solidarnosc" and thereby had acquired legal personality. Thus, the enterprise-level trade union in SIPMA S.A. had already been registered in conformity with article 14 of the Trade Union Act of 23 May 1991 and the case law of the Supreme Court dating from 1993. This practice had also been confirmed by the Ministry of Justice in a letter to the president of NSZZ "Solidarnosc" dating from 2003.
- 127.** According to the complainant, there was no doubt that the employer was under an obligation to cooperate with the enterprise-level trade union. However, the proceedings concerning the existence of this obligation had been pending since 22 November 2002 and no first hearing had been organized. Four different courts had been referring the case to one another, considering themselves as not having competence in the matter. In these

conditions, it was impossible to impose on the employer an obligation to cooperate with the trade union. An excessive delay in court proceedings was in itself an infringement of the right to appropriate protection against discrimination and constituted a violation of freedom of association principles and Conventions.

128. The complainant further stated that the Lublin District Labour Court suspended the proceedings concerning the dismissal of Zenon Mazus, former leader of the enterprise-level trade union in SIPMA S.A., until the issuing of the Court's decision in the abovementioned proceedings concerning the recognition of the employer's obligation to cooperate with the trade union. The proceedings concerning Zenon Mazus had therefore been pending since 8 July 2002.
129. With regard to the criminal charges filed against 19 senior managers of SIPMA S.A. for impeding trade union activities and violating workers' rights on 14 October 2003, the complainant stated that there had been no action on the side of the courts, while the case was transferred to the Kielce District by the Public Prosecutor, because of the lack of action on the side of the Public Prosecutor in the Lublin District.
130. The complainant finally stated that the result of the failure to secure a fair trial on the above violations of freedom of association constituted a denial of justice, made it impossible to oppose the activities of the employer aimed at eliminating the trade union from the enterprise, and brought about a decline in trade union affiliation. In 2003, the number of trade union members fell below nine, and the NSZZ "Solidarnosc" section in the region of Lublin undertook activities aiming at counteracting the dissolution of the trade union at the SIPMA S.A. enterprise. More specifically, it was transformed into an inter-enterprise-level trade union, absorbing the remaining members of the trade union in the SIPMA S.A. enterprise. However, the employer continued to evade cooperation with the trade union. Thus, according to the complainant, the recommendations of the Committee had not been implemented and the situation called for further measures.
131. In a communication dated 24 February 2005, the Government stated that the 1st Civil Department of the Lublin District Court initiated on 3 December 2002 the examination of the case filed by SIPMA S.A. against the enterprise-level trade union concerning the recognition of the employer's duty to cooperate with the trade union. The case was then transferred for review to the 7th Labour Department of the District Court, which transferred it back to the Labour Department of the Lublin District Court by means of its decision of 4 February 2004. After an appeal filed by the plaintiff, the case was examined by the Lublin Court of Appeal, which acknowledged, by means of its ruling dated 31 March 2004, that the 1st Civil Department of the Lublin District Court was the body competent to hear this case as it did not concern the employment relationship and thus was not subject to review by a labour court. The first hearing before the competent court was held on 8 June 2004, but was adjourned as the plaintiff had to assume a standpoint with regard to the alleged loss, by the defendant, of its capacity to be a party in civil lawsuits. As declared by both parties to the dispute, the NSZZ "Solidarnosc" trade union operating in SIPMA S.A. had ceased to exist as of 5 April 2004, after it was removed from the register of NSZZ "Solidarnosc" trade union organizations. The removal took place when the NSZZ "Solidarnosc" Inter-Enterprise Organization of the Middle East Region was established and the members of the trade union at the SIPMA S.A. enterprise joined the newly established entity. This was considered by the defendant to be a determinant factor with respect to the union's existence and its capacity to take part in the proceedings.
132. According to the Government, the fact that the capacity to be a party in a civil lawsuit no longer existed was not disputed by the parties. Thus, upon obtaining the position of the plaintiff, the 1st Civil Department of the Lublin District Court decided on 22 November 2004 to suspend the proceedings due to the fact that a party to the case had lost its capacity

to participate in the proceedings. Nevertheless, actions were taken ex officio to proceed with the case. The judge ordered that certified copies of documents confirming the establishment and registration of the NSZZ "Solidarnosc" Inter-Enterprise Organization of the Middle East Region be submitted. Such information would enable the court to determine the plaintiff's capacity to be a party in civil cases, which was a prerequisite for continuing the proceedings. The Government concluded that although the duration of the proceedings was extended due to the referral of the case to various courts, it was necessary to clarify the issue in order to avoid a future action to overturn the court's ruling.

- 133.** With regard to Zenon Mazus, the Government stated that he filed a suit for recognition of termination of his employment contract as ineffective. The examination of the suit commenced on 2 July 2002 at the 7th Labour Department of the Lublin District Court. Six hearings had taken place so far. Although the first of them was scheduled for 1 July 2003, the dates of subsequent hearings were fixed regularly, with much shorter intervals and the adjournments of the hearings were caused by new motions as to evidence (in particular witness hearings) filed by both parties. During hearings held on 16 December 2003, 12 February 2004 and 15 April 2004 the Court interviewed the witnesses. The last hearing was adjourned upon the application of the plaintiff, in order to assume a standpoint with regard to the defendant's position and to file potential motions as to evidence. At the next hearing held on 27 May 2004, the Court summoned a member of the defendant company's Management Board. Due to his justified absence, however, the Court rescheduled the hearing once again for 9 September 2004. On that date the proceedings were suspended by the Court upon the defendant's application. The District Court decided that examination of the employee's case depended on the result of a parallel civil lawsuit in progress before the Lublin District Court. The court of second instance did not share that opinion, however, and having examined the objection raised by the plaintiff, decided on 8 November 2004, to quash the decision on suspending the proceedings. The next hearing had been scheduled for 11 January 2005.
- 134.** With regard to the penal charges brought against 19 senior managers of SIPMA S.A. accused of impeding trade union activity and violating workers' rights, the Government stated that upon delivering certified copies of the indictment, 11 of the accused filed lengthy procedural writs with the court. Additionally, one of them filed a motion for the case to be returned to the Prosecutor's Office. This application was rejected on 13 November 2003 and further rejected on 25 November 2003 and 29 December 2003 by the Lublin District Court. After this the judge in charge of the file was replaced on 19 May 2004. The new judge was given three months to become acquainted with the material (42 files) and a new hearing was scheduled for 27 October. The proceedings were not initiated however, as one of the accused (Jan Pradziuch) failed to show up. His absence was justified due to a medical sick leave. Thus, the court adjourned the case and admitted evidence (an opinion issued by the Forensic Medicine Department of the Lublin Medical Academy) on whether the accused could participate in the hearings. Five of the accused filed motions for the case file to be returned to the Prosecutor's Office on grounds of the case's subject matter. The said motions were not examined as planned on 15 November 2004, because the case file had not been returned from the Medical Academy. The next meeting was scheduled for 8 December 2004. The large number of accused persons, the bulky evidence material and a number of formal or procedural motions definitely contributed to the fact that the proceedings were lengthy. However, these were objective obstacles over which the court had no influence.
- 135.** The Government finally stated that in order to intensify the Court's efforts and to undertake action aimed at completing the aforementioned proceedings promptly, the abovementioned cases would remain in the area of interest of the Common Courts Department in the Ministry of Justice. They had also been covered by the administrative supervision of the chairpersons of the respective courts.

- 136.** *The Committee notes from the latest communications of the complainant and the Government that no steps appear to have been taken under the auspices of the Regional Social Dialogue Commission to bring the parties back to the bargaining table as requested by the Committee in its previous recommendations. On the contrary, the climate of bitter industrial relations characterized by permanent conflict and the refusal of individual employers to recognize a workers' organization and enter into good-faith bargaining with it, observed by the Committee during the last examination of this case, seems to persist [see 333rd Report, para. 916]. The Committee further notes with regret that the NSZZ "Solidarnosc" trade union in the SIPMA S.A. enterprise has ceased to exist and had to be amalgamated with the NSZZ "Solidarnosc" Inter-Enterprise Organization of the Middle East Region so as to maintain the representation of the few members which remained in the enterprise. The Committee recalls that since inadequate safeguards against acts of anti-union discrimination in particular against dismissals, may lead to the actual disappearance of trade unions composed only of workers in an undertaking, additional measures should be taken to ensure fuller protection for leaders of all organizations, and delegates and members of trade unions, against any discriminatory acts [Digest of decisions and principles of the Freedom of Association Committee, 4th edition, 1996, para. 700].*
- 137.** *With regard to the need to ensure effective protection for trade union leaders against acts of anti-union discrimination and interference, which was part of its previous recommendations, the Committee notes with regret from the communications of the complainant and the Government, that the judicial proceedings initiated by Zenon Mazus, leader of the NSZZ "Solidarnosc" trade union in the SIPMA S.A. enterprise, in order to render his dismissal ineffective, have been pending since 2 July 2002, that is, for almost three years now. The Committee observes in particular that the first hearing of this case was fixed 12 months after the filing of the complaint and that subsequently, the proceedings were suspended for several months (between 9 September and 11 January 2005) as a result of a parallel lawsuit filed on 3 December 2002 by the employer. With regard to the latter lawsuit, the Committee notes that although its purpose was to determine whether the employer had a duty to cooperate with the trade union, the courts do not appear to have examined this issue until today. On the contrary, for two-and-a-half years successive rulings have been issued on preliminary issues like the determination of the competent court and the standing of the defendant trade union after its amalgamation with the NSZZ "Solidarnosc" Inter-Enterprise Organization of the Middle East Region. Finally, with regard to the penal charges brought against 19 senior managers of SIPMA S.A. on 14 October 2003, the Committee notes that according to the Government, this case has been pending due to the large number of accused persons, the bulk of the materials and a series of formal or procedural motions filed by the parties. The Committee further observes that the Government does not provide a response to the complainant's allegation that this case was transferred to the Kielce District by the Public Prosecutor because of the lack of action on the side of the Public Prosecutor in the Lublin District. The Committee finally notes the Government's statement that all the above cases will remain in the "area of interest" of the Common Courts Department of the Ministry of Justice and have been covered by the administrative supervision of the chairpersons of the respective courts.*
- 138.** *The Committee notes with deep regret that this is not the only case brought to it with respect to unjustified delays in the administration of justice and alleged partiality by the Public Prosecutor's Office in cases concerning anti-union discrimination. These wider issues are addressed in the framework of Case No. 2395.*
- 139.** *Noting with regret that the NSZZ "Solidarnosc" trade union in the SIPMA S.A. enterprise has been dissolved, the Committee requests the Government to intercede with the parties with a view to improving the industrial relations climate between the enterprise and the*

NSZZ "Solidarnosc" Inter-Enterprise Organization of the Middle East Region so that the latter may exercise its activities with respect to this enterprise without any interference or discrimination by the employer against its members or delegates. Furthermore, recalling once again that justice delayed is justice denied, the Committee expects that the measures taken by the Government will effectively speed up the judicial proceedings initiated almost three years ago by Zenon Mazus, leader of the NSZZ "Solidarnosc" trade union in the SIPMA S.A. enterprise, for recognition of his dismissal as ineffective. The Committee requests the Government to keep it informed on the above issues as well as the progress of the proceedings concerning the employer's obligation to cooperate with the trade union and the penal charges filed against 19 senior managers of SIPMA S.A. and to provide information with regard to the dispute in the Hetman Limited enterprise.

Cases Nos. 2216 and 2251 (Russian Federation)

140. The Committee examined Case No. 2251 at its March 2004 meeting [see 333rd Report, approved by the Governing Body at its 289th Session, paras. 940-1001] and the effect given to its recommendations in Case No. 2216 at its June 2004 meeting [see 334th Report, approved by the Governing Body at its 290th Session, paras. 47-62]. The allegations in both cases concerned the Labour Code and the recommendations of the Committee in this respect can be summarized as follows.
141. The Committee requested the Government to amend sections 31, 26, 45, 410, 412 and 413(3) of the Labour Code so as to bring it into conformity with Conventions Nos. 87 and 98. The Committee further requested the Government to amend its legislation so as to ensure that railroad employees, as well as those engaged in the public service, but not exercising the authority in the name of the state, enjoy the right to strike. The Committee also requested the Government to provide information on sections 29(1) and 413(1)(b) of the Labour Code, as well on a number of issues related to the exercise of the right to strike and the right to collective bargaining.
142. As concerns the practical application of the right to collective bargaining, the Committee requested the Government to keep it informed of the outcome of the investigation on the alleged violations of the right to collective bargaining of the Ural Trade Union Centre (URALPROFCENTRE) by the administration of the Uralsk Electro-Chemical Enterprises (UECE) as well as of the inquiries into the allegations made by the Tyumen Regional Trade Union Centre (TRTUC) concerning the refusal to establish a unified representative body for collective bargaining purposes at the "Managing Company for Housing Communal Services UG".
143. In its communication of 11 June 2004, the complainant organization in Case No. 2216, the Seafarers Union of Russia (RPSM), alleged the continuing failure of the Government to implement the recommendation of the Committee. The RPSM submitted that it had made several proposals to amend the Labour Code so as to bring it in line with the recommendation of the Committee only to meet the Government's disagreement.
144. In its communication of 1 October 2004, the complainant organization in Case No. 2251, the Russian Labour Confederation (KTR), also alleged the continuing failure of the Government to implement the recommendations of the Committee. The KTR stated that, based on the Committee's recommendations, it had drafted amendments to the Labour Code. However, according to the KTR, the Government rejected the submitted draft amendment law.
145. In its communication of 1 March 2005, the Government stated that on 19 January 2005, the Ministry of Health and Social Development of the Russian Federation (Department of Labour Relations) held a conference with the RPSM and the regional trade union

organization Murmansk Trawler Fleet. A decision was made at this conference to set up a joint working group of the Ministry and the RPSM to prepare proposals for the introduction of amendments to the Labour Code concerning protection of the interests of workers on seagoing craft and in aircraft. It was also decided that amendments to the Labour Code should be formulated and then put forward to working groups of the Labour and Social Policy Committee of the State Parliament of the Russian Federation for consideration as potential subjects for legislative initiatives during the spring 2005 session.

- 146.** The Government further made the following comments related to the recommendations for amendments to a number of provisions of national legislation. As concerns the question of taking measures to amend section 45 of the Labour Code and to guarantee the opportunity to conduct collective bargaining at occupational level both in legislation and in practice, the Government indicated that the position of the office of the Attorney-General of the Russian Federation was that this section of the Labour Code did not prevent trade unions from taking part in collective bargaining and contained no provisions inhibiting the rights of trade unions. To the contrary, it actually reinforced the legal position and competence of trade unions that are established on a territorial or sectoral basis. It defined the notion of an agreement, a legal document, establishing general principles for the regulation of social, labour and economic relations, concluded by authorized representatives of workers and employers at federal, regional, sectoral (or intersectoral) and territorial levels.
- 147.** As concerns section 31 of the Labour Code, the Government stated that it could not see the need to amend this section. According to the Government, this section allowed workers, if there was no trade union at an establishment or if a trade union organization did exist but represented fewer than half of the workforce, to delegate the representation of their interests to the trade union organization or to another representative. The existence of another representative could not prevent a trade union from fulfilling its authorized role. The provision granting workers the right to elect a representative was also reinforced by section 29 of the Labour Code.
- 148.** As concerns the question of representation of workers during collective bargaining at the enterprise level by trade unions other than primary trade unions, the Government indicated that the issues relating to the participation of trade unions in collective bargaining and concluding collective agreements were governed not only by the Labour Code but also by other federal Acts – in particular Federal Act No. 10 and Federal Act No. 175-FZ of 23 November 1995 “On the procedure for the settlement of collective labour disputes”. According to section 29.2 of the Labour Code, the interests of workers at an establishment with regard to collective bargaining, the conclusion and amendment of collective agreements are represented by a primary trade union organization or by another representative elected by the workforce. Therefore, the Labour Code provided for the possibility to participate in the procedure of conclusion and amendment of agreements and the settlement of collective labour disputes concerning the conclusion and amendment of agreements not only to primary union organizations, but also to other representatives elected by the workers at a particular establishment. Workers may be represented by a trade union or trade union association bodies that were authorized to act as representatives in accordance with their constitutions or by independent public organizations set up at meetings (conferences) of the workers at an establishment, branch or agency and authorized by them (section 2.3 of Federal Act No. 175). Accordingly, higher-level organizations or their associations may also represent the interests of workers at particular establishments (enterprises) in collective bargaining if they have been elected to do so. Section 13 of Federal Act No. 10 reinforces the right of trade unions, trade union associations, primary union organizations and bodies created by them to carry out collective bargaining and conclude accords and collective agreements. Account was taken of the number of members represented by a trade union organization or association to determine its right to conduct collective bargaining and conclude agreements in the name

of the workers at federal, sectoral or territorial level. Therefore, according to the Government, no amendments need to be made to current legislation in this area.

- 149.** With regard to the amendment of section 410 of the Labour Code concerning setting a lower level for the quorum required for a vote on strike action, the Government submitted that currently, a workers' meeting was considered valid if no less than two-thirds of the total workforce (or conference delegates) was present. Consequently, a qualified majority was necessary for a decision to be considered lawful. It was the Government's position that the standard under consideration did not contradict international labour standards. In particular, States parties to the International Covenant on Economic, Social and Cultural Rights were obliged to ensure the right to strike, provided that it was exercised in conformity with their laws (Article 8.1(d)).
- 150.** The Government further submitted that the complainants' position with regard to the restriction on the right to strike imposed on certain categories of workers (section 413 of the Labour Code) seemed ill-founded. In accordance with a ruling of the Constitutional Court of the Russian Federation dated 17 May 1995, the regulation of the right to strike must achieve the necessary balance between the protection of occupational interests and consideration of the public interest, which can be harmed by strike action and which the employer was obliged to guarantee. The possibility of restricting the right to strike for certain categories of worker in consideration of the nature of their work and the possible consequences of a work stoppage by them directly flowed from the provisions of article 17.3 of the Constitution of the Russian Federation, which stipulated that the rights and freedoms of others must not be violated in the exercise of human and civil rights and freedoms, and from article 55.3 of the Constitution of the Russian Federation, in accordance with which, human and civil rights and freedoms may be restricted by federal legislation only in so far as this was necessary to protect fundamental aspects of the Constitutional order, the moral well-being, health, rights or lawful interests of other persons, the defence of the country or the security of the State. In this way, the boundaries for any potential restriction were set out for the legislator by the Constitution. Neither, according to the Government, did the restriction of the right to strike contradict universally accepted principles or standards of labour legislation. The provisions of the International Covenant on Economic, Social and Cultural Rights state that prohibition of a strike action is permissible in relation to persons in the armed forces, the police or the administration of the State (Article 8.2). Restrictions can be made for other persons if necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others (Article 8.1(c)). Nevertheless, while instruments of international human rights law leave it to national legislation to regulate the right to strike, this national legislation must not impose restrictions that go beyond the boundaries set out by these international instruments.
- 151.** In its communication of 25 May 2005, the Government stated that a working group, created by the Ministry of Health and Social Development and the RPSM, submitted to the Commission on Regulations of Social and Labour Relations its proposals to amend sections 29(3), 31(1), 37(3-6), 45(7), 372(1), 399(2) and 410(1) of the Labour Code. The Government indicated that a working group of the said Commission rejected the draft amendments. The Government further indicated that the Federation of Independent Trade Unions of Russia (FNPR) was also opposed to the draft amendments. Furthermore, a tripartite working group of the Labour and Social Policy Committee of the State Parliament of the Russian Federation had also recommended to reject the draft amendments. The Government stated that the specifics of these decisions were attached to its communication. However, this attachment was not received.
- 152.** *The Committee notes the Government's reply concerning various provisions of the Labour Code. As regards section 45, the Committee must once again emphasize that legislation*

should not constitute an obstacle to collective bargaining at the occupational or professional level. It therefore once again requests the Government to take all the necessary measures, including the amendment of sections 26 and 45 of the Labour Code, so as to ensure both in law and in practice that collective bargaining may be conducted at occupational or professional level. While taking into account the Government's explanation concerning section 31 of the Labour Code, the Committee once again refers to the Collective Agreements Recommendation, 1951 (No. 91), which stresses the role of trade union organizations as one of the parties in collective bargaining and refers to representatives of non-unionized workers only when no trade union organization exists at the enterprise. A provision which permits collective bargaining with other workers' representatives, bypassing trade union existing at the enterprise does not promote collective bargaining. The Committee therefore once again requests the Government to amend its legislation so as to ensure the application of the abovementioned principle and to keep it informed in this respect.

- 153.** As concerns the quorum required for a strike ballot pursuant to section 410 of the Labour Code, while noting the Government's reference to the already existing quorum for a trade union conference, the Committee recalls that the observance of a quorum of two-thirds of the members may be difficult to reach, in particular where trade unions have large numbers of members covering a large area [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 511]. Therefore, the Committee once again requests the Government to amend section 410 of the Labour Code so as to lower the quorum required for a strike ballot. The Committee notes the information provided by the Government in respect of the restriction on the right to strike imposed on certain categories of workers. The Committee recalls that, as concerns the restrictions imposed on the right to strike, it had previously requested the Government: (1) to indicate the enterprises and services it qualified as "directly servicing highly hazardous kinds of production or equipment" where the right to strike was prohibited (section 413(1)(b) of the Labour Code); and (2) to amend its legislation so as to ensure that railroad employees, as well as those engaged in the public service, but not exercising the authority in the name of the State, enjoyed the right to strike. Noting that the Government has not specified the enterprises and services referred to in section 413(b) of the Code, the Committee would reiterate its request in this regard. The Committee further refers to Case No. 2244 where it noted new Federal Act No. 17-FZ of 10 January 2003 on rail transport and requested the Government to amend section 26 of that Act which provided that a strike by the workers of railways in services related to the traffic, shunting, service to passengers, freight was illegal and prohibited. The Committee once again recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the state; (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); and (3) in the event of an acute national emergency [see **Digest**, op. cit., paras. 526 and 527]. The Committee requests the Government to take the necessary measures so as to bring its legislation into conformity with the above principles.

- 154.** Noting that the details on the decisions of various working groups as well as of the FNPR to reject the draft amendments to the Labour Code were not submitted by the Government, the Committee requests the Government to transmit this information to the Committee of Experts on the Application of Conventions and Recommendations to which it refers the legislative aspects of these cases in respect of the application of Conventions Nos. 87 and 98, ratified by the Russian Federation.

- 155.** Noting that the Government's reply was limited to the legislative aspects of the cases, the Committee further requests the Government to provide information on the following recommendations:

- *The Committee requests the Government to keep it informed of the outcome of the investigation on the alleged violations of trade union rights of the URALPROFCENTRE by the administration of the UECE.*
- *The Committee requests the Government to initiate the relevant inquiries into the allegations made by the TRTUC concerning the refusal to establish a unified representative body for collective bargaining purposes at the “Managing Company for Housing Communal Services UG”.*
- *In the light of the complainant’s allegation to the effect that in practice, the strike is often postponed or declared illegal, the Committee requests the Government to provide relevant information, including statistical information, on how the right to strike is exercised in practice.*

Case No. 2171 (Sweden)

- 156.** At its November 2004 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 referred to its extensive analysis of the fundamental issues in its initial examination on the merits of the case [330th Report, paras. 1010-1053] and reiterated its previous requests that the Government take remedial measures so that agreements already negotiated on compulsory retirement age shall continue to produce all their effects until their expiry dates, including after 31 December 2002, and that it should resume thorough consultations on these issues, with a view to finding a negotiated solution which would be mutually acceptable to all parties concerned, in conformity with freedom of association principles. The Committee also requested the Government to keep it informed of developments in this matter, and of the results of meetings with bargaining partners, including those which the Government states it intends to initiate in the near future [see 335th Report, para. 183].
- 157.** In a communication dated 16 February 2005, the Government stated that the Minister of Employment intended to resume contacts with the social partners. The Ministry has now continued these consultations, which were followed on 2 February 2005 by a meeting between the Minister and the complainant organizations (Swedish Trade Union Confederation and Swedish Confederation of Professional Employees). The Government stated that it expected that an agreed solution could be reached in the future, but that discussions had to continue.
- 158.** *The Committee notes this information. Pointing out that the complaint was filed in November 2001, the Committee expects its recommendations on remedial measures will be acted upon and hopes that a negotiated solution may be found in the near future. The Committee requests the Government to keep it informed of developments in this matter, including on the results of any meetings held with social partners.*

Case No. 2125 (Thailand)

- 159.** The Committee last examined this case at its March 2004 session [see 333rd Report, paras. 138-141]. On that occasion, the Committee regretted that for the second time the Government, considering that it was a matter to be dealt with by the national courts, had not taken any steps to ensure that the 21 employees of the ITV-Shin Corporation were reinstated. The Committee noted that, by not taking the required steps, the Government allowed acts of anti-union discrimination to have prolonged, if not irreversible, effects on the workers concerned and thus was not only in clear infringement of the principles of freedom of association, but also rendered the Thai statutory prohibition against anti-union

discrimination ineffective. The Committee therefore firmly requested the Government to put an end to such a situation and to take, without delay, active steps to ensure the reinstatement of the 21 employees dismissed on account of their trade union activities.

- 160.** In a communication dated 30 November 2004, the complainant stated that in the past four years, the Labour Relations Committee, the ILO and the Labour Court have all reached decisions in favour of the reinstatement of the 21 dismissed workers. The complainant indicated that the company's appeal to the Supreme Court has been pending for two years which, in the view of the workers, is an excessive delay constituting a denial of justice where the Government of Thailand has failed to protect the workers whose rights have been violated.
- 161.** In a communication dated 1 February 2005, the Government stated that it was truly aware that the prevention of all acts of anti-union discrimination in the country was its responsibility. The Government stated that, according to section 125 of the Labour Relations Act, 1975, and the Act concerning the Establishment of Labour Court and Labour Court Procedures 1979, ITV Corporation Ltd. had the right to appeal against the order of the Labour Relations Committee to the Central Labour Court and the Supreme Court and the case is presently under consideration by the Supreme Court. The Government indicated that the Ministry of Labour has informed the Supreme Court to take note of the Committee's recommendation.
- 162.** In its communication of 1 April 2005, the Government transmitted the judgement of the Supreme Court in the case of the ITV-Shin Corporation Limited. The Supreme Court ordered the ITV-Shin Corporation Limited to reinstate all 21 newsroom staff it had dismissed since February 2001. The Supreme Court found the appeal of the ITV-Shin Corporation groundless and its orders dismissing the 21 staff unlawful, upholding the Labour Court's order for the Corporation to reinstate the 21 journalists and pay damages equivalent to their wages owed to them from the day of their dismissal.
- 163.** *The Committee notes this information with satisfaction.*

Case No. 1952 (Venezuela)

- 164.** At its March 2004 meeting, the Committee recalled that firefighters (even if they are considered civil servants) must enjoy the guarantees provided for in Conventions Nos. 87 and 98, which have been ratified by Venezuela, and requested the Government to take measures to this end and, more generally, to conduct negotiations with the complainants to find a solution to the problems posed in various localities [see 333rd Report, para. 160].
- 165.** In its communication of 7 March 2005, the Government states that the National Trade Union Association of Professional Firefighters, Auxiliaries and Related Workers of Venezuela (ASINBOMPROVEN) has presented a draft collective agreement which will be discussed with the Mayor's office. The Government also provides a copy of the ruling given by the Constitutional Division of the Supreme Court of Justice which upheld the claim of invalidity lodged by representatives of the trade union regarding article 50(d), in fine, of the Decree concerning the Caracas Metropolitan District Fire Brigade. The Constitutional Division annulled actions that had been taken on the basis of the provision in question, which prevented members of the Eastern Joint Fire Brigade from being considered in the assessment process (to select employees on the basis of their qualifications and merits for entry into the Caracas Metropolitan District Fire Brigade) if they had previously been excluded from other fire brigades for disciplinary reasons.

- 166.** *The Committee takes note of this information.*

Case No. 2088 (Venezuela)

- 167.** The Committee last examined this case at its meeting in March 2004 and on that occasion requested the Government to intercede with the parties with a view to obtaining the reinstatement of trade union officials, Oscar Rafael Romero Machado and Isidro Ríos, and to keep it informed in this respect [see 333rd Report, para. 1036, approved by the Governing Body at its 289th Session (March 2004)].
- 168.** The Latin American Central of Workers (CLAT) in its communication of 25 May 2004 states that the trade union officials, María de la Esperanza Hermida and Luis Martín Galvis, have not been notified of the closure of disciplinary proceedings instigated against them because of the strike in 1999, and that indeed the employer's anti-union moves in the courts continued in 2001. The Ministry of Labour suspended talks on a second collective agreement with a view to combining the text presented by the National Organized Single Trade Union of Court and Council of the Judicature Workers (SUONTRAJ) with that presented by the recently established organization SINTRAT. The CLAT also claims that the right of assembly and of unrestricted access to the headquarters of SUONTRAJ was blatantly violated between 1999 and 2004, despite the fact that the requirement of prior notice to ensure the safety of persons on these premises was satisfied. The union SUONTRAJ applied to the Labour Inspectorate of Maracaibo, in Zulia State, to refer the application for the reinstatement of trade union official Isidro Ríos and payment of his wage arrears, but there has been no ruling on this by the Ministry of Labour. Lastly, the CLAT claims that the arguments put forward by the Government concerning union official Oscar Romero are dubious, and the administrative labour authority which, more than four years ago ordered his reinstatement, now claims not to recognize his trade union immunity.
- 169.** The SUONTRAJ, in its communication of 10 May 2004, states that the union officials, María de la Esperanza Hermida and Luis Martín Galvis, have not been notified of the closure of disciplinary proceedings against them following the strike in 1999, and that indeed new proceedings began before the Labour Inspectorate in response to an application to have them dismissed as a result of the strike carried out on 31 July and 14 August 2001. The union official, Pablo Emilio Salgado Cuevas, was also included in these proceedings. The SUONTRAJ also alleges that the Ministry of Labour suspended talks on a second collective agreement, ostensibly in order to combine the text with the one presented in November 2003 by the recently established organization SINTRAT. Referring to the Government's statements in the previous examination of the case, SUONTRAJ claims that the union official Oscar Rafael Romero Machado was detained arbitrarily on 17 February 2000. On 2 March 2004, he was detained again (on that occasion for 36 hours) while on union business. The union also complains of anti-union practices specifically against Ms. Marjoris Méndez, who was given a warning on 26 February 2006 for organizing a trade union meeting. In March 2003, threats were made against the job security of court workers of the Miranda State criminal circuit courts, despite the fact that a list of demands had been presented with a view to discussions on the second collective agreement. The SUONTRAJ adds that Judge Hilda Zamora threatened the union official, Mario Naspe, with death for having interceded to safeguard the employment security and the personal and physical safety of a number of officials who belonged to SUONTRAJ.
- 170.** The Government, in its communications of 5 November and 27 December 2004 and 18 and 23 February 2005, states that the Executive Directorate of the Judiciary (Supreme Court of Justice) agreed to the discontinuation of the dismissal proceedings initiated by the Labour Inspectorate of the Capital District against María de la Esperanza Hermida, Luis Martín Galvis and Pablo Emilio Salgado Cuevas.
- 171.** As regards the situation of the official, Marjoris Méndez, the judicial authorities quashed the appeal and upheld the warning on the grounds that the official had acted rudely and

arrogantly and displayed a lack of respect towards her superior, mocking her and calling for “applause for this great president of ours”, according to statements (sent by the Government in an attachment) by presiding Judge Mirla Malave Saez of the Criminal Circuit Court in Delta Amacuro State. These documents show that the penalty was not imposed because the official in question had organized a trade union meeting.

- 172.** As regards the suspension of talks on the draft collective agreement, the Government states that negotiations on working conditions of officials of the Executive Directorate of the Judiciary began again on 4 June 2004, and indicates that the parties have concluded a new collective agreement, according to an official document dated 22 December 2004 (sent as an attachment).
- 173.** As regards the allegation that judiciary workers of Miranda State criminal circuit courts were threatened with the loss of their employment security, despite the fact that a list of demands had been presented with a view to discussions on the second collective labour agreement, the Government states that judges cannot in any way threaten judiciary workers of a given circuit with dismissal, as the law gives them no authority whatsoever to impose any disciplinary sanction, let alone sanctions that would result in indefinite removal of a worker from his or her post. The Government sends documents originating from the complainant union which show that the alleged acts are not linked to the exercise of trade union rights but relate to a security problem which, according to the security service, prevented some individuals from entering the Palace of Justice and led to an altercation.
- 174.** As regards the removal of Isidro Ríos from his post, the Government reiterates what it has stated on previous occasions and indicates that, if Mr. Ríos considered that the disciplinary proceedings against him were flawed or in any way infringed his legal or constitutional rights, he could have appealed to the courts to overturn the administrative decision and obtain suitable compensation. Mr. Ríos did not, however, apply to the competent court with a view to obtaining such a ruling and being reinstated.
- 175.** As regards the complaint concerning the trade unionist, Oscar Romero Machado, the Government rejects the complainants' account of events leading to his dismissal (in 1999), and maintains that Mr. Romero was subsequently sentenced by the court on 2 March 2004 to 36 hours' detention for his disrespectful and insulting behaviour towards Judges Ever Contreras and Iván Harting – shouting, speaking in an arrogant manner, accusing the judges of corruption and abuses of power, using obscene language, making threatening gestures at Dr. Iván Harting, failing even to show proper respect to the security and National Guard personnel, and threatening to strike Judge Harting when he came out of his chambers, according to documents from the Tenth Court of First Instance of the Caracas civil court circuit (a copy is provided by the Government). Mr. Romero did not apply to the courts for reinstatement.
- 176.** As regards the threats by Judge Hilda Zamora against the trade union official Mario Naspe, the Government states that no stoppage ever took place for any reason, let alone for alleged verbal abuse or threats against job security, as the members of SUONTRAJ claim.
- 177.** *The Committee takes note of the Government's observations, according to which:*
 - (a) *the authorities have abandoned the dismissal proceedings initiated by the Labour Inspectorate of the Capital District against María de la Esperanza Hermida, Luis Martín Galvis and Pablo Emilio Salgado Cuevas;*
 - (b) *talks on conditions of employment of employees of the Executive Directorate of the Judiciary began again on 4 June 2004 and the parties concluded a new collective agreement;*

- (c) the Government rejects the allegation that threats were made against workers' employment security during the collective bargaining;
- (d) the trade unionist, Oscar Romero Machado, was held under arrest for a period of 36 hours by order of the judicial authority on 2 March 2004, for disrespectful and insulting behaviour described in detail in the Government's reply. The trade unionists, Isidro Ríos and Oscar Romero Machado, did not appeal to the competent judicial authority against the decisions to dismiss them and obtain reinstatement;
- (e) the Government sends documents on the trade unionist, Marjoris Méndez, employed by the judicial authority, specifically regarding the reasons for the warning for rude, arrogant and sarcastic behaviour towards a superior in the presence of others, and categorically denies that the warning had anything to do with the fact that she had organized a trade union meeting.
- 178.** As regards the death threats allegedly made against the trade union official, Mario Naspe, by Judge Hilda Zamora, when interceding to safeguard the employment security stability and physical security of a number of members of the complainant organization, the Committee notes that the Government in its reply does not refer to the death threats but to threats against employment stability. The Committee requests the Government to send observations relating specifically to alleged death threats.
- 179.** As regards the dismissal of Mr. Ríos and Mr. Romero, the Committee notes that the Government reiterates its previous observations and adds that they did not appeal to the competent judicial authority to overturn the decisions to dismiss them and obtain reinstatement. The Committee regrets that the Government has not interceded with the parties to bring about the reinstatement of the trade union officials, Rafael Romero Machado and Isidro Ríos, as it had requested in its previous examination of the case, and reiterates that recommendation.
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- 180.** Finally, as regards the following cases, the Committee requests the governments concerned to keep it informed of any developments relating to these cases.

Case	Last examination on the merits	Last follow-up examination
1937 (Zimbabwe)	March 1998	March 2005
1965 (Panama)	March 2001	March 2005
1970 (Guatemala)	November 2000	March 2005
1991 (Japan)	November 2000	June 2004
1996 (Uganda)	June 1999	March 2005
2027 (Zimbabwe)	March 2000	March 2005
2046 (Colombia)	March 2005	-
2047 (Bulgaria)	March 2000	March 2005
2084 (Costa Rica)	March 2001	March 2005
2086 (Paraguay)	June 2002	November 2003
2087 (Uruguay)	March 2005	-
2104 (Costa Rica)	March 2002	March 2005

Case	Last examination on the merits	Last follow-up examination
2114 (Japan)	June 2002	November 2002
2126 (Turkey)	March 2002	June 2004
2132 (Madagascar)	June 2003	November 2004
2133 (The former Yugoslav Republic of Macedonia)	November 2002	November 2004
2141 (Chile)	March 2002	March 2005
2146 (Serbia and Montenegro)	March 2002	November 2004
2148 (Togo)	March 2002	March 2005
2156 (Brazil)	March 2002	November 2004
2160 (Venezuela)	June 2002	March 2005
2166 (Canada)	March 2003	March 2004
2173 (Canada)	March 2003	March 2004
2175 (Morocco)	November 2002	November 2004
2180 (Canada)	March 2003	March 2004
2187 (Guyana)	November 2003	November 2004
2192 (Togo)	March 2003	March 2005
2199 (Russian Federation)	June 2003	June 2004
2200 (Turkey)	June 2004	–
2214 (El Salvador)	March 2005	–
2226 (Colombia)	November 2004	–
2227 (United States)	November 2003	November 2004
2233 (France)	November 2003	March 2005
2236 (Indonesia)	November 2004	March 2005
2242 (Pakistan)	November 2003	–
2253 (China, Special Administrative Region of Hong Kong)	June 2004	–
2255 (Sri Lanka)	November 2003	March 2005
2257 (Canada)	November 2004	–
2266 (Lithuania)	June 2004	November 2004
2271 (Uruguay)	June 2004	March 2005
2272 (Costa Rica)	March 2004	March 2005
2273 (Pakistan)	November 2004	–
2276 (Burundi)	November 2004	–
2280 (Uruguay)	June 2004	–
2285 (Peru)	November 2004	–

Case	Last examination on the merits	Last follow-up examination
2288 (Niger)	March 2004	March 2005
2303 (Turkey)	November 2004	-
2304 (Japan)	November 2004	-
2316 (Fiji)	June 2004	March 2005
2324 (Canada)	March 2005	-
2328 (Zimbabwe)	March 2005	-
2336 (Indonesia)	March 2005	-
2338 (Mexico)	March 2005	-
2340 (Nepal)	March 2005	-
2344 (Argentina)	March 2005	-
2347 (Mexico)	March 2005	-
2381 (Lithuania)	March 2005	-
2383 (United Kingdom)	March 2005	-

- 181.** The Committee hopes that these governments will quickly provide the information requested.
- 182.** In addition, the Committee has just received information concerning the follow-up of Cases Nos. 1890 (India), 1916 (Colombia), 2038 (Ukraine), 2109 (Morocco), 2139 (Japan), 2141 (Chile), 2151 (Colombia), 2153 (Algeria), 2158 (India), 2164 (Morocco), 2172 (Chile), 2186 (China, Special Administrative Region of Hong Kong), 2228 (India), 2234 (Mexico), 2237 (Colombia), 2239 (Colombia), 2252 (Philippines), 2256 (Argentina), 2274 (Nicaragua), 2281 (Mauritius), 2283 (Argentina) and 2304 (Japan) which it will examine at its next meeting.

CASE NO. 2327

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

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

***Allegations: The complainant organization
alleges that the Government violates the
freedom of association in export processing
zones (EPZs)***

- 183.** The complaint is set out in a communication by the International Textile, Garment and Leather Workers' Federation (ITGLWF) dated 3 March 2004 on behalf of its affiliate, the Bangladesh Independent Garment Workers' Union Federation (BIGUF).

- 184.** The Government has sent its reply in a communication dated 10 January 2005.

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

A. The complainant's allegations

186. The complainant alleges that the Government of Bangladesh has denied the right of freedom of association to workers in the export processing zones (EPZs) in the country. According to the complainant, in 1992, after the United States Government threatened to revoke the generalized system of preference (GSP) facilities granted to Bangladesh because of the country's denial of trade union rights in its EPZs, the Government of Bangladesh agreed to phase out the suspension of labour laws in the EPZs in three phases as follows: restoration of the Employment of Labour (Standing Orders) Act, 1965, in 1995; restoration of section 3 of the Industrial Relations Ordinance 1969 to allow freedom of association and formation of unions, in 1997; and restoration of all sections of the Industrial Relations Ordinance, 1969, in 2000. The complainant alleges that after the Government missed the first two deadlines, the United States Government indicated in 1999, that Bangladesh would lose its GSP status unless freedom of association was guaranteed in EPZs. The Government of Bangladesh then gazetted an official notice on 31 January 2001 to the effect that all workers in EPZs would have their legal rights in the zones, effective from 1 January 2004. According to the complainant, in the latter half of 2003 the Government however appeared to be backtracking on the issue of granting trade union rights in EPZs and towards the end of the year, the Government of Bangladesh indicated that it would seek an extension or alternative plan to the gazette notification of January 2001. On 28 December, the United States Ambassador agreed to extend the deadline for a relatively short period during which an agreement was to be negotiated to enable freedom of association to be granted to the EPZs. The Government of Bangladesh invited the World Bank to mediate this process.

187. The complainant further states that it has repeatedly made approaches to the Government stressing that, as per the ILO standards which the Government is committed to observe, workers in EPZs cannot be denied either freedom of association or the right to bargain collectively, and have as much right as other workers to the full application of these standards.

B. The Government's reply

188. The Government states that 130,000 workers are employed in the country's EPZs. During the initial period of operation, labour laws were not suspended in the EPZs. However, in 1986 the country's first EPZ in Chittagong, suffered serious labour unrest due to instigation from vested interest groups and outside trade unions. In order to restore the productive working environment and to safeguard labour employment and foreign investment, the following laws were suspended through government notifications: the Industrial Relations Ordinance, 1969, on 6 March 1986; the Employment of Labour (Standing Orders) Act, 1965, on 6 March 1986; and The Factories Act, 1965, on 9 January 1989. The Government indicates that the following factors were taken into consideration while deciding to exempt EPZs from the application of the aforesaid laws:

- (i) the reservation of foreign investors to trade unionism;
- (ii) the need to create an enabling environment for the industrial growth of the country – the Government points out that in the case of a developing country like Bangladesh, apart from labour rights issues, associated socio-economic factors like literacy rate, life expectancy, poverty level, required environment and infrastructure should be

taken into account. According to the Government, these are factors which would facilitate appropriate application of workers' rights in EPZs and produce a meaningful outcome for all stakeholders;

(iii) the economic realities of the country – the Government states that 33.7 per cent of the total population of Bangladesh still lives under the poverty line and it has been striving hard to alleviate poverty by creating more employment opportunities. EPZs in Bangladesh are considered as one means to achieve this objective. The historical experience with trade unions has however not been encouraging and the introduction of trade unions would put the 130,000 workers in EPZs and their dependent family members in a state of uncertainty. The right of EPZ workers to food, shelter, medical facilities and other basic needs also should be treated with utmost importance. The potential threat of abuse of workers' rights in the name of trade unions is likely to retard the economic development of the country in terms of job loss and foregoing export earnings, foreign direct investment as well as linkage benefits.

- 189.** The Government states that the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) had filed a number of petitions appealing for the withdrawal of the GSP facility to Bangladesh until the restoration of the abovementioned laws in the EPZs. It adds that the Bangladesh Export Processing Zones Authority (BEPZA) had taken several reformative measures in a bid to comply with international labour standards both by modification of its existing instructions and introducing new instructions. These measures include making the workers' welfare committees more democratic and participatory, providing workers' representatives the opportunity to discuss on all matters of mutual interest and protection against disciplinary action initiated by the management or punishment. The Government also refers to a report of a foreign independent audit firm SGS, which reviewed the BEPZA instructions and the performance of workers' welfare committees. According to the Government, the findings of this firm suggest that BEPZA instructions are much more effective in addressing workers' benefits, employment conditions and wages issues. The report also stressed the need for additional training in order to strengthen workers' welfare committees and create a sound industrial relations environment within the EPZs.
- 190.** The Government finally states that a separate law entitled "EPZ Workers' Associations and Industrial Relations Act, 2004 (Act No. 23 of 2004)", was enacted on 18 July 2004, giving rights to workers in EPZs to form associations of their own.

C. The Committee's conclusions

- 191.** *The Committee notes that this case concerns the freedom of association of workers in export processing zones (EPZs) in Bangladesh. According to the complainant, the Government of Bangladesh had suspended the operation of the Industrial Relations Ordinance, 1969, in the country's EPZs, as a result of which workers in the zones had been denied the right to freedom of association and the right to bargain collectively. The complainant indicates that under the threat of revocation of its GSP status by the United States Government, the Government agreed to phase out the suspension of labour laws in the zones and also gazetted an official notice on 31 January 2001 to the effect that workers in EPZs would be granted freedom of association from 1 January 2004 but subsequently appeared to be backtracking on the issue.*
- 192.** *The Committee notes that the Government has indicated that based on economic and other considerations, the operation of the Industrial Relations Ordinance, 1969, and the Employment of Labour (Standing Orders) Act, 1965, was suspended in the zones on 6 March 1986 and the operation of the Factories Act, 1965, on 9 January 1989. The Government also refers to measures introduced by the Bangladesh Export Processing*

Zones Authority (BEPZA), to make workers' welfare committees more democratic and participatory, and finally to the recently passed law entitled "EPZ Workers' Associations and Industrial Relations Act, 2004" (hereinafter, the Act), which according to the Government, provides EPZ workers with the right to form associations of their own.

193. The Committee notes that section 5 of the Act, requires the formation by employers and workers in EPZs of workers' representation and welfare committees (WRWCs), in industrial units in EPZs and, as per section 11 of the Act, the WRWCs would be in existence until 31 October 2006. Thereafter, from 1 November 2006, in accordance with section 13(1) and other provisions in Chapter III of the Act, workers in EPZs would have certain rights to form workers' associations. If such an association is formed in an industrial unit, a WRWC shall cease to exist. If there is no workers' association in the industrial unit, the WRWC may continue to function at the option of the employer.
194. The Committee notes that the result of the Act is to further postpone the effective recognition of the right to organize in EPZs until November 2006. Moreover, the Committee is not certain of the long-lasting impact of this right once it is introduced as section 13(3), provides that the duration of a workers' association shall be through 31 October 2008, from 1 November 2006.
195. Recalling that workers in EPZs – despite the economic arguments often put forward – like other workers, without distinction whatsoever, should enjoy the trade union rights provided for by the freedom of association Conventions [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 240], the Committee considers the blanket denial of the right to organize to workers in EPZs until 31 October 2006, as amounting to a serious violation of freedom of association principles and, in particular, Article 2 of Convention No. 87, which guarantees to all workers the right to establish and join organizations of their own choosing. The Committee therefore requests the Government to take all possible measures to amend section 13(1) of the Act, so as to expedite the recognition of the right to organize to EPZ workers. Recalling further that the right to organize should not be limited in time, the Committee requests the Government to clarify the impact of section 13(3) on newly formed organizations after October 2008, and if this provision would result in the limitation of workers' associations to a trial period, to ensure its immediate repeal.
196. The Committee notes that section 11(3) provides that a WRWC shall cease to exist as soon as a workers' association is formed in an industrial unit. Section 11(2) however provides that where no association has been formed, a WRWC may continue to function even after 31 October 2006, at the option of the employer. The Committee considers that, in respect of industrial units where a workers' association has not been formed for whatever reason, it may indeed be in the interest of the concerned workers that the WRWCs continue to exist and function even after 31 October 2006, and that the continuance of the WRWC in such circumstances should not be contingent upon the employer's will. The Committee, therefore, requests the Government to take the necessary measures to amend section 11(2) so as to ensure that WRWCs may continue to function beyond 31 October 2006 in industrial units where a workers' association has not been formed and that their continuance is not subject to the employer's approval, while ensuring that the establishment and functioning of workers' organizations are not undermined.
197. The Committee further notes that, as per section 24, workers in industrial units established after the commencement of the Act will not be allowed to form workers' associations until the expiry of a period of three months following the commencement of commercial production in the concerned unit. The Committee considers that section 24 is contrary to Article 2 of Convention No. 87, which guarantees to workers, without distinction whatsoever, the right to establish and join organizations of their own choosing. The

Committee therefore requests the Government to take all necessary measures to amend section 24, so as to ensure that workers in industrial units established after the commencement of the Act may form workers' associations from the beginning of their contractual relationship.

198. *The Committee notes that, as per section 25(1), there cannot be more than one workers' association in an industrial unit. The Committee recalls in this context that the right of workers to establish organizations of their own choosing implies, in particular, the effective possibility to create – if the workers so choose – more than one workers' organization per enterprise. A provision of the law which does not authorize the establishment of a second union in an enterprise fails to comply with Article 2 of the Convention, which guarantees workers the right to establish and join organizations of their own choosing, without previous authorization [Digest, op. cit., paras. 280 and 281]. The Committee therefore, requests the Government to take all necessary measures to repeal section 25(1) so as to ensure that there exists the effective possibility of establishing more than one workers' association in an industrial unit, if the workers choose to do so.*
199. *Under sections 14 and 15 of the Act, a workers' association may be formed only when a minimum of 30 per cent of the eligible workers of an industrial unit seek its formation, and this has been verified by the executive chairperson of the authority (that is the BEPZA), who shall then conduct a referendum on the basis of which the workers shall acquire the legitimate right to form an association under the Act, only if more than 50 per cent of the eligible workers cast their vote, and more than 50 per cent of the votes cast are in favour of the formation of the workers' association. When the results of the referendum are in favour of the formation of an association, section 17(1) requires the executive chairperson of the authority to ask the workers to form a constitution drafting committee, and section 17(2) requires the executive chairperson of the authority to approve of the Committee. Thereafter, as per section 20, the convener of the constitution drafting committee is to apply to the executive chairperson of the authority for registration of the workers' association.*
200. *The Committee recalls that, although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations [Digest, op. cit., para. 248]. Moreover, the Committee has already indicated more generally in respect of the Bangladesh Industrial Relations Ordinance, that the minimum membership requirement of 30 per cent of the workers concerned to form an organization is too high, and has requested the Government to amend the relevant provision [Case No. 1862, 306th Report, para. 102]. The Committee therefore requests the Government, in consultation with the workers' and employers' organizations concerned, to amend the legislation so as to avoid the obstacles that can be created by the minimum membership and referendum requirements to the formation of workers' organizations in export processing zones. The Committee further considers the powers of discretionary approval granted to the executive chairperson of the authority as regards the constitution drafting committee as granting excessive powers to the BEPZA that could give rise to undue interference in the activities and formation of workers' associations. The Committee therefore, requests the Government to take all necessary measures to amend section 17(2) so as to eliminate the need for prior approval of the constitution drafting committee by the executive chairperson of the authority.*
201. *The Committee further notes in this regard that section 16 provides that, when a referendum held under section 15 does not result in a mandate being obtained for the formation of a workers' association, no further referendum shall be held for the same industrial unit until the expiry of one year thereafter. The Committee considers that section 16 unreasonably restricts the right of workers in EPZs to establish and join organizations of their own choosing and is contrary to Article 2 of Convention No. 87. The*

Committee therefore requests the Government to take all necessary measures to repeal section 16 of the Act, so that workers shall not be barred from establishing organizations simply because such an attempt may have failed.

- 202.** *Along the same lines, the Committee notes that subsection (7) of section 35 provides that, once an association is de-registered under the section, no further association shall be allowed in that industrial unit until the expiry of one year from the date of notification of deregistration. The Committee considers that the effect of section 35(7) is to deny workers in EPZs freedom of association for a substantial period of time upon deregistration of an association and this is contrary to Article 2 of Convention No. 87, which guarantees to all workers the right to form and join associations of their own choosing.*
- 203.** *More generally, section 35 permits deregistration of a workers' association at the request of 30 per cent of the eligible workers (meaning those in the relevant unit), apparently even if they are not members of the association. The Committee notes that section 35 thus has the potential to seriously limit the right to organize EPZ workers. The Committee considers that deregistration of an association is an issue that should be solely governed by the constitutions of the workers' associations. In fact, section 18(1) of the Act requires the constitutions of workers' associations to prescribe the manner in which the workers' association may be deregistered. The Committee therefore requests the Government to take all necessary measures to repeal the whole of section 35 so as to ensure that the issue of deregistration of workers' associations is governed solely by the constitutions of the associations and so that workers in industrial units in EPZs are not deprived of their right to organize for any period of time following the deregistration of a workers' association.*
- 204.** *The Committee further notes that under section 36 the registration of a workers' association may be cancelled on a variety of grounds and in many cases would appear to be either excessive as compared to the type of breach committed, such as contravention of any of the provisions of its constitution, or simply in violation of principles of freedom of association. An example of the latter is that a workers' association may be cancelled for committing an unfair labour practice which, under section 42(1)(a) would include persuading a worker to join or refrain from joining an association during working hours. The Committee considers that attempts at recruiting new members are part of the lawful activities of a workers' association, and the serious consequence of cancellation of registration on the basis of such an attempt being characterized as an unfair practice under section 42(1)(a), is contrary to the principles of freedom of association. The Committee, therefore, requests the Government to take the necessary measures to repeal sections 36(1)(c), (e)-(h) and 42(1)(a), so as to ensure that the extremely serious consequence of cancellation of registration of a workers' association is restricted to the seriousness of the violation committed.*
- 205.** *Under section 18(2) of the Act, no workers' association shall obtain or receive any fund from any outside source without the prior approval of the executive chairperson of the authority. The Committee recalls that trade unions should not be required to obtain prior authorization to receive international financial assistance in their trade union activities [Digest, op. cit., para. 633]. The Committee considers that the said provision interferes with the right of workers' organizations to organize their administration and activities without interference from the public authorities. The Committee, therefore, requests the Government to take the necessary measures to amend section 18(2) so as to ensure that workers' associations in EPZs are not required to obtain prior authorization to receive financial assistance in respect of their trade union activities.*
- 206.** *The Committee notes that as per section 88(1), no strike or lockout shall be permissible in any industrial unit in an EPZ until 31 October 2008 and as per section 88(2), in the meanwhile, all labour disputes will be subject to mandatory and binding arbitration. There*

is thus a total prohibition of the right to strike of workers in EPZs until 31 October 2008. The Committee recalls that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. The right to strike can only be restricted (such as by the imposition of compulsory arbitration to end a strike) or prohibited in essential services in the strict sense of the term, that is, those services whose interruption would endanger the life, personal safety or health of the whole or part of the population [Digest, op. cit., paras. 475 and 516]. The Committee therefore, requests the Government to take the necessary measures to amend section 88(1) and (2) so as to expedite the recognition of industrial action in EPZs before 31 October 2008.

- 207.** *The Committee further notes that, once strike action is recognized under the Act, a number of provisions severely restrict the exercise of this right. Under section 54(3), the executive chairperson of the authority may prohibit a strike or lockout if it continues for more than 15 days and under 54(4), the executive chairman may prohibit it even before the expiry of 15 days if he or she is satisfied that the continuance of the strike or lockout is causing serious harm to productivity in the EPZ, or is prejudicial to the public interest or the national economy. The Committee considers that these provisions place a substantial limitation on the workers' right to strike as a legitimate means of defending their occupational and economic interests. The Government may, however, consider the possibility of providing for a negotiated minimum service so as to effectively ensure the safe functioning of machinery within the EPZs. It, therefore, requests the Government to take the necessary measures to amend section 54(3) and (4) so as to ensure that industrial action in EPZs may only be restricted in accordance with the abovementioned principle.*
- 208.** *Under section 32(1) of the Act, a federation may be formed only when more than 50 per cent of the workers' associations in an EPZ agree to its formation. The Committee recalls that the requirement of an excessively high minimum number of trade unions to establish a higher level organization conflicts with Article 5 of Convention No. 87, and with the principles of freedom of association [Digest, op. cit., para. 611]. The Committee considers the requirement of agreement by more than 50 per cent of the workers' associations in an EPZ for the formation of a federation to be excessively high. The Committee therefore requests the Government to take the necessary measures to amend section 32(1) so as to ensure that the formation of federations is not conditional on such an excessively high requirement concerning member associations.*
- 209.** *Section 32(3) prohibits a federation from affiliating or associating in any manner with federations in other EPZs and also with other federations beyond EPZs. The Committee recalls that, in order to defend the interests of their members more effectively, workers' and employers' organizations should have the right to form federations and confederations of their own choosing, which should themselves enjoy the various rights accorded to first-level organizations, in particular as regards their freedom of operation, activities and programmes [Digest, op. cit., para. 621]. The Committee, therefore, considers that federations formed in EPZs should have the right to form and join confederations at a regional or national level and requests the Government to take the necessary measures to amend section 32(3) accordingly.*
- 210.** *The Committee notes that several provisions of the Act interfere with the right of workers to elect their representatives in full freedom: for instance; section 5(7) provides that the procedure of election to the WRWC shall be determined by the authority, section 5(6) provides that the manner of selection of the convener from amongst the elected members of the WRWC shall be determined by the executive chairperson of the authority; section 28(1) empowers the authority to organize and conduct the elections to the executive council of the workers' association; section 29 requires the executive council to be approved by the executive chairperson of the authority within five days of the results of the election; and*

section 32(4) provides that the procedure of election and other details in respect of federations shall be determined by the authority. The Committee recalls that the right of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining conditions of eligibility of leaders or in the conduct of the elections themselves [Digest, op. cit., para. 353]. The Committee therefore, requests the Government to take the necessary measures to ensure that the elections to be held under the provisions of the Act are conducted without any interference from the public authorities, including the BEPZA and its executive chairperson.

- 211.** In conclusion, the Committee must express its concern that the EPZ Workers' Associations and Industrial Relations Act, while taking certain steps to provide greater freedom of association to EPZ workers, contains numerous and significant restrictions and delays in relation to the right to organize in EPZs such that the Committee must query whether in these circumstances this right may be truly and effectively exercised. The Committee, therefore, urges the Government to review the Act without delay in the light of its conclusions set forth above, so as to ensure meaningful respect for the freedom of association of EPZ workers in the very near future. The Committee reminds the Government that it may avail itself of the technical assistance of the Office to this end, if it so desires. It requests the Government to keep it informed of all measures taken in this regard.

- 212.** 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

- 213.** In the light of its foregoing conclusions, the Committee requests the Governing Body to approve the following recommendations:
 - (a) The Committee urges the Government to review the EPZ Workers' Associations and Industrial Relations Act, without delay in the light of its conclusions set forth above, so as to ensure meaningful respect for the freedom of association of EPZ workers in the very near future, and to keep it informed of all measures taken in this regard. In particular, the Committee requests the Government to take all necessary measures to:
 - (i) amend section 13(1) so as to expedite the recognition of the right to organize to EPZ workers, in view of the blanket denial of the right to organize until 31 October 2006, which it deplores;
 - (ii) amend section 11(2) so as to ensure that workers' representation and welfare committees may continue to function beyond 31 October 2006 in industrial units where a workers' association has not been formed and that their continuance is not subject to the employer's approval, while ensuring that the establishment and functioning of workers' organizations are not undermined;
 - (iii) amend section 24 so as to ensure that workers in industrial units established after the commencement of the Act may form workers' associations from the beginning of their contractual relationship;

- (iv) *repeal section 25(1) so as to ensure that there exists the effective possibility of establishing more than one workers' association in an industrial unit, if the workers choose to do so;*
- (v) *amend the legislation, in consultation with the workers' and employers' organizations concerned, so as to avoid the obstacles that can be created by the minimum membership and referendum requirements to the formation of workers' organizations in export processing zones;*
- (vi) *amend section 17(2) so as to eliminate the need for approval of the constitution drafting committee by the executive chairperson of the authority;*
- (vii) *repeal section 16 so that workers shall not be barred from establishing organizations simply because their attempt to establish a workers' association may have failed;*
- (viii) *repeal the whole of section 35 so as to ensure that the issue of deregistration of workers' associations is governed solely by the constitutions of the associations and so that workers in industrial units in EPZs are not deprived of their right to organize for any period of time following the deregistration of a workers' association;*
- (ix) *repeal sections 36(1)(c), (e)-(h) and 42(1)(a) so as to ensure that the extremely serious consequence of cancellation of a workers' association is restricted to the seriousness of the violation committed;*
- (x) *amend section 18(2) so as to ensure that workers' associations in EPZs are not required to obtain prior authorization to receive financial assistance in respect of their trade union activities;*
- (xi) *amend section 88(1) and (2) so as to expedite the recognition of industrial action in EPZs before 31 October 2008;*
- (xii) *amend section 54(3) and (4) so as to ensure that industrial action in EPZs may only be restricted in accordance with the principle of providing for a negotiated minimum service so as to effectively ensure the safe functioning of machinery within the EPZs or to avoid an acute national crisis endangering the normal living conditions of the population;*
- (xiii) *amend section 32(1) so as to ensure that the formation of federations is not conditional on an excessively high requirement concerning member associations;*
- (xiv) *amend section 32(3) so as to ensure that federations formed in EPZs have the right to form and join confederations at a regional or national level; and*

- (xv) *ensure that the elections to be held under the provisions of the Act are conducted without any interference from the public authorities, including the BEPZA and its executive chairperson.*
- (b) *The Committee requests the Government to clarify the impact of section 13(3) of the Act on newly formed organizations after October 2008 and, if this provision would result in the limitation of workers' associations to a trial period, to ensure its immediate repeal.*
- (c) *The Committee reminds the Government that it may avail itself of the technical assistance of the Office, if it so desires.*
- (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.*

Annex

EPZ Workers' Associations and Industrial Relations Act, 2004 (extracts)

...

- 5. **Workers' Representation and Welfare Committee** – (1) After commencement of this Act, the Executive Chairman or any officer authorized by him in that behalf, shall require the employer and the workers in an industrial unit in a Zone to constitute, in prescribed manner, a Workers' Representation and Welfare Committee, hereinafter referred to as the Committee.
 - (2) Every employer registered as a company with a separate certificate of incorporation and operating as such in a Zone shall have one committee under it in that Zone:
Provided that two or more industrial units in a Zone under an employer registered as a company shall be deemed to be one industrial unit for the purposes of this section.
 - (3) The Committee shall, subject to the provision of sub-section (4), consist of not more than 15 (fifteen) and not less than 5 (five) members with one of them as the convener.
 - (4) If the number of workers eligible to vote is above 500 (five hundred), the number of members in the Committee shall be increased over 5 (five) at the ratio of 1 (one) per 100 (one hundred) workers, but shall not exceed the aforesaid 15 (fifteen).
 - (5) The Committee shall be formed only with the eligible workers employed in the industrial unit in a Zone for which the Committee is formed.
 - (6) The members of a Committee shall be elected through secret ballots from among the eligible workers, and the Convener from among the elected members of the said Committee, in a manner to be determined by the Executive Chairman.
 - (7) The procedure of election under this Chapter shall be determined by the Authority.
 - (8) The employer shall provide necessary space within the Zone for establishing the office of the Committee.
- ...
- 11. **Duration and cessation of Committee** – (1) A Committee constituted in a Zone shall be in existence until October 31, 2006.
 - (2) Subject to the provision of sub-section (3), a Committee may continue to function even after October 31, 2006 at the option of the employer.
 - (3) A Committee shall cease to exist as soon as a Workers' Association is formed in that industrial unit.

...

13. **Formation of Workers' Association** – (1) With the expiry of October 31, 2006 and beginning of November 1, 2006, the workers in an industrial unit situated within the territorial limits of a Zone shall have the right to form association to engage in industrial relations subject to the provisions made by or under this Act.
 (2) Every employer registered as a company with a separate certificate of incorporation and operating as such in a Zone shall have one Workers' Association under it in that Zone:
 Provided that two or more industrial units in a Zone under an employer registered as a company shall be deemed to be one industrial unit for the purposes of this section.
 (3) The duration of a workers' association shall be through October 31, 2008 from November 1, 2006.
14. **Requisition for formation of association** – (1) If the workers in an industrial unit situated within the territorial limits of a Zone intend to form an association, not less than 30% (thirty per cent) of the eligible workers of the industrial unit shall apply in a prescribed form to the Executive Chairman demanding formation of a workers' association.
 (2) Upon receipt of an application under sub-section (1), the Executive Chairman shall verify and ascertain that not less than 30% (thirty per cent) of the eligible workers have subscribed to the application by signature or thumb impression.
 (3) No employer shall in any manner discriminate against a worker for subscribing to an application under sub-section (1), should ultimately the workers' association be not formed on the basis of the result of the referendum held under section 15, and any such discrimination shall be deemed to be an unfair labour practice by the employer under section 41.
 (4) A form signed by a worker under this section shall remain valid up to six months from the date of its signature; and such form shall not be filled in or signed before November 1, 2006.
15. **Referendum to ascertain support for association** – (1) If the Executive Chairman is satisfied under sub-section (2) of section 14 that not less than 30% of the eligible workers have applied in prescribed forms demanding formation of association, he shall arrange to hold a referendum of the eligible workers of the industrial unit within the Zone, within a period not later than five days from the date of receipt of the application under sub-section (1) of section 14, to ascertain the support of the eligible workers in favour of formation of workers' association.
 (2) If more than 50% (fifty per cent) of the eligible workers do not cast votes, the referendum under this section shall be ineffective.
 (3) If more than 50% (fifty per cent) of the workers cast votes, and more than 50% (fifty per cent) of the votes cast are in favour of formation of workers' association, the workers in the said industrial unit shall, thereby, acquire the legitimate right to form an association under this Act, and the Executive Chairman shall be required to accord registration to that association within 25 (twenty-five) working days of the date of the referendum.
 (4) The referendum shall be held through secret ballots and the Executive Chairman shall determine the necessary procedure in respect of holding of the referendum, if not, in the meantime, prescribed by regulations.
16. **No further referendum in one year** – If in a referendum held under section 15, mandate cannot be obtained for formation of workers' association, no further referendum shall be held for the same industrial unit until the expiry of one year since thereafter.
17. **Constitution of the workers' association** – (1) If workers exercise their option under section 15 in favour of formation of workers' association, the Executive Chairman shall, within a period not later than five days thereafter, ask the workers to form a Constitution Drafting Committee (hereinafter referred to as the "Constitution Committee" as and when deemed to be appropriate), consisting of not more than nine representatives with one of them as the Convener.
 (2) The Executive Chairman shall, on being satisfied, approve the Constitution Committee within 5 days of receipt of the proposal, and shall ask the Constitution Committee to frame and submit a constitution of the workers' association within a period of 15 days.

- (3) No provision of the constitution shall be contrary to any provision of this Act, and it shall conform to the provisions of this Act.
- (4) The constitution of an association under this Act shall propose:
- (a) a General Council to consist of the eligible workers who shall be registered as members of the workers' association; and
 - (b) an Executive Council to consist of, among other positions, a President, a General Secretary, a Treasurer and such number of other positions not exceeding fifteen in total. All the members in the Executive Council shall be elected by the members of the General Council.
18. **Further requirements of the constitution** – (1) A constitution for the formation of an association shall not be approved under this Act, unless the constitution thereof further provides for the following matters, namely:
- (a) the name and address of the workers' association;
 - (b) the objects for which the workers' association has been formed;
 - (c) the manner in which a worker may become a member of the workers' association specifying therein that no worker shall be enrolled as its member unless he applies in the form set out in the constitution;
 - (d) the sources of the fund of the workers' association and the purposes for which such fund shall be applicable;
 - (e) the conditions under which a member shall be entitled to any benefit assured by the constitution of the workers' association and under which any fine or forfeiture may be imposed on him;
 - (f) the maintenance of a list of the members of the workers' association and of adequate facilities for the inspection thereof by the officers and members of the workers association;
 - (g) the manner in which the constitution shall be amended, varied or repealed;
 - (h) the safe custody of the funds of workers' association, its annual audit, the manner of audit and adequate facilities for inspection of the account books by the officers and members of workers' association;
 - (i) the manner in which the workers' association may be de-registered;
 - (j) the manner of election of officers by the General Council of the workers' association and the term for which an officer may hold office upon his election or re-election;
 - (k) the procedure about resignation from the General Council of the workers' association and cancellation of membership;
 - (l) the procedure for expressing want of confidence in any officer of the workers' association; and
 - (m) the meetings of the Executive Council and General Council of the workers' association, where there shall be obligation for the Executive Council to meet at least once in every four months and for the General Council to meet at least once in every year.
- (2) No workers' association shall obtain or receive any fund from any outside source without the prior approval of the Executive Chairman.
- ...
24. **No association in a new industrial unit for three months** – No workers' association shall be allowed to be formed under this Act, in any industrial unit established in a Zone after the commencement of this Act, unless a period of three months has expired after the commencement of commercial production in that industrial unit.
25. **Restriction in respect of number of association** – (1) There shall not be more than one workers' association in an industrial unit in a Zone.
- (2) If there are more than one industrial units under the same employer or company in a Zone and any of the said units comes within the restriction under section 24, that shall not bar formation of workers' association for the rest of the units.
- ...

32. **Federation of Associations** – (1) If more than 50% (fifty per cent) of the workers' associations in a Zone agree, they shall be entitled to form one Federation of Workers' Associations in that Zone.
- (2) Unless earlier de-registered or ceases to exist, a federation formed under this section shall hold office for a period of four years from the date of its being approved by the Executive Chairman.
- (3) A federation formed within the territorial limits of one Zone shall not affiliate or associate in any manner with another federation in another Zone or with any other federation beyond any Zone.
- (4) The Authority shall determine, by regulations, the procedure of election and other details in respect of the Federation of Workers' Associations.
- ...
35. **De-registration of workers' association** – (1) At any time during the existence of a workers' association, not less than 30% of the eligible workers may apply in prescribed form to the Executive Chairman demanding de-registration of the Association.
- (2) Upon receipt of an application under sub-section (1), the Executive Chairman shall verify and ascertain that not less than 30% of the eligible workers have subscribed to the application by signature or thumb impression.
- (3) If the Executive Chairman is satisfied under sub-section (2), he shall hold a referendum in 5 days by secret ballots of the eligible workers to ascertain demand in favour of such de registration.
- (4) If more than 50 per cent of the eligible workers cast votes in the referendum and if more than 50 per cent of the votes cast are in favour of de-registration of the Association, the Executive Chairman shall, within 25 days thereafter, issue an order notifying de-registration.
- (5) No employer shall in any manner discriminate against a worker for subscribing to an application under sub-section (1), should ultimately the workers' association be not de-registered under sub-section (4) on the basis of the result of the referendum held under sub-section (3); and any such discrimination shall be deemed to be an unfair practice on the part of the employer under section 41.
- (6) The Authority shall, by regulations, determine and prescribe procedure and further details in respect of referendum under this section.
- (7) Once an association is de-registered under this section, no further association shall be allowed in that industrial unit until the expiry of one year from the date of notification of de-registration.
- (8) A form signed by a worker under sub-section (1) shall remain valid up to six months from the date of signature.
36. **Cancellation of registration of workers' association** – (1) In addition to the procedure regarding de-registration under section 35, the Executive Chairman may also, subject to the provision of sub-section (2), cancel the registration of a workers' association on any of the grounds stated below, that the workers' association has:
- (a) ceased to exist on any ground;
 - (b) obtained registration by fraud or by misrepresentation of facts;
 - (c) contravened any of the provisions of its constitution;
 - (d) committed any unfair practice;
 - (e) inserted in its constitution any provision which is inconsistent with this Act or rules or regulations made thereunder;
 - (f) failed to submit its annual report to the Executive Chairman as required under this Act;
 - (g) elected as its officer a person who is disqualified under this Act to be elected as such officer; or
 - (h) contravened any of the provisions of this Act or rules or regulations made thereunder.

- (2) Where the Executive Chairman is of the opinion that the registration of a workers' association should be cancelled, he shall submit an application to the Tribunal praying for permission to cancel such registration.
- (3) The Executive Chairman shall cancel the registration of a workers' association within five days of the date of receipt of permission from the Tribunal.
- (4) The registration of an association shall not be cancelled on the ground mentioned in clause (d) of sub-section (1) if the unfair practice is not committed within three months prior to the date of submission of the application to the Tribunal.
- ...
42. **Unfair practices on the part of workers or association** – (1) It will be an act of unfair practice for a worker, workers' association or any person acting on behalf of such a worker or workers' association to:
- persuade a worker to join or refrain from joining an association during working hours;
 - intimidate any person to become, or refrain from becoming, or to continue to be or to cease to be a member or officer of an association;
 - induce any person to refrain from becoming, or cease to be a member or officer of an association, by conferring or offering to confer any advantage on or by procuring or offering to procure any advantage for, such person or any other person;
 - compel or attempt to compel the employer to sign a memorandum of settlement by using intimidation, coercion, pressure, threat, confinement to a place, physical injury, disconnection of telephone, water and power facilities or resorting to any other similar technique; or
 - compel or attempt to compel any worker to pay, or refrain from paying, any subscription towards the fund of any workers' association by using intimidation, coercion, pressure, threat, confinement to a place, physical injury, disconnection of telephone, water and power facilities or resorting to any other similar technique.
- (2) It shall be an unfair practice for a worker or an association to interfere with a ballot for holding any referendum or election under this Act, by the exercise of undue influence, intimidation, impersonation or by bribery through its Executive Council or through any person acting on its behalf.
- ...
54. **Strike and Lock-out** – (1) If no settlement is arrived at during the course of conciliation proceedings and the parties to the dispute do not agree to refer it to an Arbitrator under section 53, the workers may go on strike or, as the case may be, the employer may declare a lock-out, on the expiry of the period of the notice under section 50, or upon the issuance of a certificate by the Conciliator to the parties to the dispute to the effect that the conciliation proceedings have failed, whichever is the later.
- The parties to the dispute may, at any time, either before or after the commencement of a strike or lock-out, make a joint application to the EPZ Labour Tribunal for adjudication of the dispute.
 - If a strike or lock-out continues for more than 15 days, the Executive Chairman may, by order in writing, prohibit the strike or lock-out.
 - Notwithstanding the provision of sub-section (3), the Executive Chairman may, by order in writing, prohibit a strike or lock-out at any time before the expiry of 15 days, if he is satisfied that the continuance of such strike or lock-out is causing serious harm to productivity in the Zone or is prejudicial to public interest or national economy.
 - In any case in which the Executive Chairman prohibits a strike or lock-out, he shall, forthwith, refer the dispute to the EPZ Labour Tribunal.
 - The Tribunal shall, after giving both the parties to the dispute an opportunity of being heard, make such award as it deems fit as expeditiously as possible, but not exceeding 40 days from the date on which the dispute was referred to it.
 - The Tribunal may also make an interim award on any matter of dispute, and any delay by the Tribunal in making an award shall not effect the validity of any award made by it.

- (8) An award of the Tribunal shall be valid for such period, as may be specified in the award, but shall not be valid for more than two years.
- ...
88. **Transitional and temporary provisions** – Notwithstanding anything contained in this Act, the transitional and temporary provisions contained in this section shall be effective.
- (1) **No strike or lock-out** – No strike or lock-out shall be permissible in any industrial unit in a Zone until October 31, 2008.
- (2) **Mandatory and binding arbitration** – (a) Notwithstanding anything contained in section 53, arbitration shall be mandatory for the parties during the period beginning with commencement of this Act and ending with October 31, 2008.
- (b) Mutually acceptable arbitrator shall be appointed by the parties from a list of arbitrators approved by the Authority. If the parties cannot agree on the selection of the arbitrator, the Executive Chairman shall assign an arbitrator from its approved list. The selection or appointment of the arbitrator shall be completed and the date of the arbitration hearing shall be fixed within 15 working days from the date of the request for arbitration. The arbitration hearing shall be completed and a written award shall be given within 30 days from the date of the first hearing.
- (c) The decision of the arbitrator shall be binding on the parties and enforceable by the Executive Chairman. The Executive Chairman shall be authorized to take punitive measures as required to enforce the terms of the arbitrator's decision.
- (d) An appeal from an arbitrator's decision shall be limited to decisions where there is reasonable suspicion and evidence of fraud, corruption or other major defects in the arbitrator's decision.
- (e) An appeal under clause (d) shall lie to the Labour Appellate Tribunal, and the Appellate Tribunal shall dispose the appeal within 30 days of the filing of the appeal, and the decision of the Appellate Tribunal shall be final and binding on the parties.

CASE NO. 2371

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

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

Allegations: The complainant alleges that: the 1969 Industrial Relations Ordinance (IRO) is incompatible with the right of workers to form and join organizations of their own choosing; the application for registration of the Immaculate (Pvt.) Ltd. Sramik Union was unlawfully and unreasonably refused by the Registrar of Trade Unions (RTU); and that seven of the most active workers in the union were dismissed for anti-union reasons

- 214.** The complaint is contained in a communication from the International Textile, Garment and Leather Workers' Federation (ITGLWF) dated 15 July 2004.
- 215.** The Government sent its observations in a communication dated 21 October 2004.

216. Bangladesh 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

217. In its communication dated 15 July 2004, the complainant lodged a complaint on behalf of the Bangladesh Independent Garments Workers' Union Federation (BIGUF) in relation to the refusal of registration of the union representing workers at Immaculate (Pvt.) Ltd., a garment factory in Mirpur, Dhaka. The complainant stated that on 4 July 2003, the Immaculate (Pvt.) Ltd. Sramik Union was formed. It was stated that 242 of the total workforce of 620 workers at the factory joined, amounting to 40 per cent of the total workforce and thus well over the 30 per cent requirement contained in the 1969 industrial relations ordinance (IRO). The complainant stated that on 18 July, the union adopted its constitution, elected an executive committee, and authorized its president and secretary to take all the necessary steps to register the union.

218. The complainant stated that on 24 September 2003, the union submitted its application for registration to the registrar of trade unions (RTU). On 6 October 2003, the RTU wrote to the union, stating that it found the application deficient and citing its objections. The complainant attached its transcript of this letter, which contained a list of the following ten "defects and shortfalls found in the papers attached with the application":

- (1) Copies of the notices of the general meetings dated 4 July 2003 and 18 July 2003, have not been submitted.
- (2) Any copy containing the signatures, to prove that workers were present in the general meetings of 4 July 2003 and 18 July 2003, has not been submitted.
- (3) Copies of appointment letters/identity cards of the workers whose names have been stated in the P-form have to be submitted to prove that such workers are in the employment of the Immaculate (Pvt.) Ltd.
- (4) To determine 30 per cent, a certificate to the effect that how many workers are in the employment in the factory has to be submitted after obtaining the same from the employer.
- (5) The permanent address of the organizing secretary has not been mentioned in the list of the executive committee.
- (6) Only one copy of the list of the general members has been submitted. Another copy has to be submitted.
- (7) In article 7 of the Constitution it has been stated if a member commits any anti-constitutional activity, a fine of taka 500 shall be imposed. This sentence has to be deleted.
- (8) In the Constitution it has been stated in some places as two-thirds and in some places 51 per cent which are contradictory and have to be corrected.
- (9) D-forms filled in by the workers whose names have been stated in the P-form have to be submitted for scrutiny/examination.
- (10) The resolution book, notice book, cash book and member registrar of the proposed union have to be submitted for inspection/examination.

219. The RTU advised the union to correct the defects and shortfalls and to submit the amended papers within 15 days of receipt of the letter, following that time, "there shall be no scope to consider your registration application".

220. The complainant noted that the letter included a request to provide copies of letters of appointment for the workers named in the request for registration, as well as placing the

requirement on the union to obtain the certificate regarding the total number of employees at the factory, and stated that such demands appeared excessive. Firstly, the complainant stated that the company did not provide such identity cards or letter of appointment and so the union had to resort to making copies of attendance cards. Secondly, the complainant alleged that the onus should be on the RTU, not on the union, to obtain the certificate indicating the number of employees. Finally, the complainant stated that, for a number of years now the Committee on Freedom of Association has been asking the Government to review the IRO provision requiring a union to represent 30 per cent of the workforce before it can obtain registration, yet the Government has failed to take any action in this regard.

221. The complainant explained that, it replied to the registrar responding to each of the points raised, in a letter dated 22 October, within the 15-day time limit, a transcript of which was attached to the complaint. The following matters were submitted:

- (1) Copies of the notices of the general meetings dated 4 July 2003 and 18 July 2003, are submitted herewith.
- (2) Copies containing the signatures of the general meetings of 4 July 2003 and 18 July 2003, are submitted herewith.
- (3) This is for your information that the management of the Immaculate (Pvt.) does not provide appointment letters/identity cards to the workers. But the photocopies of the attendance cards provided by the employer (which are taken back by the management every month) are submitted herewith. For your information it may further be mentioned here that membership in the union has been provided keeping conformity with the provision of section 7A of IRO and article 4 of the Constitution (of which you have no objection). It is necessary for you to take into consideration of the correct interpretation of section 7A of IRO.
- (4) Certificate could not be obtained from the management. To determine 30 per cent, photocopy of the concerned page of the garment directory of BGMEA (owners' association) are submitted herewith for your information.
- (5) The permanent address of the organizing secretary is mentioned herein in the list of the executive committee.
- (6) Another one copy of the list of the general members is submitted herewith.
- (7) Concerned part of article 7 of the Constitution has been deleted.
- (8) Except for the provision of raising no-confidence motion, all areas have been corrected as "two-thirds".
- (9) D-forms filled in by the workers are submitted herewith.
- (10) Resolution book, notice book, cash book and member registrar of the proposed union are submitted herewith.

222. On 15 January 2004 the complainant stated that, following the expiry of the deadline for registration and in the absence of any reply from the RTU, the union appealed to the labour court in Dhaka under section 8(3) of the IRO which provides that "in case the Registrar, after settlement of the objections, has delayed disposal of the application beyond the period of sixty days, the trade union may appeal to the Labour Court".

223. The complainant indicated that, in his written statement to the court dated 15 February 2004, the RTU stated that he had rejected the application for registration in a letter to the union dated 27 October 2003. The BIGUF stated that it had not received this letter, nor any other information regarding its application for registration; the complainant indicated that it was trying to obtain from the court a copy of the letter dated 27 October 2003. According to the complainant, in that written statement to the court, the RTU gave the grounds upon which he refused the application, as the facts that the union did not submit

copies of the resolutions with signatures of members of the union's general meetings on 4 and 18 July 2003, and "in response to the letter dated 6 October 2003 of the RTU, the appellant union did not submit the reply and the papers of the amendments properly". The complainant alleged that these grounds were baseless, as the various documents were provided despite the fact that the signatures of members present are not required under the provisions of the IRO, and that the detailed response of the union dated 22 October, shows that the union did respond to the RTU's letter.

- 224.** In addition, the complainant alleged that the management of the company, once it came to know about the workers' involvement with BIGUF and the effort to form a union, terminated seven of the most active workers in the union. Further, according to the complainant, the management told union supporters that even if they tried for their whole lives, they would not be able to establish a union in the factory or obtain a wage increase.
- 225.** In conclusion, the complainant stated that the complaint comprised three issues. Firstly, that the provisions of the IRO are not compatible with the right of workers to form and join the organizations of their own choosing. Secondly, although the union had complied with the IRO requirements, its application for registration was rejected by the RTU. The union never received the letter advising of the rejection and it was forced to appeal to the labour court to try to secure registration. Thirdly, the protracted registration procedure gave the company the opportunity to discriminate against the union.

B. The Government's reply

- 226.** In a communication dated 21 October 2004, the Government stated that Immaculate (Pvt.) Ltd. employed 620 workers, some of which had organized themselves to form a trade union which they subsequently sought to have registered by the RTU, Dhaka division.
- 227.** The Government explained that section 7(1)(f) of the IRO provides for the maintenance of a list of the members of the trade union, and of adequate facilities for the inspection thereof by the officers and members of the trade union. It also referred to section 7(2) of the IRO which states that, a trade union shall not be entitled to registration unless it has a minimum membership of 30 per cent of the total number of workers employed in the establishment, or group of establishments in which it is formed.
- 228.** The Government stated that section 5(4)(a) of the industrial relations rules which is related, provides that every registered trade union shall maintain the particulars of officers and statement of particulars of paid members in their union, in the appropriate forms. The Government asserted that the combination of these provisions makes it obligatory for a trade union to maintain a list of paid members which is also a requirement for registration of a trade union.
- 229.** The Government indicated that, the union gave at the time of submission of documents for registration, a list of 160 workers as paid members of the union, and this number is below the required 30 per cent of total workers. The Government stated that, after scrutinizing the documents, the application for registration was rejected and the decision was communicated by post to the president/secretary of the proposed union, in due time. The Government explained that the union was asked to provide copies of appointment letters and other evidence only to ensure that the requirements for registration were met and that it is the responsibility of the applicants applying for registration to prove that they have all supporting evidence.
- 230.** The Government asserted that BIGUF's allegations were not correct. The Government added that the applicant cannot claim to be the general secretary of the said union, as her leadership has been challenged by her colleagues and a lawsuit is pending in court. In

addition, the Government stated that international bodies such as the ITGLWF should show respect for the law of the land, such as the 30 per cent requirement for registration of a trade union and in any case, the Government asserted that the requirement protects the interests of workers in Bangladesh by ensuring genuine and proper representation, and restraining the mushroom growth of trade unions formed by unscrupulous persons.

- 231.** Finally, the Government noted that the union has filed an appeal before the First Labour Court, Dhaka, regarding the refusal of registration and consequently the Ministry of Labour and Employment shall wait for the judgement of the court with which it will duly comply.

C. The Committee's conclusions

- 232.** *The Committee notes that this complaint concerns allegations of incompatibility between the IRO and the principles of freedom of association, the unlawful and unreasonable refusal of registration of the Immaculate (Pvt.) Ltd. Sramik Union by the RTU, and the anti-union dismissal of seven of its members.*
- 233.** *Concerning the allegation in relation to the IRO requirement that a union represents at least 30 per cent of total workers in order to obtain registration, the Committee notes that the complainant referred to comments by the ILO supervisory bodies on this point and that the Government indicated that the law of the land should be respected and, in this case, that the 30 per cent requirement was in the interests of Bangladeshi workers.*
- 234.** *In this regard, the Committee recalls that when examining an earlier complaint brought against the Government of Bangladesh, the Committee on Freedom of Association requested the Government to amend its legislation concerning the 30 per cent requirement for initial or continued registration as a trade union, in sections 7(2) and 10(1)(g) of the IRO [Case No. 1862, 306th Report, para. 102]. Although the complainant contends in any event that it had met this requirement of the IRO, the Committee would once again urge the Government, in consultation with the workers' and employers' organizations concerned, to amend the legislation so as to avoid the obstacles that can be created by the minimum membership requirement to the formation of workers' organizations.*
- 235.** *Concerning the allegation that the application for registration of the union was rejected despite it having conformed with all the requirements of the IRO, the Committee notes that while the complainant stated that the union's application complied with both the IRO and the letter of the RTU demanding further particulars and amendments, the Government has maintained that the application was rejected from the outset for, in particular, non-compliance with the 30 per cent requirement.*
- 236.** *While the Government, in referring to the 30 per cent minimum membership requirement for registration of the trade union, stated that the union had only referred to 160 paid members in its initial submission (a figure which did not meet the minimum membership requirement), the complainant stated that 242 workers joined the union, that is 40 per cent of the workforce. The Committee notes that both the Government and the complainant have stated that the company employs a total workforce of 620 workers. The Committee further notes that the complainant indicated that the grounds given by the RTU in his submission to the labour court referred more generally to non-submission of certain copies and that certain papers had not been submitted properly, without any specific reference to a breach of the 30 per cent requirement. The complainant disputes both of the grounds raised in the RTU submission, stating that it submitted a full reply which included copies of the appropriate resolution with signatures. Finally, the Committee notes that the letter which the RTU indicated had been sent to the union on 27 October 2003 rejecting its*

application for registration, is still unknown to the complainant and the union and has not been referred to by the Government.

- 237.** *In these circumstances, the Committee is not certain whether the union's request for registration was denied on the basis of the 30 per cent membership requirement as the Government seems to assert in its reply – a requirement that has long been criticized by the ILO supervisory bodies – or whether, as the RTU reportedly indicated to the court, the documentation accompanying the application was insufficient. In any event, the Committee recalls the importance it attaches to the principle according to which the formalities prescribed by law for the establishment of a union should not be applied in such a way as to delay or prevent the setting up of occupational organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, op. cit., para. 249]. Therefore, in the light of this principle, and taking into account the Committee's previous request to the Government to amend the minimum membership requirement, the Committee urges the Government to take the necessary steps immediately so that the union is registered promptly. The Committee requests the Government to keep it informed of all progress made in this regard.*
- 238.** *Finally, the Committee notes that the Government has not replied to the allegation that seven of the more active members of the union were dismissed upon the company learning that a union was being established. In this regard, the Committee recalls that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities, and that it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest**, op. cit., para. 696]. The Committee further recalls that where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest**, op. cit., para. 754].*
- 239.** *The Committee accordingly requests the Government to convene an independent inquiry to thoroughly and promptly consider these allegations of anti-union discrimination and to ensure that appropriate measures are taken in response to any conclusions reached. The Committee requests the Government to ensure that, if it appears in the independent inquiry that the dismissals did occur as a result of involvement by the workers concerned in the establishment of a union, those workers will be reinstated in their jobs, without loss of pay. If the independent inquiry finds that reinstatement is not possible, the Committee requests the Government to ensure that adequate compensation so as to constitute sufficiently dissuasive sanctions is paid to the workers. The Committee requests the Government to keep it informed of any developments in this regard.*

The Committee's recommendations

- 240.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *The Committee once again urges the Government, in consultation with the workers' and employers' organizations concerned, to amend the legislation so as to avoid the obstacles that can be created by the minimum membership requirement to the formation of workers' organizations.*
 - (b)** *The Committee urges the Government to take the necessary steps immediately so that the Immaculate (Pvt.) Ltd. Sramik Union is registered promptly. The Committee requests the Government to keep it informed of all progress made in this regard.*

- (c) *The Committee requests the Government to convene an independent inquiry to thoroughly and promptly consider the allegation that seven members of the union were dismissed by the company upon it learning that a union was being established and to ensure that appropriate measures are taken in response to any conclusions reached in relation to these allegations of anti-union discrimination. The Committee requests the Government to ensure that, if it appears in the independent inquiry that the dismissals did occur as a result of involvement by the workers concerned in the establishment of a union, those workers will be reinstated in their jobs, without loss of pay. If the independent inquiry finds that reinstatement is not possible, the Committee requests the Government to ensure that adequate compensation so as to constitute sufficiently dissuasive sanctions is paid to the workers. The Committee requests the Government to keep it informed of any developments in this regard.*

CASE NO. 2294

DEFINITIVE REPORT

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

- the Trade Union of Workers in the Metallurgical, Mechanical, Electrical, Electronic, Iron and Steel, Automobile and Spare Parts Industries and Offices in Taubaté, Tremembé and Districts (Taubaté Metalworkers' Union) and
- the Single Central Organization of Workers (CUT), which supported the complaint

Allegations: The complainant organization alleges undue interference by the authorities in the election held to appoint new trade union leaders and non-observance of provisions of its statute

241. The Committee examined this case at its November 2004 meeting and submitted an interim report [see 335th Report, paras. 366-388].
242. The Government sent its observations in a communication of 9 February 2005.
243. Brazil has ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), but has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

A. Previous examination of the case

244. At its November 2004 meeting, having examined allegations of undue interference by the authorities in the election to appoint new officers of the Taubaté Metalworkers' Union, which significantly affected the election results, the Committee made the following recommendations [see 335th Report, para. 388(a)]:

Noting that the decisions and measures taken by the judge of the First Instance during the election process in this case have been questioned before the judicial authorities and that

the outcomes are pending, the Committee requests the Government to send it a copy of the rulings and expects that they will be handed down without delay.

B. The Government's reply

- 245.** In its communication of 9 February 2005, the Government reports that the complainant organization formally recognized that the elections to renew the union's executive board were conducted in a proper manner and applied for withdrawal of suit. The judicial authority decided to shelve the proceedings. A note to this effect from the complainant organization is attached to the Government's reply.

C. The Committee's conclusions

- 246.** *The Committee observes that the complainant organization alleged that the authorities intervened in the executive board election, decisively affecting the results, and indicated that it had lodged judicial appeals in this respect. The Committee had requested the Government to send it a copy of the rulings.*
- 247.** *The Committee notes that, according to the Government, the complainant organization formally recognized that the elections to appoint new officials were conducted in a proper manner and applied to the courts to have the suits withdrawn, and that the judge decided to shelve the proceedings. In these circumstances, the Committee will not pursue its examination of the allegations.*

The Committee's recommendation

- 248.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 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 have been dismissed because of their role in establishing a trade union in private companies in the garment sector

- 249.** The Committee examined this case on its merits at its November 2003 session, where it issued an interim report, approved by the Governing Body at its 288th Session [see 332nd Report, paras. 382-399].
- 250.** The complainant submitted new allegations in a communication dated 28 October 2003.
- 251.** The Government provided partial observations in a communication dated 11 May 2004.

252. 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 Committee's previous recommendations

253. In its 332nd Report, the Committee made the following recommendations:

- (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 Miss 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 in conformity. 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.

B. The complainant's new allegations

254. In its communication of 28 October 2003, the complainant organization states that Ms. Chey Khunthynith, President of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC) branch union at the Cung Sing Garment Factory in Phnom Penh has been dismissed because of her trade union activities. Ms. Khunthynith was elected as President of the local union (registered on 19 September 2002) and dismissed on 1 October 2002, because she had demanded that management respect the Cambodian Labour Code, in particular the provisions dealing with payment of wages, use of annual leave and seniority pay. The FTUWKC filed a complaint on 9 October 2002 to the competent authority which, on 26 February 2003, ordered her reinstatement. The company management ignored that order from the Ministry, which took no action to enforce its decision.

- 255.** The relevant ministerial order (Prakas 305) requires reinstatement in such situations but there are two problems of implementation. First, the Government does nothing effectively to enforce its reinstatement order; thus, while the law seems appropriate, the Government does not use it. Secondly, the fines in the law for firing union leaders are so small that factory owners are willing to ignore them.

C. The Government's partial reply

- 256.** In its communication of 11 May 2004, the Government states that officials of the Department of Labour Inspection visited the Cung Sing Factory on 3 October 2002 to investigate the case and examine whether the dispute could be resolved. The factory manager told the inspectors that Ms. Khunthynith had been dismissed because she had falsified her date of birth in order to qualify for election as President. Ms. Khunthynith declared to the inspectors that she was actually 25 years old in 2002, as she was born in 1977. The factory management thereupon proposed that she be dismissed because she had stated in her application form that she was born in 1979, false statements being considered as serious offences under article 83 of the Labour Code.
- 257.** Ms. Khunthynith complained once more on 9 October 2002; labour inspectors visited the factory on 10 October and a conciliation attempt took place at the Department of Labour Inspection on 16 October. The manager still refused to reinstate her. The Department concluded on the basis of the investigation that the dismissal was illegal; on 23 February 2003, it issued Letter No. 348, requesting the manager to reinstate Ms. Khunthynith within 15 days, failing which the sanction provided for in article 382 of the Labour Law would be applied. The manager wrote to the Department on 5 March 2003, refusing the reinstatement. The Department sent another letter on 12 December 2003 ordering reinstatement within 15 days, which was declined by management on 26 December 2003. On 15 March 2004, the Department issued Letter No. 480 imposing a fine of 2,016,000 riels, to be paid by 30 March 2004. As the factory did not pay the fine, the Department filed a complaint in court.
- 258.** The Government's communication does not contain any reply on the Committee's previous recommendations and requests for information concerning the situation at the three other factories.

D. The Committee's conclusions

- 259.** *The Committee recalls that this complaint initially concerned various allegations of anti-union discrimination, harassment and dismissals at three private companies in the garment and textile industry in Cambodia (INSM Garment Factory, Top Clothes Garment Factory and Splendid Chance Garment Factory). A further complaint of a similar nature has now been filed concerning the dismissal of the President of the FTUWKC local branch at the Cung Sing Garment Factory, in Phnom Penh.*
- 260.** *While noting the explanations given by the Government concerning the efforts made by the labour inspectorate to conciliate the case, and the failed attempt to have the management reinstate Ms. Khunthynith, the Committee recalls once again 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; and that 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**, 4th edition, 1996, 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 [see **Digest**, op. cit., para. 703]. The Committee therefore urges the Government to continue making all efforts to ensure that Ms. Khunthynith is reinstated in her post or in a similar position without loss of pay or benefits, and enjoys full legal protection against acts of anti-union discrimination. If the competent court finds that her reinstatement is not possible, the Committee requests the Government to ensure that she receives adequate compensation so as to constitute sufficiently dissuasive sanctions in respect of such acts of anti-union discrimination. The Committee requests the Government to keep it informed of the decision issued by the competent court in respect of the complaint filed by the Department of Labour Inspection, and to provide it with a copy of that decision as soon as it is handed down.*

- 261.** *The Committee deplores that, despite several reminders, the Government did not provide any reply concerning the other aspects of the case and its previous recommendations which it reiterates here. The Committee therefore urges the Government to submit its observations in respect of its recommendations concerning the situation at the following establishments: INSM Garment Factory; Top Clothes Garment Factory; and Splendid Chance Garment Factory.*
- 262.** *As regards the alleged insufficiency of the legislation to protect workers from anti-union discrimination, in view of the evidence adduced, the Committee cannot but note a discernible pattern in all the situations complained of in this case, i.e. repeated acts of anti-union discrimination, often culminating in dismissals; and an apparent lack of effectiveness of the sanctions provided for in the law to remedy such acts of anti-union discrimination. Taking into account the repeated nature of similar complaints in the country, the Committee points out once again that 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 [see **Digest**, op. cit., para. 707]. The Committee requests the Government rapidly to take legislative measures to ensure, through sufficiently dissuasive sanctions, that these principles are embodied in the legislation. The Committee reminds the Government that it can avail itself of the technical assistance of the Office in this regard.*

The Committee's recommendations

- 263.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
 - (a)** *The Committee requests the Government to make all efforts to ensure that Ms. Chey Khunthynith is reinstated in her post or in an equivalent position without loss of pay or benefits at the Cung Sing Factory, and that she enjoys full legal protection against acts of anti-union discrimination. If the competent court finds that her reinstatement is not possible, the Committee requests the Government to ensure that she is paid adequate compensation, so as to constitute sufficiently dissuasive sanctions in respect of such acts of anti-union discrimination. The Committee requests the Government to keep it informed of the decision issued by the competent court in respect of the complaint filed by the Department of Labour Inspection, and to provide it with a copy of said decision as soon as it is handed down.*

- (b) *The Committee urges once again the Government to provide its observations on its previous recommendations, as follows:*
- (i) *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 so as to constitute sufficiently dissuasive sanctions, in conformity with the above principles;*
 - (ii) *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 so as to constitute sufficiently dissuasive sanctions in conformity with the principles of freedom of association and collective bargaining;*
 - (iii) *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 so as to constitute sufficiently dissuasive sanctions, in conformity with the above principles;*
 - (iv) *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 so as to constitute sufficiently dissuasive sanctions, in conformity with the above principles.*
- (c) *The Committee reminds the Government that it can avail itself of the technical assistance of the Office in order to assist with the drafting and enforcement of the appropriate legislation.*
- (d) *The Committee requests the Government to keep it informed of developments on all the points above.*

CASE NO. 2318

INTERIM REPORT

**Complaint against the Government of Cambodia
presented by
the International Confederation of Free Trade Unions (ICFTU)**

***Allegations: Murder of two trade union leaders;
continuing repression of unionists in Cambodia***

- 264.** The complaint is contained in communications dated 22 January, 11 May and 26 October 2004, 12 January and 11 February 2005 from the International Confederation of Free Trade Unions (ICFTU).
- 265.** The Government sent its observations in communications dated 11 May and 2 June 2004.
- 266.** Cambodia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 267.** In its communication dated 22 January 2004, the International Confederation of Free Trade Unions (ICFTU) reported the murder of Chea Vichea, President of the Free Trade Union of the Workers of the Kingdom of Cambodia (FTUWKC). Chea Vichea was reportedly shot two or three times, while reading a newspaper at a roadside news-stand in Phnom Penh. According to the owner of that news-stand, there were two assailants, one of whom was waiting on a motorbike; the other one walked up to Chea Vichea and shot him at close range, after which both individuals fled on the motorbike.
- 268.** Chea Vichea died on the spot. It was reported that trade unionists who came quickly to the area protested at police officials when they attempted to remove his body in order to arrange for the victim's immediate cremation. The body was then reportedly transferred, firstly to a pagoda, then to the FTUWKC headquarters.
- 269.** The ICFTU indicated that Chea Vichea had received several death threats, in particular on or around 27 July 2003, when national elections were held in the country. The ICFTU was investigating the nature and origins of this specific death threat, which was sent to him by way of a text message on his cell phone and reportedly stated that he should be "killed like a dog". The ICFTU had been reliably informed that Vichea had succeeded in identifying the origin of this threat, as a result of which he had gone into hiding a number of times. He had also reportedly been denied police protection in connection with this threat.
- 270.** The ICFTU explained that Vichea had won a court case in September 2003 against the head of security at the "Vinstar" garment factory, who had physically attacked him when he was distributing leaflets inviting workers to a rally celebrating Labour Day on 1 May of that year. The defendant had not attended the initial trial and had thus been sentenced in absentia. During the retrial, said company official had been sentenced to two months' imprisonment and to a fine amounting to the equivalent of approximately US\$250. The ICFTU had not been able to ascertain the exact name of the defendant.
- 271.** The ICFTU recalled that Chea Vichea's organization had in April 2003 lodged a complaint with the Committee, in which it indicated that Chea Vichea, as well as the General

Secretary and 30 other members of the FTUWKC, had been dismissed by the INSM Garment Factory, as reprisal for helping to establish a trade union organization. The ICFTU stated that it had no elements to draw any conclusion at that stage as to any link that may or may not exist between said complaint and Chea Vichea's murder.

- 272.** In a communication dated 11 May 2004, the ICFTU reported the murder, on 7 May 2004, of Ros Sovannareth, President of the Trinonga Komara garment factory union and a steering committee member of the FTUWKC. He was reportedly shot two times by two assailants who suddenly emerged behind him on a motorbike, while he was returning home from the Trinonga Komara factory. Ros Sovannareth died in hospital shortly afterwards. This murder of a trade union leader was the second one in less than four months, after Chea Vichea, the former President of the FTUWKC.
- 273.** Although local authorities and police reportedly claim that personal revenge or inter-union rivalry might be the motive behind the murder of Ros Sovannareth, the ICFTU stated that it had very strong reasons to believe that he was killed because of his union activities.
- 274.** In another communication dated 26 October 2004, the ICFTU submitted additional information not available at the time the complaint was lodged.

The context of the murder of Chea Vichea

- 275.** After the National Assembly elections of 27 July 2003 in Cambodia, FUNCINPEC, the royalist party led by Prince Norodom Ranariddh, chose to go into opposition and formed an alliance with the opposition party, Sam Rainsy Party (SRP) called "Alliance of Democrats". However, after a year of political stalemate the then acting Prime Minister Hun Sen was reappointed by Parliament in July 2004 after Cambodia People's Party (CPP) and FUNCINPEC agreed to form a coalition.
- 276.** The complainant explained that there was a climate of intimidation both before and after the elections and several political opponents of the ruling party CPP were assassinated. The ICFTU noted that a number of political killings had taken place before and after the killing of Chea Vichea on 22 January 2004. The killings included the October 2003 killing of a radio journalist and the shooting of a popular singer, both of whom were members of FUNCINPEC. A judge and a court clerk were killed in April 2003, a senior adviser to Norodom Ranariddh was murdered in January 2003, and 13 political party activists were killed in the run-up to the July 2003 elections. Furthermore, at least another three members of the opposition party, SRP, had been murdered during the first weeks of 2004. Chea Vichea had been closely linked to SRP and had been opposed to the CPP. Observers noted that CPP dignitaries did not attend his funeral, though it was attended by many other political leaders and trade union representatives.
- 277.** Even though Chea Vichea was a strong and vocal supporter of the SRP, he was also widely known, both in Cambodia and at the international level, for defending trade union rights and other human rights. In the direct aftermath of his death, the leader of SRP, Sam Rainsy, said that the deceased had done many things to upset the leaders of the country, and that he could not tell if there had been a political motive behind the killing. Some observers found that it was unlikely that the killing was directly political, given the fact that Chea Vichea, though politically active, was not an influential politician, and they believed that he would do more damage to the CPP dead than alive.
- 278.** The ICFTU recalled that as a result of his trade union activities Chea Vichea had found himself at odds with garment factory managers and/or owners and authorities on many occasions. Many owners of the country's fast-growing textile industry had strongly opposed his union-organizing efforts. His death was very likely to have a detrimental

effect on Cambodia's workers' attempts to organize independently of employers and public authorities and therefore the ICFTU considered that it was highly likely that his death was linked to his trade union activities. The murder of trade union leader Ros Savannareth, less than four months after Chea Vichea was murdered, supports the complainant in this belief.

- 279.** The complainant explained that Chea Vichea was not the only trade unionist being targeted. Mention was made of several reports of cases involving trade union rights violations. For example, more than 100 garment factory workers were injured on 29 January 2004, when police tried to disperse 2,000 striking workers at a peaceful strike at the MSI Garment (Cambodia) Ltd. Factory in Phnom Penh's Dangkao district. According to the President of the National Independent Federation of Textile Union of Kampuchea (NIFTUK), riot units from the intervention police fired bullets into the air and used batons to beat the strikers. A 24 year-old striker was knocked unconscious by police who subsequently detained him. He was later released after promising not to incite workers to strike. The MSI factory workers had been on strike from 25 January to demand that management reinstate the union's 24 year-old secretary-general, who had been suspended after being accused of stealing money from the factory. The President of the NIFTUK had filed a complaint with the municipal court. The Dangkao district deputy Police Chief Urn Uk denied that police had beaten strikers. He claimed that the police had only prevented workers from burning tires, because the fire could spread to houses situated near the factory.
- 280.** Another more recent example of police violence against strikers reportedly took place in Sihanoukville in October 2004. Over 1,700 workers from Ruy Yun garment factory were striking to demand the reinstatement of 41 workers for at least four days. Reportedly, the police clashed with strikers and used water hoses against them. On 7 October, a Cambodian newspaper reported that according to Chea Money, the current President of the FTUWKC and Chea Vichea's brother, the factory owner broke his promise to reinstate the 41 workers who had been sacked unexpectedly. The Sihanoukville governor was reportedly concerned about the dismissals and had demanded a full inquiry into the events.
- 281.** Furthermore, the Cambodian Independent Teachers' Association (CITA) reported to the ICFTU that on two occasions police officers prevented CITA from holding seminars.
- 282.** Moreover, the ICFTU indicated that it had received many reports of threats to trade unionists, harassment, physical assault and murder. The many incidents before and after the murder of Chea Vichea strengthened the complainant in its belief that he was murdered because of his trade union activities. Meanwhile the Government had not done enough to protect union leaders from threats, intimidation and other hostile acts by employers and government officials.
- 283.** As already referred to above, on 26 July, on the eve of Cambodia's national elections of 27 July 2003, Chea Vichea received a death threat by way of a text message ("SMS") on his mobile phone. The message was in English and reportedly read: "A dog I will kill you". After receiving the death threats, Chea Vichea went to the police to identify the source of the threat and ask for police protection. After a quick investigation, however, the police officer told him that he had better leave the country, because a high-ranking government official wanted him killed. Slightly different versions of the police officer's warning have been reported to the ICFTU. Some claimed that the police officer tracked the phone number and that it was attributed to a high-ranking government official and some claimed that the threats came from a high-ranking police officer at the Ministry of the Interior.

- 284.** Opposition politician Sam Rainsy claimed that it was Prime Minister Hun Sen who wanted Chea Vichea dead. He claimed to have given the prosecutor of Phnom Penh Municipal Court a video tape of an interview in which Chea Vichea allegedly told an American journalist that he had understood that the top-ranking government official who wanted him killed was Prime Minister Hun Sen. Allegedly, he was one of five persons figuring on what was rumoured to be a blacklist of people that Prime Minister Hun Sen wanted dead. Chea Vichea who had been followed on some occasions, took the death threat very seriously and went into hiding several times between 28 July and December 2003.
- 285.** It was not until after the murder of Chea Vichea that the police publicly detained a suspect in the case concerning the death threat. On Tuesday, 27 January 2004, the police detained Men Vatana, aged 44, who according to them had sent the text message from his mobile phone. On the morning of 30 January, police presented him to reporters and he confessed to having sent the death threat in a text message in July. Police said they had found the mobile phone from which the message was sent in his house.
- 286.** Vatana, who claimed to be a long-standing SRP member, stated that he was asked to send the text message by SRP General Secretary, Eng Chhay Eang, without being told why he had to threaten Chea Vichea. Eng Chhay Eang had reportedly provided him with the text in English and he had been paid US\$100 to send the message. Men Vatana was also shown on a Cambodian People's Party-supported television station where he reportedly repeated the above story and presented his SRP membership card.
- 287.** The SRP denied Men Vatana's story. According to them, Eng Chhay Eang had been campaigning in Barambang Province on the days on which Vatana claimed to have met him in SRP headquarters, as he had been campaigning in the provinces during the whole month of July; moreover he could not speak or write English.
- 288.** A Cambodian newspaper reported on 31 January that the police had found Vatana's membership cards for the Khmer Nation Party (the forerunner of the SRP), the SRP, FUNCINPEC "and many others". Furthermore, it was reported that Men Vatana had made a phone call to Eng Chhay Eang, asking him "and what do you think now that you ordered me to threaten Chea Vichea?". Eng Chhay Eang reportedly believed this call was being recorded by the police in order to link him to the murder.
- 289.** Another Cambodian newspaper included in its headline of the story the information that Vatana was "suspected to be mentally ill", but this possibility seemed not to have been seriously pursued by anyone else. Yet another Cambodian newspaper tried to dial that number on 26 January. They received a message that no incoming calls could be received, a function they report is commonly used by public phone booths. Furthermore the FTUWKC claimed in January, that the police itself had already charged another man for sending the threatening text message.
- 290.** The complainant also laid the emphasis on different elements concerning the death threat received in July 2003, which seemed to be contradictory. For instance, a lot of factors seemed to contradict Men Vatana's confession of having sent the death threats. Therefore the ICFTU believed that the circumstances surrounding the death threat needed to be clarified, as there could be a link between the person behind the death threat and Chea Vichea's murder. Furthermore, Cambodian trade unionists have expressed doubts about Men Vatana's guilt.
- 291.** Following the shooting, witnesses reported that the authorities wanted to take Chea Vichea's body away and cremate it immediately. They were, however, stopped by trade unionists and family members who wanted a thorough investigation to be carried out on the crime scene, before his body was taken away. Despite the protests, police loaded his

body in the trunk of a police car at 10 a.m. and drove him to Wat Preah Puch Pagoda, 3 km away. According to a witness who did not want to be named, Chea Vichea's friends, trade unionists and relatives were afraid that the fire in the Pagoda already burning for another cremation would be used for Vichea too. Chea Money, Vichea's younger brother and CITA official, and other family members managed to arrange for his body to be brought to the headquarters of the FTUWKC.

- 292.** Following the death of Chea Vichea, the complainant indicated that police arrested the suspects called Sok Sam Oeun, 36 and Born Samnang, 23. Police arrested Born Samnang on Tuesday 27 January at his girlfriend's house in Prey Veng Province near the Neak Leoung ferry crossing. The police said that his confession had led to the capture of Sok Sam Oeun, who was arrested on 28 January along with three other men. However, they were released on 29 January after more than 24 hours in detention. According to one of those arrested, they had not been interrogated or given any explanation whatsoever. Two of them were bodyguards of a former FUNCINPEC colonel of the Royal Cambodian Armed Forces, Suong Sopul, and were arrested at his house in Tuol Kork. The third was the son of Colonel Suong Sopul, Suong Sokha. He and Sok Sam Oeun were reportedly friends and Sok Sam Oeun had lived in his house.
- 293.** The arrest came after the police had released a sketch of a suspect. However, at first it remained unclear if one of the people arrested was identical to the suspect on the sketch. Later it was reported that the sketch matched Born Samnang. According to the police Born Samnang had fired the shots and Sok Sam Oeun had driven the motorbike on which they fled from the crime scene. Sok Sam Oeun and Born Samnang were presented to the press on Thursday, 29 January. They were handcuffed and had black bags pulled over their heads when they were brought in. As soon as the bags were pulled off their heads they both cried out loudly that they were innocent and that it was a set-up. They also claimed that they had been beaten into signing confessions. Oeun also claimed that he had not known Samnang prior to his arrest.
- 294.** However, on Friday, 30 January 2004, Born Samnang confessed to having fired the shots. He said that he knew that a confession could reduce his penalty. He was also reported to have said that he had not admitted the killing at first because Sok Sam Oeun had threatened that Born Samnang's parents and siblings would be in danger if he confessed. He claimed that the killing was ordered by a Mr. Chith, who had first approached Sok Sam Oeun, whom he knew personally and offered US\$5,000 for the job. Afterwards Sok Sam Oeun had asked Born Samnang if he was interested in the job. They had already received US\$1,500 that they split between them. Born Samnang is also reported to have said that he killed Vichea because he was desperate and needed the money. He also said that he had never met the man who paid for the killing and just knew him by the name Chith. Sok Sam Oeun has consistently denied the charges. He claimed that he had never heard of Chea Vichea before and that he did not know Born Samnang.
- 295.** On 30 January Phnom Penh Police Chief, Heng Peou, reported that police had confiscated a loaded pistol, K54 bullets, handcuffs and four holsters from the two suspects. The police also said that Born Samnang had led them to their hiding place after he confessed. The police said that they were still looking for the person who had solicited the killing. On 31 January, Born Samnang withdrew his statement from the day before, again saying that he had been beaten and forced to confess and to put his fingerprint on a five- or six-page document.
- 296.** On 19 March the investigating judge in the case, Mr. Hing Thirth, ordered that the case be dismissed for lack of evidence. The following day, Prosecutor Khut Sokheng challenged Thirth's decision, and sent the case to the Appeals Court. Shortly afterwards, the Supreme Council of Magistracy, which holds constitutional responsibility for appointing and

disciplining judicial officers, reportedly removed the investigating judge from his position at the Phnom Penh Municipal Court for unspecified judicial mistakes. It also ordered that he be transferred to the remote province of Stung Treng.

- 297.** The case was then heard before the Court of Appeal on 1 July 2004. Both men denied the charges when they appeared before court. Born Samnang said he had been gathering fruit at the time Chea Vichea was shot dead in Phnom Penh on 22 January. He said he had been arrested without a warrant and that he had not been given any explanation when he and his girlfriend were taken to the Tuol Kok district police headquarters. He told the court that Tuol Kok district police beat him and forced him to thumbprint a confession that he was not allowed to read. He said that he had been threatened and that the police had beaten him whilst he was handcuffed, and one police officer had kicked him several times in the hand. Therefore, after having denied being the perpetrator on the first day, he had confessed to the murder the next day. He also told the court that once he had confessed, the police provided him with money, cigarettes and the company of a woman at the prison. Reportedly, he produced a US\$100 note from the pocket of his blue prison uniform, and said that the day before the court hearing the Tuol Kok Deputy District Police Chief, Hun Song, had told him that he had to stick to his confession and then he would be rewarded with more money when he left court. No police were at the court on Thursday, 1 July for cross-examination. Later however, Police Chief Hun Song denied Born Samnang's allegations and stated that Born Samnang had confessed voluntarily.
- 298.** No new evidence was presented, but Judge Thuong Mony overturned Municipal Court Judge Hing Thirth's decision of 19 March to drop the charges against the two suspects because of lack of evidence and ruled that the two defendants should be returned to jail. He also ruled that the case be remitted to Phnom Penh Municipal Court for further investigation "in order to find more clear evidence to prove the suspects' guilt".
- 299.** The complainant indicated that many witnesses to the murder or persons that could provide alibis for the suspects had been intimidated and threatened. On 30 January, the media reported that the owner of the news-stand where Chea Vichea was shot dead, 36 year-old Va Sothy told reporters earlier that week that she feared for her life and had asked human rights groups and United Nations staff for protection. She had denied seeing the faces of the two men who killed Chea Vichea.
- 300.** In the Cambodian Center for Human Rights' review of the court hearing it was reported that Born Samnang's girlfriend and her mother had been taken away by police on the day that their testimonies in Born Samnang's favour became known. The police denied that they had been taken away and the deputy police chief dismissed their alibis and said that Samnang's confession proved his guilt.
- 301.** At the beginning of February relatives and friends of Born Samnang provided him with an alibi. The Cambodian Human Rights Action Committee (CHRAC) cited numerous people, who testified that Born Samnang was at their Prey Veng Province village when Chea Vichea was shot. Reportedly three persons, who had informed human rights investigators and reporters of alibis for the detained suspects, were later arrested in June and July. CHRAC also said it had received complaints from people who claimed to have been threatened after "they reported the truth." Many called for the release of the suspects in light of the testimonies and the lack of evidence. By 31 January 2004, the investigation had already been denounced as a show by several human rights defenders, including Kern Sokha, Head of the Cambodian Center for Human Rights. Many also called for international assistance in ensuring proper judicial process.
- 302.** Chea Money, Vichea's brother, did not believe that the two suspects were the real killers. He filed a complaint against the Court of Appeal's decision, which stopped the trial from

continuing, but on 13 September he decided to withdraw his complaint because he did not think it would have any effect. The Court of Appeal's decision to remit the case to the Municipal Court would therefore stand.

- 303.** The fact that it was difficult to assess who had killed Chea Vichea and why led many to believe that the truth about his murder has not been uncovered. Many rumours circulated as a result. According to one rumour, the assassins were Vietnamese who returned to Viet Nam immediately after having committed the murder. Allegedly, the perpetrators belong to a death squad similar to the one that gunned down a popular singer, killed in October 2003. This rumour is based on a perception by some that the CPP uses either petty Cambodian killers – who will be killed themselves once the job is done, in order to leave no witnesses – or Vietnamese professional agents, who will never be found once they have returned to Viet Nam after fulfilling a mission in Cambodia, to do dirty jobs such as assassinations.
- 304.** Based on the same presumption that the CPP resorts to death squads in order to assassinate opponents, and afterwards kill the perpetrators to prevent any investigation, some believed that the gunmen could have been eliminated at Hun Sen's house in Phnom Penh on 7 February. On that date two of the Prime Minister's bodyguards were mysteriously killed, their bodies immediately cremated, and the police were "not allowed to make a report" according to a newspaper dated 10 February.
- 305.** Finally, a rumour was reported that the killing of Chea Vichea was part of a plan conceived by the CPP to ultimately target SRP and FUNCINPEC leaders – the ultimate targets being SRP Secretary-General, Eng Chhay Eang, SRP President, Sam Rainsy, and FUNCINPEC Secretary-General, Norodom Sirivudh, by implicating them in the killing of Chea Vichea. Allegedly, Sok Sam Oeun and Born Samnang, were soldiers or former soldiers linked to FUNCINPEC, and they were forced to make false confessions. Purportedly the sketch of Born Samnang, the suspect who allegedly pulled the trigger, had been prepared by the police before Chea Vichea's death. The arrest of Men Vatana was part of this plan, which would allow Hun Sen's CPP to kill several birds with one stone, i.e. Chea Vichea, Eng Chhay Eng, Sam Rainsy and Norodom Sirivudh.
- 306.** The complainant recalled that Cambodia's judicial system had been widely condemned for its lack of independence, low levels of competence, and corruption. Independent observers found that instead of playing balance-of-power roles, the judiciary and Parliament were firmly under government and party control. Whenever a judge does not comply with government policy, he or she is removed from office. The ICFTU stated that the court proceedings on Chea Vichea's murder supported the allegations of the judicial system's shortcomings. It clearly called into question the impartiality of the court proceedings that witnesses, who back in February had testified to journalists that the suspects were elsewhere at the time of the murder, were not heard by the Court of Appeal in July and the fact that the municipal court judge was removed from office after dismissing the case.
- 307.** The reason for the Tuol Kok District Police Department's involvement in the case was also unclear, as the murder took place at a news-stand near the Independence Monument in the Chamkar Mon district, two different areas of the capital, Phnom Penh. The whole investigation and the court proceedings clearly seemed to be flawed and it did not suggest any real intent to find the actual perpetrators. Furthermore, the complete absence of further investigation into the fact that the murder was a contract killing seemed conspicuous. The lack of investigation into this aspect of the murder could suggest that the person who ordered the murder was indeed a high-ranking government or police officer and that this person enjoys high-level protection and, hence, complete impunity.

- 308.** According to some sources mentioned by the complainant, hundreds of union leaders had been beaten, fired, or threatened by employers and hired thugs over the last few years. The sources claimed that there was a consistent government policy of breaking activist unions and intimidating union leaders in the garment factories, hotels and casinos and schools.
- 309.** The murder of Chea Vichea put additional pressure on other trade unionists, whose safety had been further compromised. The fact that the perpetrators had not been brought to justice created an atmosphere of impunity and created fear among trade unionists. As a consequence, even more trade unionists were being targeted.
- 310.** On 25 February 2004, Chea Vichea's partner left for Thailand, to apply for the status of asylum seeker. She was granted asylum in a third country. She was accompanied by her 2 year-old daughter and staff from the Cambodia Office of the UN High Commissioner for Human Rights. The threat to her life was perceived to be very serious.
- 311.** The ICFTU also reported that the President of the CITA, Rong Chhun, raised concerns about his security in a letter to the ILO on 2 February 2004, and he went into hiding in a secret place immediately afterwards. In the letter, Rong Chhun raised the issue of a so-called "White List", made public by a parliamentarian, naming five people including Rong Chhun, who allegedly appeared on a blacklist of the CPP of people to be assassinated in the near future. The blacklist that was made public was printed on paper carrying the national assembly's letterhead. The other four persons on the list were Sam Rainsy, President of SRP, Eng Chhay Eang, Secretary-General of SRP, Norodom Sirivudh, Secretary-General of FUNCINPEC and Kern Sokha, President of the NGO, Cambodian Human Rights Center.
- 312.** After the Chea Vichea murder, police were posted outside the CITA offices, both uniformed and plain clothes officers. The CITA had to change premises shortly after – at the beginning of March 2004 – as the owner no longer wanted to rent premises to the union. The authorities were aware of their new address because they are obliged to inform them of it, but CITA officials had seen no sign of uniformed police at the entrance. Rong Chhun wrote to the ILO that he had received a verbal threat from a government official warning him "you are a poor man, how [however] strong you are, Chea was assassinated and, in turn, you will also be killed". About a week after Chea Vichea was murdered, a teacher had also heard a high-ranking army officer saying that the regular demonstrations held in Cambodia were caused by two men, namely Chea Vichea and Rong Chhun. One had been assassinated and if the other would be killed too there would be no more demonstrations or riots. Rong Chhun informed the ICFTU, that owing to security concerns, he currently lived in a small apartment above his union's offices. He did not dare to go out in the streets and he has informed us that it was difficult for him and the CITA to carry out normal activities in the aftermath of the Chea Vichea murder. Because of the threats that had been made against him and his association, he greatly limited his attendance at trade union meetings – hence the trade union activities of CITA are heavily affected by the threats, especially since their activities require a lot of travelling.
- 313.** Furthermore, FTUWKC acting General Secretary, Sum Som Neang, also decided to go in hiding abroad for at least three months, in fear for his own safety. Many other trade union leaders have felt so threatened that they have resigned from their leadership positions.
- 314.** In its communication dated 26 October 2004, the complainant submitted further information about the murder of the other Cambodian trade union leader, Ros Sovannareth. Like in the Chea Vichea murder case, witnesses to the murder of Ros Sovannareth had been intimidated.

- 315.** Local authorities and police reportedly claimed that personal revenge or inter-union rivalry might be the motive behind the murder of Ros Sovannareth. In November 2003, six members of FTUWKC, including Ros Sovannareth, had filed a complaint against the Cambodian Union Federation (CUF) with the Trinunggal Komara garment factory management and with the police at Russei Keo district. CUF organizer, Khvan Chanlymony, had reportedly threatened them and said that they “might disappear”. After the murder, Khvan Chanlymony said that the problems between him and Ros Sovannareth had been solved and that they had become friends. Khvan Chanlymony also added that he is only a poor worker from the countryside and that he “did not have the power to do anything like that”, i.e. have somebody murdered.
- 316.** The complainant stated that to its knowledge, the police had not yet arrested any suspects. On 17 May, the Phnom Penh Penal Police Chief told a Cambodian newspaper that the police were collecting information from workers at the factory and were interviewing eyewitnesses. He said that the eyewitnesses’ stories did not corroborate and that now the witnesses did not want to talk to the police because they feared for their security. On 18 May he offered a reward of US\$300 for information that would lead to the perpetrators’ arrest.
- 317.** Chea Money, the new President of FTUWKC and Chea Vichea’s brother, believed that it might be the same killers, because the murder was executed in a way very similar to the way Chea Vichea was killed. Trade unionists in the country reportedly felt that this murder was a clear warning designed to frighten them and warn them not to be too active.
- 318.** In view of the many threats encountered by trade unionists and the murder of Chea Vichea, the ICFTU had very strong reasons to believe that Ros Sovannareth had been killed because of his union activities. The complainant did not think it was probable that Khvan Chanlymony had committed the murder or had the capacity to hire assassins. Furthermore, the way the murders were executed indeed seems to suggest that the murders were connected. Moreover, nothing indicated that Khvan Chanlymony had any relation or any personal problems with Chea Vichea.
- 319.** The ICFTU also reported that on 17 May a FTUWKC representative for PCCS Garment Ltd. filed a complaint with the Phnom Penh municipal police for harassment similar to that encountered by the two killed trade union leaders. On 9 February, the representative was chased by men on two motorbikes. They chased him until he turned into a gas station, but did not attempt an assault as there would have been many witnesses at the gas station. On 14 May he was again followed by two menacing men, this time on foot. They followed him outside the PCCS factory until he lost them among the crowd of workers.
- 320.** On the night of 23 June, Lay Sophead, the female President of the union at the Luen Thai garment factory in Phnom Penh – affiliated with the FTUWKC – was attacked. Two men dressed in bodyguard-style uniforms followed her home, stuffed a towel in her mouth and tied a “khrama” around her head. They accused her of “being a Chea Vichea person” and threw her under her bed, where they presumably left her to die. She was unconscious for a long time but was luckily found by union colleagues who came looking for her after she failed to show up for work the day after. They forced the door to her home and found her under the bed. After the assault there were visible bruises around her neck. According to ICFTU sources, she had fully recovered in hospital. On 23 June, she had attempted to organize an industrial action at the Luen Thai factory that was supposed to have begun the next morning. Union leaders believe that once again a trade unionist was attacked for simply doing union work. Furthermore, she had been one of the candidates for the position of President of FTUWKC. The matter was reported to the police. The police ruled out robbery as a motive for the attack.

- 321.** The ICFTU stated that the above information illustrated extensively the violent climate of terror and impunity under which the Cambodian trade union movement operates. The garment industry in Cambodia was under considerable pressure due to the end of garment quotas under the WTO Agreement on Textiles and Clothing on 31 December 2004. The end of the quota system was widely seen as putting the industry's profits at risk and consequently its very existence. Docile trade unions would clearly make the lives of factory owners and the Government's life easier. Furthermore, the quota agreement with the United States, which created a positive incentive for the Government to respect international labour standards, will have to come to an end as a result of the end to the WTO Agreement.
- 322.** The increase in harassment and targeting of trade unionists may therefore not be coincidental. The many reported cases of intimidation, threats, physical attacks and even murders cannot all be isolated and unrelated. Instead, they clearly showed a pattern of intimidation and harassment against trade unionists.
- 323.** The ICFTU indicated it was particularly concerned by the several murders that had been preceded by threats, the many other instances of intimidation and harassment of trade unionists, unreliable police investigations into the murders, suspects changing versions, allegations of forced confessions, intimidation and disappearance of witnesses, dismissal of or lack of investigation into crucial evidence, judges being taken off cases and then demoted, etc. The above showed, at best, that the Government of Cambodia was unable to carry out a proper investigation into the murders and ensure proper judicial process; at worst, that it was unwilling to do so. This in turn suggested that the Government itself might not wish the truth to be known. At any note, the events described above clearly showed that the Government has failed to guarantee that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives. This suggests that international assistance to the investigation and the judicial process could be helpful.
- 324.** The ICFTU submitted additional information in another communication dated 12 January 2005, which corroborated the strong impression that the level of trade union harassment had intensified in the country. The ICFTU was informed that on 22 December 2004 at 5.20 a.m., Mr. Pul Sopheak, President of the enterprise union at the Teratex Garment Factory affiliated to the FTUWKC, had been attacked with a chain by three men on his way to the factory. He sustained wounds to his head, from which he was bleeding. Photos of his wounds were also submitted by the complainant. The attack followed two days of negotiation on a collective bargaining agreement at the Teratex Garment Factory located in Mean Chey district, Phnom Penh. On 20 December 2004 at 8 a.m., Pul Sopheak negotiated with the employer and reached a preliminary agreement as the first stage of the negotiation process. One outstanding issue was the payment of US\$5 additional monthly pay, which the union claims that employers are obliged to pay according to Cambodian law. During the next stage of the negotiation, on 21 December 2004, Pul Sopheak was accompanied by Mr. Chea Money, President of the FTUWKC, but no collective bargaining agreement was obtained.
- 325.** In its communication dated 11 February 2005, the complainant referred to the arrest and brief detention of the President of the FTUWKC, Chea Money, on 20 January 2005. The police arrested Chea Money in front of the union's headquarters. They also arrested Heng Sophoan, FTUWKC representative at the Su Tong Fang garment factory.
- 326.** Earlier that day some 300 workers from Su Tong Fang factory had protested against the dismissal of one of their fellow workers and the alleged beating of another worker by a factory security guard. The Labour Ministry Facilitator, Khem Ben Chhean, reportedly said on Tuesday, 18 January, that the security guard accused of beating the worker had not

been fired but that “a resolution [was] underway”. The demonstration that started on Saturday, 15 January, was according to a worker, dispersed violently when it reached the Ministry of Commerce. The workers were told to disperse because they did not have the necessary authorization for the march. It is reported that permission to organize a march is generally never granted.

- 327.** The ICFTU indicated that according to its information, Chea Money had not taken part in the demonstration, but he and a group of about 30 union activists were blocked from entering their headquarters later that day. Police reportedly violently pushed the two men into a waiting police vehicle. They were released around 5 p.m. According to Pal Chanrat, Chief of Daun Penh district’s Boeung Raing commune, the two had not been arrested, but had only been brought in for questioning. He contended that Chea Money had held a megaphone and had been calling for a rally, disturbing people near the Embassy of the United States.
- 328.** Upon their release they were forced to thumbprint a document in which they admitted, among other things, having disturbed public order during the march held earlier that morning and promised to make garment workers stop the strike and refrain from further marches. The document originally included a virtual commitment to refrain from future strike action, but even though the document was reworded, it still imposes heavy restrictions on their normal trade union activities including the right to strike. The ICFTU has received the following translation of the document:

*Kingdom of Cambodia Nation
Religion King*

Agreement

We, both named and position below,

1. Chea Money, Leader of the Free Trade Union of the Kingdom of Cambodia.
2. Heng Sophorn, Leader of Free Trade Union based in Su Tong Fa garment factory.

We, would like to make an agreement before the relevant and competent authorities as follows:

- to refrain from any activities which could affect the honour of the nation.
- to remain silent.
- to refrain from breaching security and public order.
- to respect absolutely the laws on demonstration.
- upon returning home, we will announce to all garment workers that each of them should return to their homes and not conduct further marches.

As proof, both of us will put our right thumbprints as evidence.

Right thumbprint: Having seen and agreed

- 329.** The ICFTU also mentioned that in a worrying development Sam Rainsy, leader of the political opposition party Sam Rainsy Party (SRP), was stripped of his parliamentarian immunity on 3 February 2005. This decision will enable the Government to pursue its allegation of defamation against Sam Rainsy following his statements in the wake of the murder of Chea Vichea that the Government might be implicated in the murder and it had a blacklist on which Chea Vichea, Rong Chhun and himself figured. It was reported that Sam Rainsy was the founder of FTUWKC and had close links with the trade union movement and the current President Chea Money and his deceased brother Chea Vichea.

B. The Government's reply

- 330.** In its communication dated 11 May 2004, the Government stated that based on a report of the Phnom Penh municipality police, it could be concluded that the case of the killing of Mr. Chea Vichea was a voluntary manslaughter and was not related to union discrimination. The Government attached the results of the investigation carried out by the Phnom Penh police. The report indicates that based on investigations carried out with the Committee for Prevention and Suppression of Crimes in Phnom Penh and acting upon the information provided by several eyewitnesses, the Phnom Penh municipal police arrested two suspects, Born Samnang and Sok Sam Oeun, and confiscated a K59 pistol with serial number faded off, a cartridge and three bullets as well as collected two bullet casings from the scene and dislodged one bullet from the victim's body. Through ballistic examination, it was found that the collected bullet casings and bullet heads were indeed shot from the K59 pistol with faded serial number. The Phnom Penh municipal police report indicates that their authorities had evidence and witnesses that showed that these suspects were the perpetrators who had gunned down Mr. Chea Vichea.
- 331.** In its second communication dated 2 June 2004, the Government declared that together with competent institutions it paid very much attention and concern to every infringement or assassination and that the investigation on the cases of both Chea Vichea and Ros Sovannareth, as well as all victims, had indifferently been investigated and proceeded in full conformity with the rule of law.

C. The Committee's conclusions

- 332.** *The Committee expresses its deep concern and regret at the seriousness of this case that concerns the assassination of trade union leaders Chea Vichea and Ros Sovannareth, within less than four months' interval. The assassination of two trade unionists over such a short period of time gives rise to serious concern for the security of the trade union movement in the country. The Committee also notes the allegations according to which there would be strong reasons to believe that the two murders were connected to each other and to the victims' union activities. The Committee deeply deplores these events and draws the Government's attention to the fact that such a climate of violence leading to the death of trade union leaders is a serious obstacle to the exercise of trade union rights.*
- 333.** *The Committee notes that, according to the complainant, as a result of his trade union activities, Chea Vichea had frequently found himself in conflict with garment factory managers and/or owners and authorities over the organization of industrial action and that many owners of the country's textile industry had strongly opposed his union-organizing efforts. The Committee understands that Chea Vichea had received several death threats, as a result of which he had gone into hiding a number of times. In this respect, the Committee recalls that the environment of fear induced by threats to the life of trade unionists has inevitable repercussions on the exercise of trade union activities, and the exercise of these activities is possible only in a context of respect for basic human rights and in an atmosphere free of violence, pressure and threats of any kind [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1994, para. 63].*
- 334.** *Concerning the murder of Chea Vichea, the Committee notes that two suspects were arrested and that the decision of 19 March 2004 of the investigating judge to drop the charges against the suspects for lack of evidence was overturned on 1 July by the Court of Appeal calling for further investigation to find clear evidence to prove their guilt. With respect to the assassination of Ros Sovannareth, the Committee notes that, according to the complainant, the police had not arrested any suspect.*

- 335.** *The Committee deeply regrets that the Government only provided partial information in its reply in relation to the murder of Chea Vichea, as it merely referred to a report from the Phnom Penh municipality police, and did not send any detailed information on the action taken to determine those responsible for the murder of Ros Sovannareth.*
- 336.** *Regretting that no action was taken by the authorities in order to grant protection to the aforementioned trade union leaders and that the investigations carried out so far have not allowed the identification of those responsible for their assassinations, the Committee recalls that the killing, disappearance or serious injury of trade union leaders and trade unionists requires the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events. The absence of judgements against guilty parties creates in practice an atmosphere of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see **Digest**, op. cit., paras. 51 and 55]. In light of these principles, the Committee urges the Government to institute without delay an independent inquiry into these murders in order to identify not only the perpetrators of these crimes but also the instigators and punish those responsible. The Committee asks the Government to keep it informed of the outcome of this inquiry.*
- 337.** *Moreover, the Committee is deeply concerned by the allegations referring to an increasing level of trade union harassment in Cambodia and by the social climate and events described by the complainant, including references to forced confessions, intimidation and disappearance of witnesses, lack of investigation, etc. The Committee deeply regrets that the Government has not replied to any of the additional allegations submitted by the complainant.*
- 338.** *With regard to the allegations of arrest and brief detention of the new President of the FTUWKC, Chea Money, on 20 January 2005 together with a representative of the trade union, in the context of a demonstration, the Committee, recalling that workers should enjoy the right to peaceful demonstration to defend their occupational interests, wishes to point out that measures depriving trade unionists of their freedom on grounds related to their trade union activity, even where they are merely summoned or questioned for a short period, constitute an obstacle to the exercise of trade union rights [see **Digest**, op. cit., paras. 77 and 132].*
- 339.** *In this context, the Committee expresses its concern regarding the reported agreement on no future marches in which Chea Money and his fellow representative were said to have been forced to admit, among other things, having disturbed public order during the march held that day and promise to make garment workers stop the strike and refrain from further marches. While it is acknowledged that trade unions must conform to the general provisions applicable to all public meetings and must respect the reasonable limits which may be fixed by the authorities to avoid disturbances in public places [see **Digest**, op. cit., para. 141], the Committee expects that the Government will declare this agreement null and void and requests the Government to ensure in the future the right of workers to peaceful demonstration to defend their occupational interests.*
- 340.** *The Committee is further concerned over the numerous reported cases of intimidations, threats and physical attacks against trade unionists which the complainants state are not coincidental and clearly show a pattern of intimidation and harassment. In particular, the Committee notes the reported threats against Rong Chhun, President of the CITA, whose name allegedly appeared on a political party blacklist of five persons to be assassinated in the near future, as well as the attacks suffered in June 2004 by Lay Sophead, the female president at the Luen Thai garment factory in Phnom Penh – affiliated to the FTUWKC –*

and in December 2004 by Pul Sopheak, President of the enterprise union at the Teratex Garment Factory – also affiliated to the FTUWKC. The Committee draws the Government's attention to the fact that a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty. In this respect, the Committee has considered that in the event of assaults on the physical or moral integrity of individuals, an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts [see *Digest*, op. cit., paras. 48 and 53]. The Committee asks the Government to institute independent inquiries into the reported assaults of Lay Sophead and Pul Sopheak and to keep it informed of the outcome.

- 341.** Regretting that the Government did not provide detailed information on any of the aforementioned allegations, the Committee once again draws the Government's attention to the principle that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those related to human life and personal safety, are fully guaranteed and respected. It therefore urges the Government to take measures to ensure that the trade union rights of the workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives.

The Committee's recommendations

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

- (a) *The Committee emphasizes the seriousness of the allegations pending which refer to the murder of trade union leaders Chea Vichea and Ros Sovannareth. The Committee deeply deplores these events and draws the Government's attention to the fact that such a climate of violence leading to the death of trade union leaders is a serious obstacle to the exercise of trade union rights.*
- (b) *The Committee urges the Government to institute without delay an independent judicial inquiry into the murders of Chea Vichea and Ros Sovannareth in order to identify not only the perpetrators of these crimes but also the instigators. The Committee asks the Government to keep it informed of the outcome of this inquiry.*
- (c) *With regard to the reported agreement on no future marches in which Chea Money and his fellow representative of the FTUWKC were forced to promise to make garment workers stop the strike and refrain from further marches, the Committee expects that the Government will declare this agreement null and void and requests the Government to ensure in the future the right of workers to peaceful demonstration to defend their occupational interests.*
- (d) *With regard to the physical assaults that particularly concern Lay Sophead and Pul Sopheak, both presidents of unions affiliated to the FTUWKC, the Committee asks the Government to institute independent judicial inquiries into these assaults and to keep it informed of the outcome.*

- (e) *Lastly, the Committee urges the Government to take measures to ensure that the trade union rights of workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives.*

CASE NO. 2277

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

**Complaint against the Government of Canada
concerning the Province of Alberta
presented by
the Alberta Union of Provincial Employees (AUPE)**

Allegations: The complainant organization alleges that the provincial government significantly altered the rights to organize and to bargain collectively of health-care sector employees, through the speedy adoption of legislation, without proper consultations with trade unions

- 343.** The Committee examined this case at its March 2004 meeting, where it presented an interim report to the Governing Body [see 333rd Report, paras. 240-277].
- 344.** The complainant provided further information in a communication dated 25 October 2004.
- 345.** The Government sent some observations in communications dated 16 April 2004 and 6 January 2005.
- 346.** Canada has ratified the Freedom of Association and Protection of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), nor the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

- 347.** At its March 2004 meeting, the Committee made the following recommendations [see 333rd Report, para. 277]:
- (a) The Committee requests the Government to amend rapidly the legislative provisions depriving nurse practitioners of the right to establish and join organizations of their own choosing, and to keep it informed of developments.
 - (b) The Committee requests the Government to ensure that, in future rounds of negotiations, only workers of the health sector providing essential services in the strict sense of the term may be deprived of the right to strike and that they enjoy adequate, impartial and speedy conciliation and arbitration proceedings, in accordance with freedom of association principles.

- (c) The Committee requests the Government to keep it informed of developments concerning the severance pay dispute involving workers at the Alberta Mental Health Board, and to provide it with the arbitration decision thereon.
- (d) Recalling that where a Government seeks to alter bargaining structures in which it acts directly or indirectly as employer, it is particularly important to follow, before the introduction of legislation, an adequate consultation process conducted in good faith and where social partners should have all the necessary information, the Committee notes the alleged lack of adequate consultations in this instance, prior to the Government's decision to change functional and regional bargaining structures and requests the complainant organization to provide additional information on the practical consequences of these changes.
- (e) The Committee draws the legislative aspects of this case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

B. The complainant's additional information

- 348.** In its communication of 25 October 2004, the complainant AUPE provides the following information and allegations, in reply to the Committee's request (333rd Report, paragraph 277(d)). AUPE states that the labour relations turmoil it had predicted in its initial allegations, as a result of the run-off votes mandated by Bill 27 has now become a reality. Members of one union have become members of another union for no other reason than the "winner takes all" scenario imposed by the Government. Even though AUPE was ultimately successful in these votes, it had to expend a great deal of time, effort and resources to ensure that result. AUPE has to train new shop stewards and has to deal with an incredible backlog of grievances, arbitrations and hearings inherited from other unions.
- 349.** The complainant adds that the difficult task of merging collective agreements has begun. Employers have already taken the position that benefits in existing collective agreements will not simply be rolled over into the new merged contracts, and that these benefits must be renegotiated; members thus stand to suffer if benefits are rolled back. In addition, legislative amendments took away the right to strike from some members. AUPE will continue to do everything it can to prevent employers from doing this, but efforts made to maintain benefits that have already been agreed upon affect the union's ability to enhance wages and working conditions for members.
- 350.** In its communication of 26 June 2003, the complainant had indicated that Bill 27 would nullify severance provisions in existing collective agreements, and made reference in particular to the position taken by the Alberta Mental Health Board (AUPE is in a bargaining relationship with that employer) that it did not have to pay severance pay to AUPE members under the applicable collective agreement. AUPE filed a grievance against that decision and the arbitrator ruled in favour of the employer (the complainant attaches a copy of the arbitrator's decision).
- 351.** The complainant states in summary that the changes resulting from the adoption of Bill 27 have meant that AUPE and other surviving unions are faced in practice with employers eager to re-write collective agreements to the detriment of members. Some of the more regressive outcomes may not be known until collective agreements have been settled, a process that is still in the making.

C. The Government's reply

352. In its communication of 16 April 2004, the Government states:

- as regards recommendation (a), that nurse practitioners, like other independent professionals, already have the right to establish and join professional associations of their own choosing;
- as regards recommendation (b), that it supports these principles. Health-care employees who provide essential services are covered by the Labour Relations (Regional Health Authorities Restructuring) Amendment Act, which establishes a fair, objective and transparent common means to resolve labour disputes. The Compulsory Arbitration Board is a recognized and accepted means of dispute resolution, and has been used on a regular basis by health-care workers, fire, police and other providers of essential services;
- as regards recommendation (c), that there are currently several arbitration processes under way with a few employees of the Alberta Mental Health Board who were subject to a particular collective agreement with anomalous severance pay provisions. These have not been resolved yet; the Government will report on the outcomes once the arbitration process is completed.

353. In a communication dated 6 January 2005, the Government indicated that it did not have any additional comment to make on the complainant's supplementary information and allegations.

D. The Committee's conclusions

354. *The Committee notes the complainant's additional information, and the Government's reply.*

355. *As regards its recommendation that the law depriving nurse practitioners of the right to establish and join organizations of their own choosing be amended, the Committee notes the Government's statement that these workers already have the right to establish and join professional associations of their own choosing. The Committee must emphasize that the issue here is not the possibility to join professional associations, but the right to establish and join workers' organizations (trade unions); recalling its previous comments in this respect [see 333rd Report, para. 273] and stressing once again that the only possible exceptions provided for in Convention No. 87 are police and armed forces, the Committee urges once again the Government to repeal as soon as possible the legislative provisions that deprive nurse practitioners of the right to establish and join organizations of their own choosing.*

356. *Regarding its recommendation that essential services workers deprived of the right to strike should enjoy adequate, impartial and speedy conciliation and arbitration proceedings, the Government states that the employees in question are covered by the Labour Relations (Regional Health Authorities Restructuring) Amendment Act, which establishes a fair, objective and transparent common means to resolve labour disputes, and that the Compulsory Arbitration Board is a recognized and accepted means of dispute resolution, which has been used on a regular basis by health-care workers, fire, police and other providers of essential services. The Committee notes that information.*

- 357.** As regards its request to be kept informed of developments concerning ongoing severance pay disputes at the Alberta Mental Health Board, the Committee notes the ruling issued by the arbitrator (6 August 2004), who decided that the employees in question were not entitled to severance pay as there was no termination of employment, and that the change of employer did not constitute such a termination.
- 358.** Based on the additional information provided by the complainant on the practical effects of the major restructuring brought about by Bill 27, the Committee notes the substantial difficulties faced by the complainant and other unions as a result of that change, and those resulting from the ongoing merger of collective agreements. The Committee notes in particular that some employers have already taken the position that benefits in existing collective agreements would not be rolled over into the new merged contracts but should be renegotiated, which the Government does not deny. Noting that this situation (the regrouping in different bargaining units, which in turn entailed a renegotiation of collective agreements) was an indirect consequence of government legislative intervention, the Committee strongly recommends that the Government ensure that all efforts are made by said employers in upcoming negotiations so that workers are not detrimentally affected under new collective agreements. The Committee requests the Government to keep it informed of developments in this respect.
- 359.** Noting that the right to strike was taken away from some workers, the Committee recalls its previous recommendation that only workers providing essential services in the strict sense of the term may be deprived of the right to strike, provided furthermore that they enjoy adequate, impartial and speedy conciliation and arbitration proceedings, in accordance with freedom of association principles.

The Committee's recommendations

- 360.** In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:
- (a) The Committee urges once again the Government to repeal as soon as possible the legislative provisions that deprive nurse practitioners of the right to establish and join workers' organizations of their own choosing.
 - (b) The Committee strongly recommends that the Government ensure that all efforts are made by the employers concerned in upcoming negotiations so that workers are not detrimentally affected under new collective agreements.
 - (c) The Committee requests the Government to ensure that only those workers providing essential services in the strict sense of the term may be deprived of the right to strike, provided that they enjoy adequate, impartial and speedy conciliation and arbitration proceedings, in accordance with freedom of association principles.
 - (c) The Committee requests the Government to keep it informed of developments in these respects.

CASE NO. 2349

DEFINITIVE REPORT

**Complaint against the Government of Canada
concerning the Province of Newfoundland and Labrador
presented by**

**— the National Union of Public and General Employees (NUPGE)
on behalf of
— the Newfoundland and Labrador Association of Public and
Private Employees (NAPE/NUPGE) and
supported by
— the Canadian Labour Congress (CLC) and
— Public Services International (PSI)**

Allegations: The complainant organization alleges that the Government did not bargain collectively in good faith with representative trade unions for the renewal of public service collective agreements, and did not rely on an independent arbitration system. Rather, the Government introduced back-to-work legislation (Bill No. 18) with harsh penalties to end a legal strike and impose by law a four-year collective contract containing wage freezes and contract concessions, including as regards some benefits previously negotiated for retired public servants

- 361.** The complaint is contained in a communication dated 20 May 2004 from the National Union of Public and General Employees (NUPGE), on behalf of the Newfoundland and Labrador Association of Public and Private Employees (NAPE/NUPGE). Public Services International (PSI) and the Canadian Labour Congress (CLC) expressed their support to the complaint in communications dated 7 and 17 June 2004, respectively.
- 362.** The Government sent its observations in a communication dated 15 February 2005.
- 363.** Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), nor the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

- 364.** In its communication of 20 May 2004, NUPGE explains that the complaint is against the Act to provide for the resumption and continuation of public services (Bill No. 18) introduced in the Newfoundland and Labrador legislature on 26 April 2004 and proclaimed into law on 4 May 2004. Bill No. 18 was introduced to end a 27-day strike of some 20,000 public service employees which began on 1 April 2004. The striking employees are represented by two unions. Approximately 16,500 are members of the National Union's Newfoundland and Labrador component (NAPE/NUPGE) and some 3,500 employees are

members of the Newfoundland and Labrador division of the Canadian Union of Public Employees (CUPE).

- 365.** Bill No. 18 is much more than back-to-work legislation. It is a coercive tool that the Government used to legislate a four-year contract containing wage freezes and contract language concessions on public sector employees in Newfoundland and Labrador. It also contained the harshest penalties of any back-to-work legislation introduced in federal and provincial legislatures in the history of Canada. The Government announced on 20 April that it was going to introduce back-to-work legislation because of “the crisis the strike has caused the health-care system”, but took close to a week before introducing the legislation on 26 April in the provincial legislature. The legislation, however, covered all striking employees, the majority of whom do not work in the health-care sector.
- 366.** Subsequent to the legislation being introduced, NAPE/NUPGE and CUPE recommended to their members that the strike come to an end as of 27 April and all members return to work. As early as the evening shift on 27 April, some of the 20,000 striking employees began returning to work, with all returning to their jobs by the next day. The legislation had not yet been proclaimed, and with all employees back to work, there was no need for Bill No. 18 to be passed into law. The real reason for Bill No. 18 was to legislate the Government’s bad faith bargaining approach it consistently displayed throughout its negotiations with NAPE/NUPGE and CUPE.
- 367.** The 20,000 employees went on strike on 1 April 2004, the day after their collective agreements expired. They are covered by 11 separate contracts between NAPE/NUPGE and the provincial government and various public sector employers and five contracts between CUPE and various public sector employers. They are employed as either direct government employees, health-care professionals, hospital and nursing homes support workers, teaching assistants, support workers with schools and public colleges across the province, clerks in the province’s liquor stores, ferry workers or pilots employed with the emergency health, search and rescue operations.
- 368.** NAPE/NUPGE and CUPE were engaged in coordinated bargaining with the Government on core issues such as wages and benefits, while issues specific to individual bargaining units were separately negotiated. In June 2003, NAPE/NUPGE advised the Government that it wished to begin negotiations on behalf of 11 of its province-wide bargaining units and the Government agreed. NAPE/NUPGE told the Government at the time that the union would begin strike action on 1 April 2004 if no settlement was reached prior to contracts expiring on 31 March 2004.
- 369.** On 21 October 2003, a new Government was elected. On 18 November 2003, NAPE/NUPGE wrote to the new Government asking it to honour its predecessor’s commitment to begin negotiations. In good faith, NAPE/NUPGE’s negotiating teams presented proposals to the Government’s negotiators. For seven weeks, the Government’s negotiators refused to respond to NAPE/NUPGE’s bargaining proposals. The Government’s first response to NAPE/NUPGE’s bargaining proposals took place in the media and not at the bargaining table. Without any consultation with the union other than a one-hour notice, the Premier held a province-wide televised address on 5 January 2004, where he stated for the first time that his Government would be instituting a two-year wage freeze on public employees in the province because of the large deficit left by the previous Government. He repeated part of his election platform, indicating that the Government would reduce the size of its workforce through attrition (people retiring and resigning) predicting up to 6,000 jobs would be lost over the next five years. The Premier also indicated that the Government would be renegeing on a commitment of “no lay-offs” that he made during the October 2003 election campaign.

- 370.** The Government's portrayal of its large deficit and "dire fiscal situation" was based on very misleading evidence. The first news release issued by the Premier announced a request for proposals for an independent review of the province's finances. The next day, the Government commissioned the consulting firm of Price Waterhouse Coopers (PWC) to conduct the review. The PWC report was released on 5 January in the same province-wide television address where he announced his Government would be instituting a two-year wage freeze on public employees in the province. The report highlighted two conclusions: the current year's budget, introduced in May 2003 by the previous Government, understated the deficit for the current year; and the budget could not be brought into balance by the previous Government's target year of 2007-08. It forecast a dramatic and continuing deterioration in the fiscal situation that could not be reversed without draconian actions.
- 371.** NAPE/NUPGE felt the PWC review presented a misleadingly negative picture of the province's finances. For example, PWC chose to report the deficit on an accrual basis, as opposed to reporting it on a cash basis (the method used by previous provincial governments). The union therefore commissioned its own study of the Government's fiscal situation which was conducted by the highly respected Canadian Centre for Policy Alternatives (CCPA). The conclusion of the CCPA study was that, while Newfoundland and Labrador must face a number of important issues of financial management in the next few years, provincial finances are not spiralling out of control, and they do not present an overwhelming crisis that justifies significant cuts to public services or the imposition of financial hardship on the Government's employees. CCPA pointed out that the economic assumptions used by PWC were more pessimistic than those used by the major Canadian chartered banks. The CCPA report was based on more reasonable assumptions about economic growth and federal government transfer payments. It demonstrated that Newfoundland and Labrador's cash deficit is not spiralling out of control to more than \$700 million by 2007-08, but is relatively stable, at just over \$280 million. CCPA also noted that the government-commissioned study by PWC contained highly political statements, inappropriate to the auditing profession. It was clear that the report was meant to create public fear in order to generate support for public sector wage freezes, public sector job losses, and cuts to public services.
- 372.** After publicly announcing a two-year wage freeze, the provincial government called in representatives of provincial government retirees on 21 January 2004 to tell them that the Government intended to renege on its commitment to contribute 1 per cent to the pension plan to help fund indexing for provincial government retirees over the age of 65. This indexing had been won as part of a settlement from a strike that took place in April 2001 by 19,000 NAPE/NUPGE and CUPE members. The unions agreed to have their members contribute a percentage of their pay for pension indexing, to be matched by the provincial government. The indexing, which was capped at 1.2 per cent per annum, went into effect in October 2003. It was the first increase in pension benefits for provincial government retirees since 1989.
- 373.** As there was no progress in negotiations on key issues, and given the Government's refusal to take major concessions off the bargaining table, all NAPE/NUPGE's and CUPE's bargaining units applied for conciliation on 15 January 2004. NAPE/NUPGE broke off negotiations and began conducting strike votes on 15 February 2004 in order for its members to be in a legal strike position on 1 April 2004. The members gave NAPE/NUPGE the strongest strike mandate in the union's history; overall, 91 per cent of the members voted in favour of a strike if no acceptable agreement could be reached by 31 March. On 21 March 2004, NAPE/NUPGE resumed negotiations with the Government but was still unable to make substantial progress.

374. On 30 March, less than 36 hours before the strike deadline, the Finance Minister introduced the Government's first budget. It was by far the toughest budget in the history of the province with either harsh cuts or the elimination of numerous government services and programmes. The budget negatively impacted on every public service and programme funded by the Government. As part of the budget, the Government announced a plan to slash 4,000 jobs in the provincial public service over the next four years, including 700 in 2004. This announcement was in direct contradiction to a personal commitment of "no public service lay-offs" made by the Premier during the October 2003 election campaign that brought him and his Government to power. It is the contention of NUPGE, as well as a number of public commentators, that the Government wanted to provoke a strike in order to deflect public attention from the harsh restraint measures contained in the budget. A week of bargaining at the end of March made some progress but by 31 March, it became abundantly clear to NAPE/NUPGE and CUPE that the Government was not interested in negotiating a settlement prior to the beginning of the strike.

375. The Government's final offer had two options for wages:

- a five-year agreement that included: a wage freeze in the first two years, a 2 per cent increase in the third year, a 3 per cent increase in the fourth year, and a 3 per cent increase in the fifth year; and
- a four-year agreement that included: a wage freeze in the first two years, a 2 per cent increase in the third year, and a 3 per cent increase in the fourth year.

The final offer also included major concessions from workers in the areas of sick leave, pensions, classification review, and hours of work for school-board employees. With the exception of sick leave, the Government's position involved taking away the gains the unions had made after a six-day strike during the last round of bargaining in April 2001. As regards sick leave, the Government demanded to establish a two-tier system by cutting sick leave benefits in half for future employees.

376. During the 27-day strike, and the six days between the end of the strike and the proclamation of Bill No. 18 (4 May 2004), NAPE/NUPGE and CUPE attempted to restart the negotiations on a number of occasions by making at least six new offers. The Government officially countered only two of the unions' offers. Its first counter was on 9 April with an offer that still demanded the same four concessions and proposed wage increases that were **less** than the Government's 31 March offer. The last counter offer from the Government came on 29 April, three days after Bill No. 18 was introduced and a day after the workers ended their strike; this offer was identical to the one made previously by the Government except that it provided the opportunity for new employees to earn the same sick leave as current employees after 20 years of service. Bill No. 18 however did not include this minor change in the Government's sick leave position offered to the unions on 29 April.

377. The Government's bad faith approach to bargaining was constant throughout the strike. The Premier and the Finance Minister made many comments, both in the legislature and through the media, that they had been working hard to reach a settlement with the unions when, in fact, several calls made to them by the unions' leadership requesting that negotiations be restarted were not returned. There were never any real negotiations but simply a repetition of the Government's final offer made on 31 March. The most outrageous example of the Government's bad faith bargaining approach could be seen in the actions of the Premier in the early days of the strike. On the first day of the strike, in a nationally televised outburst, he smeared the entire provincial trade union movement by linking it to a physical assault on his adult son without citing any evidence. He suggested, through innuendo and inference, that somehow union members were linked to a physical

assault on his adult son. Insinuating that union members would choose to use violence against family members of the Government, he stated the following during a news conference on 1 April:

Let me just serve notice right now on anybody out there who is in a union: Don't go near my family, or my home, or the homes of our ministers, or anybody else in our caucus, because I can tell you right now, they will be out until cows come home, if they go near any members of our family.

As can be seen from his statement, the Premier seemed to let the episode cloud his judgement in the handling of the strike. He was insinuating that 20,000 union members and the citizens of Newfoundland and Labrador would be left to deal with a strike because of unrelated actions taken against a family member of any of the government-elected representatives. Four days later, an individual with no union affiliation was charged with assault causing bodily harm to the Premier's son. The Premier, however, refused to apologize to NAPE/NUPGE and CUPE and their members.

- 378.** On 2 April, the Premier took the very unusual move of going around the unions' bargaining committee by negotiating directly with striking public sector workers on the picket line and providing them with misleading information on the Government's last offer. His actions clearly indicated a bad faith approach to bargaining. NUPGE also contends that his actions were a serious violation of Article 3(2) of Convention No. 87, which states that public authorities shall refrain from any interference that restricts or impedes the unions' right to organize their administration and activities and to formulate their programmes. NUPGE emphasizes that in a number of cases, the Committee commented on "the desirability of consulting the representative organizations with a view to ensuring freedom from any influence or pressure by the authorities which might affect the exercise of the right to strike in practice".
- 379.** Bill No. 18 is one of the worst and most vindictive examples of labour legislations ever introduced in Canada. It terminates collective bargaining in the public sector of Newfoundland and Labrador for at least the next four years. It was introduced into the legislature and adopted without any consultation with the unions representing the 20,000 striking employees.
- Section 3 of the legislation severely limits the rights of union officials to freedoms of expression and speech by dictating what they can and cannot say to their membership. It required the union leadership to make a declaration to the striking employees they represent that their strike had become invalid and illegal.
 - Section 4 of the legislation forced all striking employees back to work immediately and forbade any union official to "direct, encourage, aid or abet an employee" from returning to work.
 - Section 5 dictated the wages, terms and conditions of employment of the 20,000 employees for a four-year period which will not end until 31 March 2008. It further stated that these wages, terms and conditions of employment will constitute the employees' collective agreement. The wages, terms and conditions of employment referred to in section 5 are identical to the Government's final offer it made to the unions on 31 March. One has to question the Government's intention to bargain in good faith during the 27-day strike when it legislated the same offer it provided the day before the strike began. Section 5 also has the effect of completely eliminating any form of collective bargaining for these 20,000 employees for an unprecedented four-year period.

- Section 6 of Bill No. 18 contained the most severe punishment of any other back-to-work legislation that has been passed in the history of Canada for those who disobeyed the legislation. Employees who did not return to work immediately upon the Act coming into force would face immediate dismissal.
 - The legislation also imposed unprecedented huge fines on the unions and their leadership. Union officers or representatives who encouraged workers to stay off the job were subject to fines of \$25,000 a day. NAPE/NUPGE and CUPE could have been fined \$250,000 a day for continuing the strike after the legislation passed. Union dues could be withheld from the unions by the Government and used to pay the fines.
- 380.** NUPGE contends that the Government, prior to the strike beginning, made a deliberate choice not to follow the Public Service (Collective Bargaining) Act, the provincial legislation that governs the collective bargaining process, but to impose by legislative fiat the Government's original "bargaining" position. NUPGE also asserts that the Government prolonged the strike for no reason other than to punish the members of NAPE/NUPGE and CUPE for daring to disagree with the Government's version of a "fair" offer. By imposing the wage freeze and concessions the Government had been demanding from day one of the strike, the Government made a mockery out of any claim that it bargained at all, let alone in good faith. Unacceptable as it would have been, rather than introduce back-to-work legislation during the first days of the strike, the Government vindictively chose to let workers walk the picket line and deny the citizens of the province access to public services for 27 days. It was only then that the Government decided to implement the decision it made at least a month before, to legislate its final offer and put an end to the strike. Evidence supporting these assertions is set out below.
- 381.** The Government's stated reason for introducing Bill No. 18 was the growing crisis in the health-care sector with the health of the province's citizens being at risk. One has to ask, if this was the case, why did the Government take four days from the time it announced it would be introducing back-to-work legislation (22 April) to the date it actually introduced Bill No. 18 in the legislature (26 April)? NUPGE underlines that every time the unions were asked by hospital medical directors to increase the number of employees over and above what was required by the essential services order, the unions complied with the requests.
- 382.** The unions also provided the Government with the option of sending the dispute to arbitration as set out in the Public Service (Collective Bargaining) Act. On 22 April, the presidents of NAPE/NUPGE and the Newfoundland and Labrador Division of CUPE wrote to the Premier stating that both unions were prepared to instruct their members "to return to work on Friday, 23 April and refer the remaining outstanding issues to binding adjudication pursuant to sections 32-37 of the Public Service (Collective Bargaining) Act", which is the legislation that has governed labour relations and the collective bargaining process between all public sector employers and employees in the province (with the exception of the municipal government) since 1976. Section 30 of this Act allows for the provincial legislature to declare a state of emergency when it considers a strike of employees to be "injurious to the health or safety of persons or a group or class of persons, or the security of the province" and declare an end to the strike. Sections 32-37 of the Act are brought into play in the event that section 30 is invoked. These sections outline a process to have all matters in the dispute referred immediately to binding adjudication. The Government chose not to follow the legislative process that was available to them through the Public Service (Collective Bargaining) Act, but instead decided to implement separate legislation designed to ensure that its "bargaining" position was forced on the 20,000 striking employees.

- 383.** There was no need to proclaim the legislation as both NAPE/NUPGE and CUPE called an end to the strike once Bill No. 18 was introduced in the legislature and their members returned to their jobs on 28 April. Their return to work ended any reason for a state of emergency to be declared, as well as any reason for back-to-work legislation to be proclaimed.
- 384.** Negotiations between the Government and the unions did continue right up until the day before the legislation was proclaimed. The major outstanding issue continued to be sick leave and the Government continued to demand their concession for a two-tier sick leave plan. The unions could not, in principle, agree with the Government's proposal because it would result in their members having different levels of benefits. NAPE/NUPGE and CUPE, however, did offer to send the outstanding issue to binding arbitration.
- 385.** The Government's bargaining position appeared to be tied closely to the Premier's personal position since there would be very little, if any, monetary gain for the Government in having a two-tier sick leave plan for employees. The Government's proposal called for cutting in half the number of sick leave days for new employees. Considering the 30 March provincial budget included a plan to slash 4,000 jobs over the next four years, including 700 in 2004, there will be no opportunity for the Government to save any money from its proposal for at least the next four years. Despite the fact that there was no need to pass back-to-work legislation (other than to allow the Government unilaterally to enforce its final offer), the Government chose to end all bargaining and pass Bill No. 18.
- 386.** The basis for NUPGE's complaint against the Government and its Bill No. 18 is based on several standards established by the Committee in many of the rulings it has made over the years. These standards are:
- government actions that seriously erode the confidence of employees in the collective bargaining process are contrary to Convention No. 87 on freedom of association and the protection of the right to organize;
 - a government should give priority to collective bargaining as a means of determining employment conditions of its public employees;
 - when a government imposes legislation restricting the collective bargaining rights of public employees, those employees should have access to a system of independent third party arbitration;
 - 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. This order might occur 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 (Case No. 1543 and others);
 - adequate consultation with unions representing public employees should take place prior to the introduction of legislation through which a government seeks to alter the bargaining process in which it actually or indirectly acts as the employer;
 - employees generally have the right to strike deriving from Article 3 of Convention No. 87; provisions which effectively deny that right are in contravention of the Article (Case No. 1247).
- 387.** NUPGE concludes that the impugned legislation is contrary to the basic principles of the right to organize and collectively bargain in the public sector as set out in ILO Conventions

Nos. 98 and 151, as well as the right to freedom of association as set out in ILO Convention No. 87 and the ILO's 1988 Declaration on Fundamental Principles and Rights at Work. Unfortunately, the damage to collective bargaining in the public sector in Newfoundland and Labrador has already taken place. Collective bargaining in the provincial public service will not exist for at least a four-year period. NUPGE therefore requests that the ILO Committee on Freedom of Association strongly criticizes the government of Newfoundland and Labrador for:

- exercising unprecedeted and extensive legislative interference in the public sector collective bargaining system instead of giving priority to collective bargaining as a means of determining wages and employment conditions of public health-care employees;
- abusing its legislative authority by imposing its final offer in four-year legislated collective agreements covering the 20,000 employees;
- failing to participate in an open and extensive consultative process with its employees prior to unilaterally imposing a legislative settlement; and
- failing to rely on the independent third party system of arbitration as a means to settle this public sector labour relations dispute.

B. The Government's reply

- 388.** In its communication of 15 February 2005, the Government states that the Public Services Resumption and Continuation Act (PSRCA), is not in contravention of Conventions Nos. 87, 98 and 151, and states that the PSRCA was enacted as a last resort measure necessitated by the critical effect that the general strike of over 20,000 public employees had on the province's responsibility to provide all aspects of public services to the people of Newfoundland and Labrador in a fiscally responsible manner. The Government adds that the contents of the 17 collective agreements scheduled to the PSRCA, reflect the significant progress and agreement made by the union and government negotiating teams both before and during the 2004 general public service strike. In fact, very few issues remained outstanding between the parties at the time the legislation was introduced. After 27 days of a vast public service withdrawal which was seriously affecting the provision of health-care and other basic public services, those items unresolved were legislated but the legislation did reflect the progress of the talks between the parties and is both fair and fiscally responsible.
- 389.** As regards the financial and fiscal contexts, in November 2004, immediately upon taking office, the Government engaged an internationally respected accounting firm to conduct a review of the province's fiscal situation. The consultant's report entitled *Directions, choices and tough choices*, released on 5 January 2004, concluded that the province was in dire economic straits with a current deficit of \$877.5 million inclusive of a current cash deficit of \$507 million. The Premier responded to the release of this report on the same day with a State of the province address, which outlined that serious fiscal restraint was critical in all areas of public expenditure, including employee salaries and benefits which account for approximately 52 per cent of the provincial budget. The Government denies that the Premier in any way breached the international labour Conventions by publicly addressing the people of Newfoundland and Labrador concerning the province's financial situation or by outlining a general plan for dealing with the problem. There was no violation of any right to collectively bargain as, subsequent to the Premier's State of the province address, collective bargaining proceeded with significant success.

- 390.** The unions gave notice to the province of their intention to bargain well before the expiry deadline in the various collective agreements (all of which expired on 31 March 2004). That notice was given prior to the general election of 21 October 2003, which resulted in a change of Government. Negotiations commenced in January 2004, once the newly elected Government was cognizant of the financial situation and the collective bargaining issues. Negotiations continued in the normal course up to and throughout the strike. In fact, during the ten days leading up to the unions' self-imposed strike deadline of 1 April 2004, union and government negotiators relocated to a local hotel where round-the-clock talks continued. In January 2004, the union applied for the assistance of a conciliation team from the Labour Relations Agency (the Labour Relations Agency is a neutral third party agency created by the Government, dedicated to fostering a positive labour management climate in the province through the provision of assistance through conciliation, facilitation and mediation services). The conciliation team, consisting of the director and five mediators, worked with the parties up to the unions' self-imposed strike deadline of 1 April 2004, including the round-the-clock negotiations in the last ten days. Once the strike was called, the chief executive officer and the director of the Agency were actively and consistently involved in talks with the unions and the Government throughout the duration of the strike in an attempt to help them reach a negotiated settlement. The extreme efforts of the unions' negotiators, the government negotiators and the conciliation team resulted in the agreement of many outstanding issues which form the bulk of the present collective agreements as outlined in section 5 of the PSRCA. At the time of the unions' self-imposed strike deadline of 1 April 2004, considerable negotiations had occurred. There were a number of outstanding issues between the unions and the Government. Some of the major points of disagreement were salaries, sick leave, and the implementation of recommendations concerning hours of work for support staff in the education sector (the "Young/Warren" recommendations, see below).
- 391.** On 22 April 2004, after 27 days of a vast withdrawal of public services, and with little movement towards resolution on the three remaining issues, the Government introduced the PSRCA, which was a last resort solution to a rapid deterioration of the health-care system, that seriously crippled the education system and compromised general public services. Given the serious financial implications of the outstanding issues, it was the province's position that a referral of these issues to binding arbitration to be determined by an unelected third party would be an irresponsible decision by a Government mandated by the people of the province to manage and control spending.
- 392.** As the title implies, the purpose of the legislation was twofold. Firstly, to direct the resumption of work by the striking public servants, and secondly, to ensure the continuation of their services. While it is correct that the vast majority of striking workers returned to work prior to the proclamation of the PSRCA, that action on behalf of the unions did nothing to ensure the stability of the workforce as services could have been withdrawn again at any time, with notice. Consequently, it was a prudent decision of the Government to introduce legislation providing for the resumption of work and the consolidation of the terms of the collective agreements incorporating the already agreed to items and the three outstanding issues: salaries, sick leave and the Young/Warren recommendations.
- 393.** The Government denies the unions' submission that it reneged on its obligation to contribute to the indexing of pensions. At the end of the exercise, the legislation incorporated a Memorandum of Understanding (see below) with one amendment relating to the extension of time for both the unions and the province to explore joint trusteeship of the pension plan.
- 394.** The Government offers the following submissions regarding the three outstanding issues legislated:

- *Salaries:* The PSRCA provides for the following salary increases over the term of the contracts: 1 April 2004 – 0 per cent, 1 April 2005 – 0 per cent, 1 April 2006 – 2 per cent, and 1 April 2007 – 3 per cent. The Government submits that the salary component is reasonable in the context of the challenging financial situation faced by the province and the long-term strategies necessary to deal with the problem. Noteworthy also is the fact that the previous collective agreements resulted in a 15 per cent increase in wages of the three-year preceding term (2001-04). ILO principles and Conventions have consistently recognized that governments must be given some flexibility to deal with economic crisis that they may face. The Committee has stated frequently: “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 it is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers’ living standards.”
- *Sick leave:* The PSRCA provides that any employee hired after the date of coming into force of this agreement will accumulate sick leave at the rate of one day per month to a maximum of 12 days per year, with a total cap of 240 days. Sick leave expenditure is one of the most significant and difficult to contain employee benefit expenses in the public service. Given the bleak financial outlook, it was initially the Government’s position that sick leave entitlement be reduced for current employees. However, as a compromise, it settled with a go-forward approach such that sick leave entitlement is not reduced for current employees but applies only to new employees. This is a prudent, long-term approach which in no way affects the current unions’ membership.
- *Young/Warren recommendations:* The Young Mediation Report formed the basis of a Memorandum of Understanding (MOU) between the parties relating to the hours of work for school-board support staff employed in the education sector. The MOU was included in the school boards’ association collective agreement which expired on 31 March 2004, and the Government complied with all its terms. The Warren Report, authored by an independent consultant retained by the Government subsequent to the Young Mediation Report, put forward recommendations on the issue of hours of work for school-board support staff employed in the education sector. These recommendations did not form part of the previous collective agreements but were contained in the unions’ proposals in the 2004 round of negotiations. There are approximately 750 employees affected by these reports.

- 395.** The Government submits that the PSRCA does not in any way violate the right to freedom of association under Convention No. 87. The restraints placed on trade union activity in the legislation was solely to allow for a peaceful resumption and continuation of striking employees. No restrictions have been placed on employees with respect to their right to associate or their right to organize.
- 396.** With respect to the alleged violation of Convention No. 87 by the Premier arising from his conversation with picketers while on route to his office, this conversation was nothing more than an exchange of information. The Premier discussed with the employees the latest government offer that was on the table at the time and known to the union negotiators. There was no interference with the unions’ right to organize their administration and activities and no attempt to undermine the unions in any way.
- 397.** With respect to the alleged violation of the right to bargain collectively under Conventions Nos. 98 and 151, the Government states that, while Convention No. 151 remains unratified by Canada, it has nonetheless complied with its provisions and principles. Restrictions on the right to bargain collectively in response to severe economic difficulties have been

accepted by the Committee where the circumstances are of an exceptional nature and only to the extent they may be necessary. The legislation was enacted in response to a situation where the resumption of public services was critical to the well-being of the people of the province. Furthermore, the vast majority of the terms of all 17 agreements resulted from the hard work of the negotiating and conciliation teams. The issues that were legislated were done so as a last resort and against a bleak background of economic challenges. The four-year term includes two significant salary increases and reflect the Government's commitment to treat its employees with respect and fairness.

- 398.** The Government concludes that the PSRCA does not violate any of the principles, declarations or provisions of international labour Conventions.

C. The Committee's conclusions

- 399.** *The Committee notes that this case concerns back-to-work legislation (the Public Services Resumption and Continuation Act (PSRCA), see Annex 1, extracts) adopted by the government of Newfoundland and Labrador. The PSRCA, which contains harsh penalties, put an end to a legal strike in the public service and imposed a four-year collective contract; the complainant organization alleges that the Government did not bargain collectively in good faith with representative trade unions and did not rely on independent arbitration. The Government replies that the PSRCA was a last resort measure to put an end to a general strike of over 20,000 public employees which affected the provision of health-care and other basic public services, as well as a fair and fiscally responsible answer to the unions' demands, in view of the financial situation of the province. The Government and the complainant organization both rely on reports on the fiscal situation of the province, drafted by two different firms, which came to different conclusions.*
- 400.** *The Committee points out that it is not mandated, nor equipped, to decide on the relative weight to be attached to the two diverging reports on the fiscal situation of the province, and on the justification of measures that might eventually flow from these reports. Likewise, the Committee is not called upon to decide whether or not the pay and other work conditions (e.g. concerning sick leave) imposed by the Government are "reasonable". Rather, the Committee's mandate is to assess whether, in adopting the PSRCA in the circumstances of the case, the Government complied with freedom of association principles.*
- 401.** *The Committee notes at the outset that the strike in the present case was a lawful one, as the complainant organization had fulfilled all legal requirements prior to launching a strike to support its demands. While a significant number of issues were actually negotiated, both through direct bargaining and with the help of mediation and conciliation services, the fact is that, ultimately, the Government imposed through the PSRCA the terms of a four-year collective agreement as regards the remaining bargaining issues, including wages. Taking into account the long duration of this imposed contract, the Committee invites the Government to hold consultations with the unions concerned with a view to a possible re-examination of these imposed working conditions.*
- 402.** *The Committee takes note of the severe penalties provided for in the PSRCA (see Annex 1) which rendered a continuation of the strike untenable, and that all workers had gone back to work (27 and 28 April 2004) at the time the PSRCA was proclaimed (4 May 2004).*
- 403.** *The Committee further notes that, on 22 April 2004, the complainant organization wrote to the Premier in the following terms: "While it has been, and continues to be, our preference to negotiate a collective agreement, we believe it is unlikely that the parties will now be able to resolve this matter through negotiations. In a final attempt to resolve this dispute without the introduction of extraordinary legislation, and in an effort to resume the*

provision of public services, we are now proposing that the parties use the provisions of the Public Service (Collective Bargaining) Act to resolve this matter. NAPE and CUPE are prepared to instruct our members to return to work on Friday, 23 April 2004, and refer the remaining outstanding issues to binding adjudication pursuant to sections 32-37 of the Public Service (Collective Bargaining) Act. We believe that this will enable the parties to consider the greater interests of the province and resume the provision of public services immediately. The offer is made in good faith in an effort to resolve this dispute and we hope that you share our desire to find a fair and equitable settlement." [See Annex 2, extracts of the Public Service (Collective Bargaining) Act.]

- 404.** *The Committee wishes to emphasize that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers' and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 781]. The Committee also recalls that the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association; 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 [see **Digest**, op. cit., paras. 844-845].*
- 405.** *Noting nevertheless the complainant organizations' offer to the Government to use the existing legislative provisions on the settlement of disputes in the public service through adjudication, the Committee has difficulty appreciating the Government's argument that a referral of the outstanding issues to binding arbitration to be determined "by an unelected third party" would have been an irresponsible decision, particularly in view of the fact that the Government could have provided the arbitrator with full data on the province's fiscal situation, and the fact that these provisions are precisely meant to cover such situations and resolve bargaining deadlocks in the public service. Rather, the Government chose to adopt back-to-work legislation and unilaterally impose terms and conditions on outstanding issues, at a time when the workers were already back at work, and their union had offered to submit the dispute to binding arbitration, as provided for in the law.*
- 406.** *Recalling that in contexts of economic stabilization, priority should be given to collective bargaining as a means of determining employment conditions of public servants, rather than adopting legislation to restrain wages in the public sector [see **Digest**, ibid., para. 900], the Committee considers that in the circumstances, the Government should have given primacy to collective bargaining. In the event that it had become clear that the pending issues could not be resolved through collective bargaining, the Committee stresses the importance, in cases concerning the public service, of having recourse to mediation and arbitration proceedings that have the confidence of the parties concerned. Recourse to back-to-work legislation that unilaterally imposes the position of one of the bargaining partners, as opposed to having recourse to existing mechanisms that benefited from the confidence of the unions concerned (as shown by their own offer to refer the outstanding issues to binding arbitration) clearly cannot be considered to be conducive to stable and harmonious industrial relations in which the parties may be confident. The Committee strongly urges the Government to refrain in future from adopting such back-to-work legislation, and to use the adjudication process provided for in the legislation to resolve bargaining impasses such as the present one.*

The Committee's recommendations

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

- (a) *Noting that the Government violated freedom of association principles through the adoption of back-to-work legislation, the Committee strongly urges it to refrain from adopting such legislation in the future, and to use the adjudication process provided for in the legislation to resolve bargaining impasses.*
- (b) *Taking into account the long duration of the imposed contract (four years), the Committee requests the Government to hold consultations with the unions concerned with a view to a possible re-examination of the imposed working conditions.*

Annex 1

An Act to provide for the resumption and continuation of public services (extracts)

...

3.(1) Immediately upon the coming into force of this Act, the unions and each official or representative of the unions shall give notice to the striking employees whom they represent that a declaration or direction to go on strike, declared or given to them before the coming into force of this Act, has become invalid by reason of the coming into force of this Act and shall direct the employees to return to work immediately.

(2) After the unions have complied with subsection (1), neither they nor their officials or representatives, shall, during the period the terms and conditions of employment referred to in section 5 are in force, engage in actions for the purpose of compelling an employer to agree to terms and conditions of employment that are different from those referred to in section 5.

4.(1) Immediately upon the coming into force of this Act every employee shall cease actions engaged in for the purpose of compelling an employer to agree to terms and conditions of employment and, where applicable, shall continue or resume the duties of his or her employment.

(2) A union and an official or representative of a union and another person acting on behalf of a union shall not direct, encourage, aid or abet an employee to engage in an action contrary to subsection (1).

(3) Neither a union, nor an official or representative of a union, nor a person acting on behalf of a union, shall, in any manner, discipline, or direct or authorize another person to discipline, by way of suspension or expulsion from the union, the imposition of a fine or otherwise, a person for the reason only that the person complies with subsection (1).

...

6.(1) Where a union fails to comply with section 3 or subsection 4(2) or (3), it is guilty of an offence and is liable on summary conviction to a fine of \$250,000, and in the case of a continuing offence, to a fine of \$250,000 each day or part of a day during which the offence continues.

(2) Every official or representative of a union who fails to comply with section 3 or subsection 4(2) or (3), and a person acting on behalf of a union who fails to comply with subsection 4(2) or (3), is guilty of an offence and is liable on summary conviction to a fine of \$25,000 and, in the case of a continuing offence, to a fine of \$25,000 for each day or part of a day during which the offence continues.

(3) Every employee who fails to comply with section 4 is dismissed.

(4) Each day or part of a day that a failure to comply with section 3 continues constitutes a new and separate offence.

(5) Where a union is convicted of an offence under subsection (1), an amount of wages deducted from an employee as union dues shall be considered forfeit to the Crown and shall be paid by the employer into the Consolidated Revenue Fund until a fine which the union is liable to pay under subsection (1) has been paid in full.

Annex 2

Public Service (Collective Bargaining) Act (extracts)

...

State of emergency

30.(1) Where the House of Assembly resolves that a strike of employees is or would be injurious to the health or safety of persons or a group or class of persons, or the security of the province, it may declare that, from and after the date stated in the resolution, a state of emergency exists and forbid the strike of all employees in a unit specified in the resolution, and may order the employees of the unit to return to duty either immediately upon publication of the resolution in the Gazette or at a later time that may be stated in the resolution.

(2) An employee, to whom an order made under subsection (1) applies, who fails to return to duty within the time stated in the order is guilty of an offence under this Act.

Lock-out

31.(1) Where, by this Act, an employee is prohibited from striking or participating in a strike, the employer shall not close the place of employment to the employee, or dismiss, or suspend the employee from work, or otherwise refuse to continue to employ the employee for the purpose of compelling the employee, or helping another employer to compel his or her employees, to agree to terms and conditions of employment.

...

Adjudication

32.(1) Where

- (a) the House of Assembly resolves that a state of emergency exists under section 30; or
- (b) all employees in a unit are considered because of subsection 10(6) to be essential employees, and 14 days elapse from occurrence of either of the events specified in paragraphs 25(a) and (b),

the chairperson of the board shall immediately, by written notice to the employer and the bargaining agent, order that the matters in dispute between them be referred immediately to adjudication.

(2) Each party to whom notice is given under subsection (1) shall, within 7 days after receipt of the notice, advise the chairperson of the board by written notice of

- (a) all the matters in dispute, with proposals towards settlement of the matters; and
- (b) the name of a person to act as a member of the adjudication board.

(3) Upon receipt of each nomination referred to in paragraph (2)(b), the chairperson shall immediately appoint the persons nominated as members of the adjudication board.

...

Adjudication board

33.(1) The adjudication board shall consider the matters in dispute together with the other matters which it considers to be incidental to the disputed matters as soon as possible after the reference to it of those matters and give judgment within 45 days after the reference or within a later time, which shall not exceed 90 days from the date of the reference, that the chairperson of the adjudication board may determine, but in giving a judgment, the adjudication board shall take into account

- (a) the health, safety and interests of the public;
- (b) the terms and conditions of employment of employees in occupations similar to those being considered, whether or not the employees are employees to which this Act applies, account being taken of the geographic, industrial, economic, social and other variations that the adjudication board considers relevant;

- (c) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the service provided;
- (d) the needs of the employer for qualified employees; and
- (e) other matters that appear to the adjudication board to have a relevant bearing to the matters in dispute.

(2) Where, before judgment, the parties reach agreement on a matter in dispute referred to it for adjudication and enter into a collective agreement in respect of it, the matter shall be considered to have been withdrawn from the reference and a judgment shall not be given by the adjudication board in respect of that matter.

(3) A judgment shall relate only to the matters referred to it by the chairperson of the board and shall not relate to salaries, wages and other terms and conditions of employment of employees who are not in the unit in respect of which the reference is made.

...

Judgment binding

35.(1) A judgment is binding on the employer, the bargaining agent and on the employees in the unit and, unless the judgment provides for retroactivity as provided in subsection (2), effective from the date on which the judgment is given or a later date that may be stated in the judgment.

(2) A judgment respecting terms or conditions of employment of employees in the unit may specify that any or all the terms and conditions shall have retroactive effect to a date not earlier than the date on which notice to start collective bargaining was given under section 13 or 14.

(3) Where any or all of the provisions of a judgment conflict with the terms of an earlier judgment affecting the parties, the provisions of the judgment shall prevail for the term determined in accordance with section 36 for which the judgment is operative.

CASE NO. 2320

DEFINITIVE REPORT

Complaints against the Government of Chile presented by

**— the National Inter-enterprise Trade Union of Metallurgy,
Communications, Energy and Allied Workers (SME) and
— the World Federation of Trade Unions,
Regional Office, Americas (WFTU-ROA)**

***Allegations: The complainant organizations
allege anti-union practices in the
PLASTYVERG conglomerate; violent
repression of a national strike on 13 August
2003 despite its peaceful nature; violations of
trade union rights by the CODELCO state
enterprise and the HERPA S.A. and Viñas
Tarapacá y Santa Helena enterprises***

- 408.** The Committee examined this case at its November 2004 meeting and submitted an interim report to the Governing Body [see 335th Report, paras. 567-665, approved by the Governing Body at its 291st Session (November 2004)].
- 409.** The Government sent new observations in communications dated 10 and 21 February, 18 March and 28 April 2005.

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

A. Previous examination of the case

411. At its November 2004 meeting, on examining allegations which mainly concern dismissals and other anti-union acts, as well as the violent repression of strikers, the Committee made the following recommendations [see 335th Report, para. 665]:

- (a) As regards the allegations concerning the PLASTYVERG group of enterprises, the Committee requests the Government to send it a copy of the reports concerning the administrative investigations carried out and all of the judicial decisions which have been handed down.
- (b) As regards the allegations concerning the violent repression of the national strike on 13 August 2003, the Committee is bound to take note of the obvious contradiction between the allegations and the Government's reply, deplores any acts of violence which occurred during the general strike, and requests the Government to send any judicial decisions handed down in relation to the criminal proceedings referred to by the complainants or any other of the acts of violence mentioned by the Government.
- (c) As regards the allegations concerning the HERPA S.A., Viñas Tarapacá y Santa Helena enterprises, the Committee requests the Government: (1) to indicate whether the latest administrative investigation in these enterprises gave rise to judicial proceedings and, if so, to inform it of their outcome; and (2) to provide information on the allegations concerning the detention of workers and violent police intervention to evict workers, despite the absence of the court order.
- (d) As regards the allegations concerning the CODELCO state enterprise, the Committee requests the Government to carry out a full and impartial investigation, including into the injuries sustained by workers, and to inform it of its outcome, as well as the results of the dialogue that has been resumed between the trade union leadership and the enterprise.

B. The Government's reply

412. In its communication of 10 February 2005, the Government refers to the allegations related to the illegal suspension of activities carried out on 13 August 2003. In particular, it states that it has no knowledge of any legal rulings that may have been handed down in relation to criminal proceedings or any other type of violent act which might have occurred during the abovementioned suspension of activities. The Government adds that, in order for it to send information regarding a legal ruling handed down by a court, it must first be informed of exactly which court handed down the ruling, the name and surname of the person affected by the ruling, the date on which it was handed down, the name of the case and what it is about. Without this essential bare minimum of information, it is physically impossible to satisfy the Committee's request that the Government send copies of rulings concerning cases of which the Government knows nothing.

413. In its communication of 21 February 2005, the Government states the following with regard to the allegations of supposed violation of trade union rights by the enterprise CODELCO – Chile, “El Teniente” Division, concerning the Inter-enterprise Union of Employees of Subcontractors of CODELCO – Chile, “El Teniente” Division (SITECO) and the events which occurred on 15 and 16 December 2003 at the “El Teniente” mine:

- As to the case of the worker Enzo Pérez, who was supposedly hit by rubber bullets, following an exhaustive, impartial investigation by the Regional Ministerial Secretary for Labour and Social Security of the VI Region, the area in which the “El Teniente” mine is located, it was concluded that the worker in question had been hit by rubber

bullets during the events of 15 and 16 December 2003. Having received medical attention, this individual was sent home in December 2003 and did not suffer from any after-effects or consequences. He is currently in perfect physical and mental health and is working normally as "Master Electrician, 1st Class" on the "El Teniente" site, Sub-6, for the subcontractors Soletanche Bachy Chile S.A., an associate enterprise of the "El Teniente" Division of CODELCO-Chile.

- As to the alleged case of two workers working for subcontractors who supposedly suffered serious injuries during clashes with the police unit which entered the "El Teniente" Division premises on 16 December 2003 in order to break up the illegal occupation of the installations, following an investigation, the Regional Ministerial Secretary for Labour and Social Security of the VI Region could not find any workers working for subcontractors who had suffered serious injuries.
- As to the allegation that 20 workers were injured and that one of them was hit 20 times by rubber bullets, in the course of a thorough, probing, impartial and objective investigation, the Regional Ministerial Secretary concluded that 20 workers suffered minor injuries as a result of clashes occurring during their illegal occupation of the "El Teniente" Division installations and that having received medical attention, they were discharged and sent home (December 2003).
- On the occasion of the public disorder events that occurred on 16 December 2003, as a result of the illegal occupation of the installations of the "El Teniente" Division, the Criminal Prosecutor for the VI Region initiated Case No. 03002001688-4 for public disorder offences. However, this case is now closed and is on file at the Office of the Regional Prosecutor, before whom the representatives of the workers and the enterprise, CODELCO – Chile "El Teniente" Division, met on various occasions. The enterprise declared it would not take action against the workers for the public disorder events of 16 December 2003 inside the mine on the condition that the workers participated in a negotiation process. For their part, the workers agreed to this proposal and dropped various legal appeals that they had lodged against the enterprise.
- As to the conversations which took place between the Regional Ministerial Secretary for Labour and Social Security, the SITECO and the "El Teniente" Division of CODELCO-Chile, before, during and after the incidents which occurred in December 2003, the Regional Ministerial Secretary for Labour and Social Security took a constant interest in the improvement of the living conditions of the workers working for the subcontractors and acted as an intermediary, not only with SITECO but also with the Federation of Subcontractor Workers (FETRACON).

414. As to the provisional conclusions and recommendations adopted by the Committee concerning the allegations related to the PLASTYVERG conglomerate, the Government states that the following have been carried out: (1) an inspection report (No. 13.00.03.096.2004) on the PLASTYVERG conglomerate, covering the period of 10 October 2003 to 18 May 2004. This exercise was aimed at verifying the following claims: (a) the dismissal of members of the inter-enterprise trade union; (b) threats of dismissal addressed to members of the inter-enterprise trade union; (c) that the employer forced workers to sign a blank document; and (2) inspection report (No. 13.00.03.138.2003) on the PLASTYVERG conglomerate, covering the period of 1 January to 20 November 2003. This exercise was aimed at verifying the claim regarding the bringing of pressure in relation to the election of staff delegates and to get union members to withdraw from the inter-enterprise trade union.

415. The Government states that these inspection reports were the basis for the charges of anti-union practices brought by the Labour Directorate before the First and Second Courts of

the First Instance of San Bernardo, against the PLASTYVERG conglomerate. With regard to the case alleging conduct harmful to freedom of association, heard by the First Court of the First Instance of San Bernardo (Case No. 7.939-03), launched on 29 December 2003 against the PLASTYVERG conglomerate, the judge issued a ruling in the first instance on 15 March 2004, which, in the declarative part, states: "(1) that the enterprise Promociones Pack y Ofertas S.A., represented by Don Sergio Vergara Salinas, employed anti-union practices against the National Inter-enterprise Trade Union of Metallurgy, Communications, Energy and Allied Workers (SME), that threaten freedom of association by bringing undue pressure to bear on workers to renounce their membership of the inter-enterprise trade union; (2) that the defendant shall immediately cease the anti-union practices described in the tenth recital of this ruling; and (3) that the accused party shall pay a fine to the National Empowerment and Employment Service of 74 Monthly Tax Units (MTUs) (a monthly tax unit is the equivalent of \$US52)". The enterprise lodged an appeal against ruling No. 189/2004 before the Court of Appeal of San Miguel, which maintained the ruling in the first instance on 12 August 2004. Furthermore, the Appeals Court increased the fine from 74 to 100 monthly tax units.

- 416.** The Government adds that at the level of the Second Court of the First Instance of San Bernardo, in Case No. 2576.04, brought against the PLASTYVERG conglomerate for anti-union practices, the judge issued a ruling in the first instance on 29 October 2004, which states that "the defendant has employed practices harmful to the freedom of association" and that "the defendant shall cease anti-union and unfair activities, allowing the free and voluntary joining of and withdrawal from trade unions on the part of the workers currently employed by the enterprise, as well as on the part of those workers joining the enterprise in the future". In the declarative part, it states: "III. The enterprises Promociones Pack y Ofertas S.A., Industria y Comercial Center Pack Ltda., Empaques Polypacks Servicios Ltda., Inmobiliaria La Vergara S.A., Plastiverg Ltda. are ordered to pay a fine of ten Monthly Tax Units". The parties were notified of this ruling on 21 January 2005.
- 417.** In its communications of 18 March and 28 April 2005, the Government states that the Second Court of the First Instance of San Bernardo issued a ruling (Case No. 10615) against the HERPA S.A. enterprise, following the latest administrative investigation carried out by the Labour Inspectorate.
- 418.** As to the Committee's request for information concerning the alleged detention of workers and the supposedly violent police intervention to remove the workers despite the lack of a court order, the Government states that, according to the report made by the acting officers who visited the enterprise on 17 February 2004 at 14:00: "two leaders of the Single Confederation of Workers of Colombia (CUT) waited at the 14th police station of San Bernardo for the arrival of Major Gilbert González Cárcamo who stated that the police had been informed of an illegal occupation and had attended the scene; it was concluded that the offence of illegal seizure of private land was being committed and, in the Major's opinion, the police had acted in accordance with the established procedures for eviction and, as a result, there had been six detentions, one police officer had been injured and equipment belonging to the forces of law and order damaged. It should be noted that the Major preferred to play down the events, not lodging a complaint with the military courts concerning the assault on the police officer, rather, limiting himself to reporting the facts to the Criminal Court. Finally, the authors of the report managed to persuade the Major to free the strikers whose domiciles it was impossible to verify, it being suggested that this information be checked using labour contracts; the Major finally decided to take the names of the CUT representatives, trusting them to ensure that the detainees appeared before the relevant court". The Government adds that it is not aware of how the case before the Criminal Court subsequently developed.

C. The Committee's conclusions

- 419.** *The Committee recalls that in this case it had requested the Government: (1) to send it a copy of the reports concerning the administrative investigations carried out and all of the judicial decisions which have been handed down in relation to the allegations concerning acts of anti-union discrimination in the PLASTYVERG conglomerate; (2) send any judicial decisions handed down in relation to the criminal proceedings referred to by the complainants or any of the acts of violence mentioned by the Government; (3) as regards the allegations concerning anti-union acts in the HERPA S.A., Viñas Tarapacá y Santa Helena enterprises, to indicate whether the latest administrative investigation in these enterprises gave rise to judicial proceedings and, if so, to inform it of their outcome and to provide information on the allegations concerning the detention of workers and violent police intervention to evict workers, despite the absence of a court order; and (4) as regards the allegations concerning the CODELCO state enterprise, to carry out a full and impartial investigation, including into the injuries allegedly sustained by workers, and to inform it of its outcome, as well as the results of the dialogue that has been resumed between the trade union leadership and the enterprise.*
- 420.** *As to the administrative investigations and legal procedures concerning the allegations of acts of anti-union discrimination in the PLASTYVERG conglomerate, the Committee notes that the Government states that: (1) two inspection reports were carried out in order to verify, in respect of the 10 October 2003 to 18 May 2004 period, the dismissal of trade union members, threats of dismissal aimed at members of the inter-enterprise trade union and workers being forced by the employer to sign a blank document, and in respect of the 1 January to 20 November 2003 period, pressure with regard to the election of staff delegates and to get union members to withdraw from the inter-enterprise trade union; (2) These verification reports served as a basis for the charges of anti-union practices brought by the Labour Directorate before the First and Second Courts of the First Instance of San Bernardo, against the PLASTYVERG conglomerate; (3) with regard to the case alleging conduct harmful to freedom of association, heard by the First Court of the First Instance of San Bernardo launched on 29 December 2003 against the PLASTYVERG conglomerate, the judge issued a ruling in the first instance on 15 March 2004, ordering the enterprise Promociones Pack y Ofertas S.A. of the PLASTYVERG conglomerate to immediately cease the anti-union practices – undue pressure on workers to renounce trade union membership – and ordering the enterprise to pay 74 Monthly Tax Units (MTUs) the Court of Appeal of San Miguel maintained the ruling in the First Instance and increased the fine to 100 MTU (according to the Government, one MTU is the equivalent of \$US52); and (4) the Second Court of the First Instance of San Bernardo issued a ruling on 29 October 2004, concluding that the enterprises Promociones Pack y Ofertas S.A., Industria y Comercial Center Pack Ltda., Empaques Polypacks Servicios Ltda., Inmobiliaria La Vergara S.A., Plastiverg Ltda., had employed practices which violated the freedom of association, ordering them to cease anti-union and unfair activities, thus allowing the free and voluntary joining of and withdrawal from trade unions on the part of the workers of the enterprise and ordering them to pay a fine of 10 MTU; The parties were notified of this ruling on 21 January 2005. In these conditions, whilst deplored the anti-union activities uncovered by the administrative and judicial authority, the Committee takes note of the sanctions imposed against the PLASTYVERG conglomerate.*
- 421.** *As to the allegations related to the violent repression of the national strike of 13 August 2003, the Committee requested the Government to send any judicial decisions handed down in relation to the criminal proceedings referred to by the complainants. The Committee notes that the Government states that it has no knowledge of judicial decisions related to the acts of violence which may have taken place during the suspension of activities (national strike) of 13 August 2003, and that it must first be informed of exactly which court handed down the ruling, the name and surname of the person affected by the*

ruling, the date on which it was handed down, etc. In these conditions, taking into account the lack of information on the allegations referred to by the Government, the Committee shall not proceed with the examination of these allegations, unless the complainants communicate the information requested by the Government.

- 422.** *As to the allegations concerning the state enterprise CODELCO, the Committee had requested the Government to carry out a complete and impartial investigation of these allegations, including the alleged injuries suffered by workers, and to keep it informed of this matter and of the result of the renewed dialogue between the trade union leadership and the enterprise. The Committee notes that the Government states that: (1) the worker Enzo Pérez, who was hit by rubber bullets during the events of 15 and 16 December 2003, received medical attention and is now in perfect physical and mental health and is working for a subcontractor at the "El Teniente" Division of CODELCO; (2) as to the alleged case of two workers working for subcontractors who sustained serious injuries during clashes with the police on 16 December 2003, following an investigation by the Regional Ministerial Secretary for Labour and Social Security of the VI Region, no workers working for subcontractors who had suffered serious injuries were found; (3) 20 workers suffered minor injuries as a result of the clashes over the illegal occupation of the "El Teniente" Division and, after having received medical attention, were discharged and sent home in December 2003; (4) on the occasion of the public disorder events which took place on 16 December 2003 as a result of the illegal occupation of the "El Teniente" Division, the Criminal Prosecutor for the VI Region initiated a case which was closed and filed in the archives after the enterprise CODELCO, "El Teniente" Division, announced that it would not be taking action against the workers and the latter came to an agreement with the enterprise, dropping the various legal appeals they had lodged against the enterprise; and (5) the Regional Ministerial Secretary for Labour and Social Security of the VI Region, has constantly taken an interest before, and after the incidents which occurred in December 2003, in the improvement of the living conditions of the workers working for the subcontractors. Taking into account this information and in particular the dropping of the legal proceedings by mutual agreement of both parties, the Committee, although deplored the acts of violence which occurred, will not proceed with the examination of these allegations.*
- 423.** *Finally, as to the allegations concerning anti-union acts in the enterprises HERPA and Viñas Tarapacá y Santa Helena, as well as the allegations concerning the detentions of workers and violent police intervention to evict the workers without a court order, the Committee notes that the Government states that: (1) in relation to the acts of anti-union discrimination, the Second Court of First Instance of San Bernardo ruled against the enterprises in question; (2) with regard to the supposed violent police intervention to evict the workers, the verification report showed that the police noted that the offence of illegal seizure of private land had been committed, the workers were evicted, during which time, six strikers were detained – only to be freed later on – a police officer was injured and a denunciation was made to the Criminal Court. The Government also states that it is not aware of subsequent developments regarding the abovementioned complaint.*

The Committee's recommendation

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

As to the allegations related to the violent repression of the national strike of 13 August 2003, the Committee, taking into account the lack of information concerning the allegations referred to by the Government, will not proceed

with the examination of these allegations, unless the complainants communicate the information requested by the Government.

CASE NO. 2337

INTERIM REPORT

**Complaint against the Government of Chile
presented by**
**— the National Trade Union of Workers of ING
Seguros de Vida S.A. (SNTISV) and**
**— supported by the Confederation of Banking and
Related Trade Unions (CSBA)**

Allegations: Failure of the transnational enterprise ING Seguros de Vida S.A. to allocate work to trade union leaders; practices used by the enterprise to obstruct the collective bargaining process; dismissal of delegates and members of the complainant trade union; pressure applied by the enterprise to force members working at two branches to resign from the trade union; non-compliance with collective agreements, in particular, deduction of benefits arising under those agreements; the enterprise's refusal to recognize the affiliation to the Trade Union ING AFP (Pension Fund Administrator) Santa María of workers whose labour contracts were modified by the enterprise, with the result that this trade union is running short of money and its existence is under threat; unilateral imposition of individual agreements

425. The complaint appears in a communication from the National Trade Union of Workers of ING Seguros de Vida S.A. (SNTISV) dated 26 February 2004. In a communication dated 26 March 2004, the Confederation of Banking and Related Trade Unions (CSBA) supported the complaint. The Government sent its observations in a communication dated 13 January 2005.
426. Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

427. In its communication of 26 February 2004, the SNTISV alleges that the transnational enterprise ING violated the trade union rights of the trade unions of the enterprises making up its holding company in Chile, the SNTISV and the Trade Union ING AFP Santa María. More specifically, the complainant organization alleges the following violations of trade union rights by the enterprise ING:

- (a) Failure to allocate work to the leaders of the SNTISV: a fine has already been imposed by the Municipal Labour Inspectorate concerning this situation and on 10 February 2004 the Labour Directorate reported the enterprise to the First Labour Tribunal for anti-trade union practices.
- (b) Obstructing the right to collective bargaining of the unionized workers, both those belonging to the SNTISV and the Trade Union ING AFP Santa María. This violation took place during the collective bargaining processes carried out with the SNTISV in May-June 2003 and the Trade Union ING AFP Santa María during the month of December 2003. In each case, the enterprise refused to negotiate in practice, thus forcing the trade unions to have recourse to article 369 of the Labour Code, which establishes the maintenance of benefits for 18 months without readjustment.
- (c) The dismissal of delegates and members of the SNTISV subsequent to the collective bargaining process undertaken in May-June 2003. This situation has meant that some of the workers who were dismissed filed suit against the ING Seguros de Vida S.A. in various Chilean cities. Furthermore, at the time of the bargaining process, the trade union had around 300 members but by December 2003 it had only 85, most of them having been dismissed without severance pay.
- (d) A suit for anti-trade union practices filed by the Provincial Labour Inspectorate of Melipilla, which was ratified by the Tribunal in Case No. 1309-2002, due to the fact that all the members at this branch were put under pressure to resign from the trade union. An identical situation arose in the Iquique office, following the collective bargaining process of May 2003. This last fact was established in Provincial Labour Inspectorate Verification Report No. 13.00.04/12.
- (e) Disregard for the consequences and effects of collective agreements, in particular the collective agreement of 9 July 2003, reducing benefits arising from these agreements.
- (f) ING also refuses to recognize and denies affiliation to the Trade Union ING AFP Santa María of workers whose individual labour agreements were modified by the enterprise, with the result that the Trade Union ING AFP Santa María is now running short of money and its existence is under threat.
- (g) ING's policy regarding agreements is based on the unilateral imposition of individual agreements, containing provisions regarding their maintenance in force that are extremely difficult to comply with.

B. The Government's reply

- 428.** In its communication of 13 January 2005, the Government refers to the allegation that the enterprise failed to allocate work to the leaders of the SNTISV and states that, in this case, the Labour Inspectorate imposed a fine. Furthermore, on 10 February a suit, Case No. 719-04, was filed with the Labour Court of First Instance of Santiago. On 2 October 2004, with a ruling on the case pending, trade union leaders Messrs. Iván Ferrada Quilodrán, Pía Caro Recio and Marco Antonio Rodríguez submitted a document to the Court in which they announced that an agreement had been concluded with the enterprise. As a part of this agreement, the parties agreed to end the case, with the enterprise ING being forced to pay each of the individuals involved a specified sum and those sums being accepted by the plaintiffs, who in doing so resigned from their jobs and received the entirety of their severance pay with regard to the employment relationship linking them to the enterprise.

- 429.** As to the allegation that the Dutch multinational ING denied the right to collective bargaining to those unionized workers belonging to the SNTISV and the Trade Union ING AFP Santa María, the Government states that both trade unions submitted draft collective agreements during the course of 2003, both cases being extremely complex in nature. The SNTISV has long-standing differences with its employer (Aetna Chile Seguros de Vida), as in 1999 the Labour Services informed the Committee on Freedom of Association of events detrimental to the right to collective bargaining.
- 430.** On 17 April 2003, the complainant trade union submitted a draft collective agreement; an impasse arose within the collective bargaining process when the enterprise refused to negotiate with regard to workers' pay conditions, basically made up of commissions. This demand led to a strike that lasted for four days. Finally, faced with a final offer, one of the conditions of which was that current wages should be lowered, the parties involved chose to have recourse to article 369, clause 2, of the Labour Code. For almost all of the workers, this meant having to accept an individual agreement, as they had no recourse to a minimum level under a previous collective agreement order to freeze benefits.
- 431.** Prior to this process, the Trade Union ING AFP Santa María (also the property of the Dutch holding company ING) undertook a bargaining process during which it submitted a draft collective agreement in the month of November 2003. This bargaining process had an added complication in that the enterprise challenged the workers involved, saying they had concluded their labour relationship and had received legal severance pay and were subsequently hired by another firm of the holding company ING. Previously, the Labour Inspectorate imposed a fine on the enterprise for excluding the abovementioned workers from receiving the benefits attached to the collective agreement. The enterprise then appealed against this ruling before the First Labour Tribunal of Santiago (Case No. 5276 of 2003). With the filing of this case, the Labour Inspectorate was forced to abstain from ruling in this respect, which led to the trade union lodging a writ of protection against the Municipal Labour Inspector of the North East, which was not accepted by the Santiago Court of Appeal. Given the fall in the number of individuals involved, and faced with an offer whose conditions were even stricter, the workers in this case also chose to have recourse to article 369, to maintain the benefits for 18 months without their wages being readjusted.
- 432.** The Government states that, prior to and during the negotiations, the Dutch enterprise ING made parallel offers to the individuals involved, pressing for the amendment of the individual agreements with the aim of lowering commissions across the board, an attempt which was resisted by the trade unions and which forced them to choose the lesser evil, that is to say, the formula of article 369.
- 433.** As to the dismissal of delegates and members of the SNTISV, subsequent to the collective bargaining process concluded in June 2003, the Government states that trade union leaders and the enterprise stated that during 2003 a large number of workers affiliated to the Trade Union ING Seguros de Vida were dismissed. However, they could provide no record of the exact number or existence of legal claims for unfair dismissal or unsettled payments/benefits.
- 434.** As to the suit for anti-trade union practices filed with the Tribunal by the Provincial Labour Inspectorate of Melipilla, Case No. 1309-2002, which is related to workers cancelling their trade union membership, the Government states that this suit was accepted in a ruling issued by the Tribunal of Melipilla on 4 August 2003, and that the defendant has been ordered to pay a fine of 10 Monthly Tax Units (MTU) and costs. The ruling was confirmed by the San Miguel Court of Appeal.

- 435.** As to the allegation that the enterprise disregards the consequences and effects of the collective agreements, the Government states that the Trade Union ING Seguros de Vida, during the meetings held with the authorities of the Labour Directorate, demonstrated that prior to the collective bargaining process and once the workers had exercised their prerogative with regard to article 369, clause 2, of the Labour Code, the enterprise proceeded to amend the contracts of the sales staff, reducing commissions and benefits which had already been stipulated in accordance with Ruling No. 4984/217 of 20 November 2004 to that effect. It was decided that this constituted a violation of article 311 of the Labour Code, as it is not possible to reduce benefits of a collective nature through an individual procedure. The new clauses established requirements that were extremely difficult to comply with, leading to a high turnover of workers and subsequently to the withholding of commissions that had accrued and that were not paid, as the worker was no longer linked to the enterprise. Despite this Labour Directorate ruling, Dutch ING proceeded to amend the individual agreements, as stated in the records provided by the trade union.
- 436.** As to the allegation that the ING refuses to recognize and denies affiliation to the Trade Union ING AFP Santa María (Pension Fund Administrator of the holding company) on the part of the workers whose labour contracts it amended, the Government states that, as is explained above, the collective bargaining process which took place in 2003 excluded those workers who had received their severance pay and who had been hired by another firm of the same holding company, making it impossible for a large number of workers belonging to the trade union to participate in collective bargaining, a fact that both the Labour Directorate and the labour tribunals have confirmed in their rulings.
- 437.** As to the alleged unilateral imposition of contracts, in addition to its previous statements on this issue, the Government adds that, through mediation and unofficial steps taken by high-ranking authorities and officials within the service, the Labour Directorate attempted to aid the parties to find alternative solutions to the collective disputes in which they were involved during 2003 and 2004. However, these actions proved to be fruitless, as the Netherlands holding company's policy on commercial decisions affecting human resources management was inflexible. In addition to the preceding information, it should be noted that the Trade Union ING Seguras de Vida amended its statutes in July 2002, changing from an enterprise union to an inter-enterprise union in order to survive when, following the collective bargaining process, the number of members fell from 310 to 35. However, the Netherlands enterprise made a parallel offer consisting of a benefits package, to which was attached the condition that the workers could not be affiliated to the trade union. This measure effectively brought to an end the recruitment to the trade union of employees of the ING enterprises and those who had already joined the union asked to cancel their membership.
- 438.** Finally, the Government states that the leaders of the Trade Union ING Seguros de Vida S.A. were prevented from working for 17 months, at the end of which time they chose to sign an agreement, as is laid out at the beginning of the Government's reply, in order to find a way out of a situation that was having an extremely negative effect, both on their financial situations and on morale, without awaiting the results of the legal cases regarding the allocation of work to trade union leaders set out in the contract and the other issues related to alleged anti-trade union practices.

C. The Committee's conclusions

- 439.** *The Committee notes that the complainant organization presented the following allegations: failure on the part of the transnational enterprise ING Seguros de Vida S.A. to allocate work to trade union leaders of the National Trade Union of Workers of ING Seguros de Vida S.A. (SNTISV); practices used by the enterprise to obstruct the collective*

bargaining process; dismissal of delegates and members of the complainant trade union; pressure applied by the enterprise to force members working at two branches to withdraw from the trade union; non-compliance with collective agreements, in particular, deduction of benefits arising under those agreements; the enterprise's refusal to recognize the affiliation to the Trade Union ING AFP (Pension Fund Administrator) Santa María of workers whose labour contracts were modified by the enterprise, with the result that this trade union is running short of money and its existence is under threat; unilateral imposition of individual contracts.

- 440.** *As to the alleged non-allocation of work to the trade union leaders of the SNTISV, the Committee notes that the complainant organization states that the Labour Inspectorate fined the enterprise and that the Government stresses that: (1) a charge of anti-trade union practices was also brought against the enterprise ING Seguros de Vida S.A.; and (2) that, during the procedure, the three trade union leaders who had not been allocated work concluded an agreement with the enterprise, accepting set sums of money, resigning from their posts and bringing to an end definitively their labour relationship and the case for non-allocation of work to trade union leaders and other anti-trade union practices.*
- 441.** *As to the practices allegedly employed by the enterprise to prevent collective bargaining by workers, both belonging to the SNTISV of Seguros de Vida and the Trade Union ING AFP Santa María in 2003, in that the enterprise refused to participate in the collective bargaining process, the Committee notes the Government's statements, according to which when the complainant trade union submitted a draft collective agreement, the enterprise refused to negotiate with regard to workers' pay conditions, basically made up of commissions. This led to a strike that lasted for four days. Finally, faced with a final offer lowering pay levels, the workers involved chose to have recourse to article 369, clause 2, of the Labour Code (which, according to the complainant, establishes the maintenance of the benefits included in the previous collective agreement for 18 months without readjustment); which, for almost all of the workers, meant having to accept an individual agreement, as they had no recourse to the previous collective agreement.*
- 442.** *As to the collective bargaining process carried out between one of the ING enterprises with the Trade Union ING AFP Santa María, the Committee notes the Government's statements, according to which: (1) the Labour Inspectorate fined the enterprise for excluding certain workers from receiving the benefits included in the previous collective agreement; (2) with the fall in the number of workers involved in the collective bargaining process for 2003 and faced with an offer, the conditions of which were stricter than those of individual agreements, the workers also chose to have recourse to article 369 of the Labour Code.*
- 443.** *In relation to the various allegations connected to collective bargaining, the Committee stresses that while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, 4th edition, para. 817]. The Committee requests the Government to take measures to ensure that in the future the ING Seguros de Vida S.A. and AFP Santa María respects this principle and abstains from employing anti-trade union practices such as those verified by the Labour Inspectorate.*
- 444.** *With regard to the dismissal of delegates and members of the SNTISV subsequent to the 2003 collective bargaining process, the Committee notes that the complainant organization has not mentioned the number or names of those dismissed, or the reasons given by the enterprise for the dismissals, nor, as pointed out by the Government, if judicial appeals were lodged. The Committee invites the complainant organization to*

communicate this information regarding the number of individuals dismissed and any facts that may indicate that the dismissals are linked to the exercise of trade union rights.

- 445.** *As to the alleged pressure for workers to cease membership of the SNTISV, the Committee notes that the Government states that the judicial authority fined the enterprise ten Monthly Tax Units (MTU) for this offence (adjusted according to the cost-of-living index). The Committee deplores the pressure of an anti-trade union nature verified by the judicial authority and requests the Government to take the measures necessary to ensure that the enterprise ING Seguros de Vida S.A. abstains from such practices, as well as from offering benefit packages to workers in return for not becoming affiliated to the trade union, as stated by the Government. The Committee also deplores the fact that these practices led to members feeling compelled to leave the trade union, as stated by the Government.*
- 446.** *As to the enterprise's alleged failure to comply with the collective agreements, the Committee notes the Government's statements that: (1) despite the terms of article 369 (which establishes the maintenance of benefits included under collective agreements for 18 months without readjustment when no other agreement has been negotiated at the end of their period of validity), the enterprise ING Seguros de Vida amended the individual agreements, lowering previously stipulated commissions and benefits of workers, in violation of article 311 of the Labour Code (according to the expert ruling of the Ministry of Labour), as collective benefits may not be reduced through the use of individual contracts; and (2) the new clauses of the individual agreements established requirements that were extremely difficult to comply with, leading to a high rotation of workers (between the abovementioned enterprises) and subsequently the withholding of commissions that had accrued and that were then not paid, as the worker was no longer linked to the enterprise. The Committee requests the Government to take the necessary measures to ensure that the enterprise ING Seguros de Vida respects the legislation and the collective agreement which was extended for 18 months in the light of article 369 of the Labour Code.*
- 447.** *As to the AFP Santa María enterprise's alleged refusal to recognize as members of the Trade Union ING AFP Santa María those workers whose labour agreements were amended by the enterprise, the Committee notes that according to the Government: (1) the collective bargaining process which took place in 2003 excluded those workers who had been released from their contracts and who had been hired by another firm of the same holding company; and (2) the Labour Directorate and the tribunals have confirmed this fact through various rulings. The Committee believes that the situation described constitutes an abuse of right and requests the Government to take the measures necessary to prevent the enterprise from having recourse to anti-trade union practices in the future.*
- 448.** *The Committee expresses its concern in observing the numerous anti-trade union practices ongoing within the ING Seguros de Vida S.A. and AFP Santa María enterprises, which were verified by the administrative and judicial authorities and requests the Government to take the necessary measures to ensure that Conventions Nos. 87 and 98 are fully respected within the abovementioned enterprises.*
- 449.** *Finally, the Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, on the questions at issue.*

The Committee's recommendations

- 450.** *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 expresses its concern in observing the numerous anti-trade union practices ongoing within the ING Seguros de Vida S.A. and AFP Santa María enterprises, which were verified by the administrative and judicial authorities and requests the Government to take the necessary measures to ensure that Conventions Nos. 87 and 98 are fully respected within the abovementioned enterprises.*
 - (b) *As to the practices allegedly employed by the enterprise to prevent collective bargaining by workers, belonging both to the National Trade Union of Workers of ING Seguros de Vida S.A. (SNTISV) and the Trade Union ING AFP Santa María in 2003, in that the enterprise refused to participate in the collective bargaining process, the Committee highlights the principle that, while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement. The Committee requests the Government to take measures to ensure that in the future the ING Seguros de Vida S.A. and AFP Santa María enterprises respect this principle and abstain from employing anti-trade union practices such as those verified by the Labour Inspectorate.*
 - (c) *With regard to the dismissal of delegates and members of the SNTISV subsequent to the 2003 collective bargaining process, the Committee invites the complainant organization to communicate any information regarding the number of individuals dismissed and any facts that may indicate that the dismissals are linked to the exercise of trade union rights.*
 - (d) *As to the alleged pressure for workers to withdraw from the SNTISV, the Committee deplores the pressure of an anti-trade union nature verified by the judicial authority and requests the Government to take the measures necessary to ensure that the enterprise ING Seguros de Vida S.A. abstains from such practices, as well as from offering benefit packages to workers in return for not joining the trade union, as stated by the Government. The Committee also deplores the fact that these practices led to the workers feeling compelled to leave the trade union.*
 - (e) *As to the enterprise's alleged failure to comply with the collective agreements, the Committee requests the Government to take the necessary measures to ensure that the ING Seguros de Vida S.A. respects the legislation and the collective agreement which was extended for 18 months in light of article 369 of the Labour Code.*
 - (f) *As to the enterprise's alleged refusal to recognize as members of the Trade Union ING AFP Santa María those workers whose labour agreements were amended by the enterprise and excluded them from the scope of the collective bargaining process, the Committee notes that these facts were verified by the judicial authority and requests the Government to take the necessary measures to prevent the enterprise from having recourse to anti-trade union practices in the future.*
 - (g) *The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal*

their views, as well as those of the enterprises concerned, on the questions at issue.

CASE NO. 2189

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

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

— the International Confederation of Free Trade Unions (ICFTU) and
— the International Metalworkers' Federation (IMF)

Allegations: The complainants allege the use of repressive measures including threats, intimidation, intervention by security forces, beatings, detentions, arrests and other mistreatment meted out to leaders, elected representatives and members of independent workers' organizations at the Ferrous Alloy Factory (FAF) in Liaoning Province and the Daqing Petroleum Company in Heilongjiang Province, as well as violent police intervention in a workers' demonstration at Guangyuan Textile Factory and sentencing of workers rights' advocates in Sichuan Province. Finally, the complainants allege the detention, arrest and mistreatment in Shanxi Province of an independent labour activist for trying to set up a federation for retired workers

451. The Committee last examined the substance of this case at its March 2004 meeting when it presented an interim report to the Governing Body [see 333rd Report, paras. 363-387, approved by the Governing Body at its 289th Session].
452. The International Confederation of Free Trade Unions (ICFTU) transmitted additional information in communications dated 5 March and 27 April 2004. The Government furnished new observations in a communication dated 8 September 2004.
453. China has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

454. At its March 2004 session, the Governing Body approved the following recommendations in the light of the Committee's interim conclusions [see 333rd Report, para. 387]:
 - (a) Deploring the serious allegations of blatant disrespect for due process in respect of the trials of Yao Fuxin and Xiao Yunliang, the Committee must emphasize that detained trade unionists, like anyone else, should benefit from normal judicial proceedings and

have the right to due process, in particular, the right to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing and the right to a prompt trial by an impartial and independent judicial authority.

- (b) The Committee requests the Government to provide a copy of the court judgement in the case of subversion brought against Yao Fuxin and Xiao Yunliang, as well as the appeal heard by the Higher People's Court of Liaoning Province and any additional information relevant to the guarantees of due process afforded in this case.
- (c) The Committee calls upon the Government to ensure that Yao Fuxin receives all necessary medical attention and treatment as a matter of urgency.
- (d) The Committee once again strongly urges the Government to take the necessary measures for the immediate release of Yao Fuxin and Xiao Yunliang and requests the Government to keep it informed of all measures taken in this respect.
- (e) The Committee once again requests the Government to institute the independent investigations requested in respect of the following pending allegations and to provide all detailed information called for in respect of the following matters:
 - (i) to institute an impartial and independent investigation into the allegations of violent police intervention in respect of the demonstrations at FAF and into the allegations that Gu Baoshu was beaten during his brief detention;
 - (ii) to provide information on the whereabouts of Wang Dawei;
 - (iii) to reply specifically to the allegations that representatives of the PAB Retrenched Workers' Provisional Union Committee and some 60 other workers were detained on 11 March 2002 and whether any of these individuals are still being detained;
 - (iv) to provide detailed information on the sentencing of two democratic opposition activists, Hu Mingjun and Wang Sen (and possibly Zheng Yongliang), who were reportedly sentenced to heavy prison terms for acting on behalf of the organizing workers; and
 - (v) to provide detailed information on the detention and alleged mistreatment of the independent labour activist, Di Tiangu.
- (f) The Committee requests the Government to transmit its observations on the recent allegations made by the ICFTU in its communication dated 5 March 2004.
- (g) In light of the numerous outstanding requests for information and action, and convinced that the development of free and independent trade unions and employers' organizations is indispensable for social dialogue and to enable a government to confront its social and economic problems and resolve them in the best interests of the workers and the nation, the Committee once again strongly urges the Government to respond positively to its previous suggestion for a direct contacts mission.

B. The complainants' additional allegations

- 455.** In communications dated 5 March and 27 April 2004, the ICFTU stated that at least nine workers from the Tieshu Textile Factory in Suizhou City (Hubei) were arrested on charges of "disturbing public order" after a demonstration staged on 8 February 2004 by some 1,200 workers at the climax of a 15-month peaceful campaign by the textile workers to recover more than 200 million yuan in back wages, redundancy payments, share options and other entitlements owed to them by the bankrupt factory. The campaign included a legal appeal, which the Hubei People's High Court rejected on 5 June 2003. According to the ICFTU, a central demand of the workers was for the Government to launch an inquiry into the charge that management corruption had contributed to bankruptcy. Hundreds of officers from the People's Armed Police violently dispersed the protest.

- 456.** According to the ICFTU, the detained and charged workers were Wang Hanwu, Zhu Guo, Chen Kehal, Zhao Yong, Yang Yongcal, Wang Hanwu, Sheng Bing, Wei Yiming and Hu Wenzhong.
- 457.** Chen Kehal and Zhao Yong, held at the Suizhou No. 1 Detention Centre, had been tried under “summary procedures”, an abbreviated form of trial in which defendants have reduced rights to legal defence in cases where the applicable sentence is no more than three years of imprisonment. The court’s verdict had not been announced at the time of the communication. The Suizhou Attorney-General stated, according to the ICFTU, that on 8 February Chen Kehal was one of “more than 1,000” laid-off Tieshu Textile Factory workers who had forced their way into the factory to prevent a new company (set up in the wake of the original factory’s bankruptcy) from beginning its first day of operations there. His “offences” were officially described as being “serious”. Zhao Yong was said to have participated in the 8 February protest march that went from the gates of the former Tieshu Textile Factory into the city centre, and from there to the main railway line, which the workers proceeded to block for several hours. The only evidence offered to indicate why Zhao – out of over 1,000 workers – was one of those singled out for trial was that he was alleged to have stated during the march: “There is an alley here; it leads up to the railway line.”
- 458.** Zhu Guo and Yang Yongcal, remained in custody and were expected to be tried on similar criminal charges.
- 459.** Furthermore, the ICFTU stated that four other Tieshu Textile Factory workers who were detained around the same time, namely, Wang Hanwu, Wei Yiming, Sheng Bing and Hu Wenzhong, had been released at the time of the communication. A fifth detainee, a woman named Chen Xiuhua was sent home by the police in late February 2004 because of illness. According to the ICFTU, at least four of these five workers had been given terms of “re-education through labour” – an administrative punishment imposed by the police which bypasses the criminal justice system. Wang Hanwu had been sentenced to 27 months of re-education through labour, Sheng Bing to 21 months, Wei Yiming to 18 months and Chen Xiuhua to a one-year term. It was unclear whether or not Hu Wenzhong had also been sentenced to re-education through labour prior to his release.
- 460.** The ICFTU added that contrary to due process, the Suizhou authorities reportedly failed to withdraw the formal charges against those released and did not provide documents certifying that their re-education through labour sentences had been revoked. Technically, this meant that the door remained open for any of them to be re-detained or criminally prosecuted at any time. In particular, Wang Hanwu was released although he still had a punishment of 27 months’ re-education through labour hanging over him. Should he continue to take part in any protests, he was likely to have to serve this sentence.

C. The Government’s reply

- 461.** In a communication dated 8 September 2004, the Government indicated that, despite several detailed responses which had already been sent to the Committee, another investigation was conducted pursuant to the conclusions and recommendations approved by the Governing Body at its 289th Session in March 2004. The investigation included visits to the Ministry of Public Security, the Ministry of Justice, the Supreme Court and other relevant locations. The Government provided some supplementary information that was obtained through the investigation.

Health conditions of Yao Fuxin and Xiao Yunliang under imprisonment

- 462.** The Government indicated that Yao Fuxin, convicted of subversion, was sentenced to a seven-year term by the Intermediary People's Court of Liaoyang City, Liaoning Province, on 25 June 2003. He was now serving his term at the No. 2 Lingyuan Prison of Liaoning Province (from 17 March 2002 to 16 March 2009). The record of the health check carried out at his entry into the prison showed that he already suffered from various chronic health problems, which the Government listed. His health condition showed marked improvement after treatment.
- 463.** Xiao Yunliang, convicted of subversion, was sentenced to a four-year term by the Intermediary People's Court of Liaoyang City, Liaoning Province, on 25 June 2003. He was now serving his term at the No. 2 Shenyang Prison of Liaoning Province (from 20 March 2002 to 19 March 2006). The record of the health check carried out when he entered the prison showed that he already had certain problems, which the Government listed. Upon timely treatment, certain symptoms were removed.
- 464.** According to the Government, Yao and Xiao enjoyed the same rights of health care as any other prisoner. The prisons concerned conducted a timely health check and gave professional treatment to the chronic diseases that the two prisoners had when they arrived at their respective prisons. On the question of guaranteeing medical treatment for prisoners, article 54 of China's Prison Law stipulated: "Prisons should be equipped with medical and sanitary facilities and establish a system for healthy living. The medical and health concerns of the prisons should be part and parcel of the health promotion and epidemic prevention planning of the locality where they are situated." The prisoners enjoy medical treatment free of charge and receive regular health checks. Their illnesses can be treated in a timely manner. Those conforming to the relevant regulations can be released on bail for medical treatment.

Incident of the Iron Tree Group, Suizhou City, Hubei Province

- 465.** The Government indicated that the Iron Tree Group in Suizhou City, Hubei Province, used to be a large-scale state-owned enterprise whose main activities included textile, printing and dyeing and garment manufacturing. For a long period since 1997, the enterprise had fallen into a state of continued stoppage and semi-stoppage. Its debt surpassed its assets by manifold. It was declared legally bankrupt in December 2002. On 8 February 2004, the newly formed Iron Tree Corporation with a reformed structure was to officially begin production. On the morning of that day, about 1,000 ex-workers of the Iron Tree Group attempted to sabotage the opening for production of the new enterprise. They harboured discontent with the process of bankruptcy of the old enterprise and the restructuring of the new enterprise, which involved the issues of restructuring compensation and the loss of employment by some workers. These ex-workers broke into the workshops and disrupted production. They further mobbed the police on duty, wounding the police as well as the government officials who had arrived to mediate the conflict. Thereafter, they barricaded highways and railways, completely cutting off transportation. The incident was subsequently settled to the satisfaction of all sides, thanks to the mediation of the local government and the relevant departments.
- 466.** Wang Hanwu, Zhu Guo, Wei Yiming, Sheng Bing and Chen Xiuhua were all ex-workers of the old Iron Tree Group of Suizhou. According to the Government, they had all committed unlawful acts during the incident and each of them had been dealt with by the relevant judiciary according to their respective crimes. The actions of Wang Hanwu constituted the crime of inciting the masses for the purposes of disrupting public order and

transportation. He was detained by the Public Security Bureau of Suizhou City, and was subsequently released. The actions of Zhu Guo constituted the crime of inciting the masses for the purposes of disrupting public order and transportation and was, according to article 291 of the Criminal Law of the People's Republic of China, sentenced to a one-year term by the People's Court of the Zengdu District of Suizhou City on 28 June 2004. According to article 19 of the Regulations of the People's Republic of China for Public Security Sanctions, the Public Security Bureau of Suizhou City gave Wei Yiming and Sheng Bing six days of administrative detention and subsequently released them. It gave Chen Xiuhua seven days of administrative detention and subsequently released her.

D. The Committee's conclusions

- 467.** *In its interim report, the Committee had once again requested the Government to institute independent investigations in respect of allegations concerning: violent police intervention in respect of demonstrations at the Ferrous Alloy Factory (FAF); the beating of Gu Baoshu during his brief detention; the whereabouts of Wang Dawei; the detention of representatives of the PAB Retrenched Workers' Provisional Union Committee and some 60 other workers on 11 March 2002; the sentencing of Hu Mingjun and Wang Sen (and possibly Zheng Yongliang); the detention and alleged mistreatment of the independent labour activist, Di Tiangui. It had also requested the Government to take the necessary measures for the immediate release of Yao Fuxin and Xiao Yunliang, to provide a copy of the court judgement in the case of subversion brought against them, as well as the appeal heard by the Higher People's Court of Liaoning Province, and to ensure that Yao Fuxin received all necessary medical attention and treatment as a matter of urgency.*
- 468.** *With regard to the health condition of Yao Fuxin and Xiao Yunliang under imprisonment, the Committee notes that the Government indicated that both underwent medical examinations when they entered prison and were found to suffer from various chronic illnesses, which the Government listed. They were given professional treatment in their respective prisons (the Lingyuan Prison of Liaoning Province for Yao Fuxin and the Shenyang Prison of Liaoning Province for Xiao Yunliang). According to the Government, Yao Fuxin's health condition showed marked improvement. As for Xiao Yunliang, certain symptoms were removed. The Government also indicated that both Yao and Xiao enjoyed the same rights of health care as any other prisoner. The prisoners receive regular health checks and their illnesses can be treated in a timely manner. Those conforming to the relevant regulations can be released on bail for medical treatment.*
- 469.** *The Committee requests the Government to keep it informed of the evolution of the state of health of Yao Fuxin and Xiao Yunliang, as well as their conditions of detention and the medical treatment provided to them within the prison. Noting the Government's statement that those conforming to the relevant regulations can be released on bail for medical treatment as well as the list of important chronic illnesses from which both individuals were found to suffer, the Committee requests the Government to take the necessary measures to release Yao Fuxin and Xiao Yunliang so that they can receive appropriate medical treatment.*
- 470.** *The Committee notes with regret that the Government has not provided information with respect to the Committee's previous request for the copy of the court judgement in the case of subversion brought against Yao Fuxin and Xiao Yunliang, as well as the appeal heard by the Higher People's Court of Liaoning Province. The Committee must therefore recall that in its previous examinations it had noted the Government's indication that the events fell within the context of a labour dispute and had requested the Government to drop all charges relating to terrorism, sabotage and subversion. Moreover, noting that Yao Fuxin and Xiao Yunliang were arrested initially simply on charges of illegal demonstration that were transformed nine months later into charges of subversion, the Committee had*

deplored the fact that they received a trial that lasted all of one day, as well as the serious allegations of blatant disrespect for due process in respect of their trials [see 333rd Report, paras. 380-382]. The Committee therefore requests the Government once again to transmit the previously requested copy of the court judgement in the case of subversion brought against Yao Fuxin and Xiao Yunliang, as well as the appeal heard by the Higher People's Court of Liaoning Province and any additional information relevant to the due process guarantees afforded in this case.

- 471.** *In the absence of the judgements requested in the case of Yao Fuxin and Xiao Yunliang, the Committee emphasizes that when it requests a government to furnish judgements in judicial proceedings, such a request does not reflect in any way on the integrity or independence of the judiciary. The very essence of judicial procedure is that its results are known, and confidence in its impartiality rests on their being known [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 113]. Having no such objective elements available to it to examine whether the sentences against Yao Fuxin and Xiao Yunliang were in no way linked to their trade union activities, the Committee must once again strongly urge the Government to take the necessary measures for their immediate release and to keep it informed of all measures taken in this respect.*
- 472.** *The Committee notes that according to the additional allegations communicated by the ICFTU with regard to an incident in the Iron Tree Group, Suizhou City, Hubei Province, at least nine workers (Wang Hanwu, Zhu Guo, Chen Kehal, Zhao Yong, Yang Yongcal, Wang Hanwu, Sheng Bing, Wei Yiming and Hu Wenzhong) were arrested on 8 February 2004 on charges of disturbing public order after a demonstration staged by some 1,200 workers at the climax of a 15-month peaceful campaign to recover more than 200 million yuan in back wages, redundancy payments, share options and other entitlements owed to them by the bankrupt factory and to have the Government launch an inquiry into charges of management corruption. The ICFTU stated that the protest was violently dispersed by the police; two of the arrested workers (Chen Kehal and Zhao Yong) were tried under summary procedures, an abbreviated form of trial in which defendants have reduced rights to legal defence in cases where the applicable sentence is no more than three years of imprisonment. According to the ICFTU, no convincing reasons were given as to why Chen Kehal and Zhao Yong were singled out for trial among more than 1,000 workers who protested on 8 February 2004. Two more workers (Zhu Guo and Yang Yongcal) remained in custody and were expected to be tried on similar criminal charges.*
- 473.** *The Committee notes that the Government replies to the allegations by indicating that the Iron Tree Group in Suizhou City, Hubei Province, used to be a large-scale state-owned enterprise which had fallen into a state of continued stoppage and semi-stoppage since 1997 and was declared legally bankrupt in December 2002. On 8 February 2004, when the newly formed Iron Tree Corporation was to officially begin production with a reformed structure, about 1,000 ex-workers of the company attempted to sabotage the opening for production of the new enterprise, harbouring discontent due to the issues of restructuring compensation and the loss of employment by some workers. The ex-workers broke into the workshops disrupting production and mobbed the police on duty, wounding the police as well as the government officials who had arrived to mediate the conflict. Thereafter, they barricaded highways and railways, completely cutting off transportation. The incident was subsequently settled to the satisfaction of all sides thanks to the mediation of the local government and the relevant departments. According to the Government, Zhu Guo, who was an ex-worker in the old Iron Tree Group of Suizhou, committed the crime of inciting the masses for the purposes of disrupting public order and transportation during the incident of the Iron Tree Group. He was sentenced to a one-year term by the People's Court of the Zengdu District of Suizhou City on 28 June 2004 in accordance with article 291 of the Criminal Law of the People's Republic of China.*

- 474.** *The Committee notes that Zhu Guo should soon be released as he appears to have practically served by now the one-year prison sentence which he received on 28 June 2004 for the crime of inciting the masses to disrupt public order and transportation. It also notes that the Government has not provided any information as to: (1) the outcome of the trial of Chen Kehal and Zhao Yong, who were accused of the same criminal offences as Zhu Guo; (2) the allegations that these two individuals were tried under summary procedures; and (3) the allegations that Yang Yongcal remained in custody and was expected to be tried on similar criminal charges as Chen Kehal, Zhao Yong and Zhu Guo for the incident of the Iron Tree Group.*
- 475.** *The Committee observes that there is a contradiction between the complainants' allegations and the Government's reply as to the violent nature of the demonstration of 8 February 2004. According to the complainants, the police dispersed the demonstrators with force. According to the Government, the demonstrators attempted to sabotage the enterprise and mobbed the police, wounding one officer. The Committee recalls that although the right of holding trade union meetings is an essential aspect of trade union rights, the organizations concerned must observe the general provisions relating to public meetings, which are applicable to all. This principle is contained in Article 8 of Convention No. 87, which provides that workers and their organizations, like other persons or organized collectives, shall respect the law of the land. 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. While persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of 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 [see Digest, op. cit., paras. 87, 137 and 140]. The Committee requests the Government to transmit the texts of the judgements concerning Zhu Guo, Chen Kehal and Zhao Yong so that it may be in a position to determine whether their arrests were in no way linked to their exercise of legitimate and peaceful trade union activity.*
- 476.** *As regards the allegations relating to the summary nature of the trial, the Committee recalls that it has always attached great importance to the principle of prompt and fair trial by an independent and impartial judiciary in all cases, including cases in which trade unionists are charged with political or criminal offences. The Committee has considered that, when trade unionists have been sentenced under summary procedures, they have not enjoyed all the safeguards of a normal procedure. Accordingly, the Committee has suggested that it should be possible to review cases of trade unionists sentenced under such procedures so as to ensure that no one is deprived of their liberty without the benefit of a normal procedure before an impartial and independent judicial authority [see Digest, op. cit., paras. 109 and 121]. The Committee requests the Government to communicate information as to whether Zhu Guo, Chen Kehal and Zhao Yong have been released and to provide information as to the nature of their trial and the due process safeguards afforded to them. It also requests the Government to provide its reply concerning the arrest and trial of Yang Yongcal.*

- 477.** *The Committee further notes that, according to the ICFTU, the remaining workers of the nine arrested were given 12- to 27-month sentences of “re-education through labour”, an administrative punishment imposed by the police which bypasses the criminal justice system (Wang Hanwu, Sheng Bing, Wei Yiming, and Chen Xiuhua – possibly also Hu Wenzhong who was detained as well). According to the ICFTU, although all these workers were released after being detained for some time, the Suizhou authorities did not withdraw the formal charges against them and did not provide documents certifying that their re-education through labour sentences had been revoked. This meant technically that they might be detained again or criminally prosecuted at any time. This was particularly the case for Wang Hanwu, who had a 27-month punishment hanging over him and was likely to serve this sentence should he continue to take part in any protests.*
- 478.** *According to the Government, Wang Hanwu, Sheng Bing, Wei Yiming and Chen Xiuhua were all ex-workers in the old Iron Tree Group of Suizhou who had all committed unlawful acts during the incident of the Iron Tree Group. The actions of Wang Hanwu constituted the crime of inciting the masses for the purposes of disrupting public order and transportation. He was detained by the Public Security Bureau of Suizhou City, and was subsequently released. Sheng Bing and Wei Yiming were given six days of administrative detention by the Public Security Bureau of Suizhou City according to article 19 of the Regulations of the People’s Republic of China for Public Security Sanctions. They were subsequently released. Chen Xiuhua was given seven days of administrative detention and was subsequently released.*
- 479.** *The Committee observes from the Government’s response that Wang Hanwu, Sheng Bing, Wei Yiming and Chen Xiuhua were released by the police after an administrative detention. However, the Government has not provided a reply to the ICFTU’s allegations that: (1) these four workers had to serve sentences of “re-education through labour”; (2) they continue to face the prospect of being detained or criminally prosecuted as the Suizhou authorities did not withdraw the formal charges against them and did not provide documents certifying that their re-education through labour sentences had been revoked; and (3) Hu Wenzhong was also detained and might have been subjected to “re-education through labour”.*
- 480.** *The Committee notes that the subjection of workers to the education through labour system without any court judgement is a form of administrative detention which constitutes a clear infringement of basic human rights, the respect of which is essential for the exercise of trade union rights, as pointed out by the International Labour Conference in 1970. The “system of education through labour” with regard to persons who have already been released, constitutes a form of forced labour and administrative detention of people who have not been convicted by the courts and who, in some cases, are not even liable to sanctions imposed by the judicial authorities. This form of detention and forced labour constitutes without any doubt a violation of basic ILO standards which guarantee compliance with human rights and, when applied to people who have engaged in trade union activities, a blatant violation of the principles of freedom of association [see Digest, op. cit., paras. 67 and 68].*
- 481.** *The Committee notes that Wang Hanwu, Sheng Bing, Wei Yiming and Chen Xiuhua were released by the police after an administrative detention and requests the Government to issue appropriate instructions so that the sentences imposed on them are formally revoked and the police authorities refrain in the future from applying the measure of “re-education through labour”, which constitutes forced labour, in response to trade union activities.*

- 482.** *The Committee also requests the Government to transmit its reply to the allegations concerning the temporary administrative detention of Hu Wenzhong.*
- 483.** *More generally, the Committee notes with grave concern that the Iron Tree Group incident bears a striking resemblance to all the other incidents under examination by the Committee in the framework of this case, namely the Ferrous Alloy Factory (FAF) incident in Liaoyang, the Guangyan Textile Factory incident in Sichuan Province and the Petrochina Petroleum Administration Bureau (PAB) incident in Daqing (Heilongjiang Province). All these incidents concerned workers' claims for financial compensation, re-employment and investigation of management corruption pursuant to a factory's bankruptcy or restructuring. The Committee further notes with deep regret that all these incidents were followed by police interventions, arrests, detentions and sometimes long prison sentences against those who participated in the protests. Thus, nine workers were allegedly arrested and imprisoned or subjected to administrative detention and "re-education through labour" following the Iron Tree Group incident (Zhu Guo, Chen Kehal, Zhao Yong, Yang Yongcal, Wang Hanwu, Sheng Bing, Wei Yiming and Chen Xiuhua – possibly also Hu Wenzhong); Yao Fuxin and Xiao Yunliang were arrested and received heavy prison sentences for subversion following the FAF incident in Liaoyang (Gu Baoshu was also allegedly beaten during his brief detention and Wang Dawei disappeared following his interventions in respect of the FAF struggle); Hu Mingjun, Wang Sen and possibly Zheng Yongliang were sentenced to heavy prison terms following the Guangyan Textile Factory incident in Sichuan Province; finally, the representatives of the PAB Retrenched Workers' Provisional Union Committee and some 60 other workers involved in protest actions in Daqing City as well as an unidentified 50-year-old woman and a retired worker, Li Yan, were detained following the PAB incident in Daqing (Heilongjiang Province).*
- 484.** *The Committee deeply regrets the massive arrests and imprisonments which repeatedly took place in the contexts of the above labour disputes. The Committee recalls once again that the arrest of trade unionists may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities, and that the detention of trade union leaders or members for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular [see **Digest**, op. cit., paras. 71 and 76].*
- 485.** *The Committee must also reiterate 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. Development needs should not justify maintaining the entire trade union movement of a country in an irregular legal situation, thereby preventing the workers from exercising their trade union rights, as well as preventing organizations from carrying out their normal activities. A balanced economic and social development requires the existence of strong and independent organizations which can participate in the process of development [see **Digest**, op. cit., paras. 24 and 25].*
- 486.** *The Committee finally notes with regret that the Government has provided no additional information in reply to the Committee's previous recommendations concerning the independent investigations requested on the following issues: violent police intervention in respect of the demonstrations at FAF; allegations that Gu Baoshu was beaten during his brief detention; the whereabouts of Wang Dawei; allegations that representatives of the PAB Retrenched Workers' Provisional Union Committee and some 60 other workers were detained on 11 March 2002; the sentencing of two democratic opposition activists, Hu Mingjun and Wang Sen (and possibly Zheng Yongliang) to heavy prison terms for acting on behalf of the organizing workers; and the detention and mistreatment of the*

independent labour activist, Di Tiangui. In these circumstances, the Committee can only urge the Government to refrain in future from addressing issues which are essentially of a labour nature through violent police interventions, arrests, detentions and long prison sentences. It requests the Government to keep it informed of the evolution regarding the above allegations.

- 487.** *In light of the numerous outstanding requests for information and action, and convinced that the development of free and independent trade unions and employers' organizations is indispensable for social dialogue and to enable a government to confront its social and economic problems and resolve them in the best interests of the workers and the nation, the Committee once again strongly urges the Government to respond positively to its previous suggestion for a direct contacts mission.*

The Committee's recommendations

- 488.** *In the light of its foregoing conclusions, the Committee requests the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government to keep it informed of the evolution of the state of health of Yao Fuxin and Xiao Yunliang as well as their conditions of detention and the medical treatment provided to them within the prison. Noting the Government's statement that those conforming to the relevant regulations can be released on bail for medical treatment, as well as the list of important chronic illnesses from which both individuals were found to suffer, the Committee requests the Government to take the necessary measures to release Yao Fuxin and Xiao Yunliang so that they can receive appropriate medical treatment.*
 - (b) *The Committee requests the Government once again to transmit the previously requested copy of the court judgement in the case of subversion brought against Yao Fuxin and Xiao Yunliang, as well as the appeal heard by the Higher People's Court of Liaoning Province and any additional information relevant to the due process guarantees afforded in this case.*
 - (c) *Having no objective elements available to it to examine whether the sentences against Yao Fuxin and Xiao Yunliang were in no way linked to their trade union activities, the Committee must once again strongly urge the Government to take the necessary measures for their immediate release and to keep it informed of all measures taken in this respect.*
 - (d) *The Committee requests the Government to transmit the texts of the judgements concerning Zhu Guo, Chen Kehal and Zhao Yong so that it may be in a position to determine whether their arrests were in no way linked to their exercise of legitimate and peaceful trade union activity.*
 - (e) *The Committee requests the Government to communicate information as to whether Zhu Guo, Chen Kehal and Zhao Yong have been released and to provide information as to the nature of their trial and the due process safeguards afforded to them. It also requests the Government to provide its reply concerning the arrest and trial of Yang Yongcal and the temporary administrative detention of Hu Wenzhong.*

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- (f) *The Committee notes that Wang Hanwu, Sheng Bing, Wei Yiming and Chen Xiuhua were released by the police after an administrative detention and requests the Government to issue appropriate instructions so that the sentences imposed on them are formally revoked and the police authorities refrain in future from applying the measure of “re-education through labour”, which constitutes forced labour, in response to trade union activities.*
 - (g) *The Committee notes that all the incidents under examination in the framework of this case concerned workers’ claims for financial compensation, re-employment and investigation of management corruption pursuant to a factory’s bankruptcy or restructuring, and that the Government has provided no additional information in reply to the Committee’s previous recommendations concerning the independent investigations requested on the following issues: violent police intervention in respect of the demonstrations at FAF; allegations that Gu Baoshu was beaten during his brief detention; the whereabouts of Wang Dawei; allegations that representatives of the PAB Retrenched Workers’ Provisional Union Committee and some 60 other workers were detained on 11 March 2002; the sentencing of two democratic opposition activists, Hu Mingjun and Wang Sen (and possibly Zheng Yongliang) to heavy prison terms for acting on behalf of the organizing workers; and the detention and mistreatment of the independent labour activist, Di Tiangui. In these circumstances, the Committee can only urge the Government to refrain in future from addressing issues which are essentially of a labour nature through violent police interventions, arrests, detentions and long prison sentences. It requests the Government to keep it informed of the evolution regarding the allegations which are still pending.*
 - (h) *In light of the numerous outstanding requests for information and action, and convinced that the development of free and independent trade unions and employers’ organizations is indispensable for social dialogue and to enable a government to confront its social and economic problems and resolve them in the best interests of the workers and the nation, the Committee once again strongly urges the Government to respond positively to its previous suggestion for a direct contacts mission.*

CASE NO. 1787

INTERIM REPORT

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

- the International Confederation of Free Trade Unions (ICFTU)
- the Latin American Central of Workers (CLAT)
- the World Federation of Trade Unions (WFTU)
- the Single Confederation of Workers of Colombia (CUT)
- the General Confederation of Democratic Workers (CGTD)
- the Confederation of Workers of Colombia (CTC)
- the Trade Union Association of Civil Servants of the Ministry of Defence, Armed Forces, National Police and Related Bodies (ASODEFENSA)
- the Petroleum Industry Workers' Trade Union (USO)
- the World Confederation of Labour (WCL) and others

***Allegations: Murders and other acts of violence
against trade union officials and members***

489. The Committee last examined this case at its November 2004 meeting [see 335th Report, paras. 680-731]. The International Confederation of Free Trade Unions (ICFTU) sent new allegations in communications dated 2 and 4 November 2004; the World Federation of Trade Unions (WFTU) in communications dated 3 and 15 March 2005.
490. The Government sent its observations in communications dated 28 September, 5 October and 3, 17 and 23 November 2004 and 2 February and 8 and 16 March, 20 April and 4 May 2005.
491. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

492. At its November 2004 meeting, the Committee made the following recommendations on the allegations that were still pending, which for the most part referred to acts of violence against trade union members [see 335th Report, para. 731]:
 - (a) While noting that this time the Government provided more details on the allegations, the Committee expresses its deep concern about the extreme gravity of the situation and deeply deplores the fact that allegations have been submitted of 42 new murders of union officials and members, 17 threats, three abductions and disappearances, 11 arrests and two forced relocations. The Committee reiterates that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed.
 - (b) The Committee notes the Government's information regarding the protection measures provided for the trade union organizations SINALTRAINAL, and ASODEFENSA and for union officials of RISARALDA. The Committee requests the Government to continue keeping it informed of the protection measures and security schemes in force and those adopted in the future in respect of other unions and other departments or regions. The Committee must reiterate its request that the Government take particular

account of those trade unions and regions to which it referred in previous examinations of the case, such as the health services and the Barrancabermeja Gas Company, as well as municipal administrations (municipality of Barrancabermeja) and department administrations (departments of Valle del Cauca and Antioquia). The Committee requests the Government to provide, as a matter of high priority, information on all these matters.

- (c) The Committee notes with the utmost interest that the Government has provided detailed information on the Working Plan of the Inter-Institutional Commission for the Prevention of Violations and the Protection of Workers' Rights and requests it to continue keeping it informed in detail of developments in the work of the said Commission.
- (d) Concerning the investigations into acts of violence against union officials and members that are currently under way, the Committee requests the Government to continue making every possible effort to initiate investigations into all the alleged acts of violence up to March 2004, into those regarding which it has not reported the initiation of investigations or judicial proceedings (Appendix I), and into those listed in the section "New allegations" in the present report, on which it has not yet reported, and to continue sending its observations on the progress made in the investigations already begun on which the Government has already reported.
- (e) In respect of the extremely serious situation that prevails in respect of impunity, the Committee finds itself obliged to reiterate the conclusions it reached in its previous examinations of the case, namely, that the lack of investigations in some cases, the limited progress in the investigations already begun in other cases and the total lack of convictions underscore the prevailing state of impunity, which inevitably contributes to the climate of violence affecting all sectors of society and the destruction of the trade union movement. The Committee once again urges the Government in the strongest terms to take the necessary measures to put an end to the intolerable situation of impunity and to punish effectively all those responsible.
- (f) Regarding the trade union status of certain victims and allegations in respect of which information could not be provided because of insufficient data, the Committee observes that once again the complainant organizations have not provided information concerning the trade union status of certain victims, denied by the Government in the last examination of the case, and again urges them to provide all information relating to the trade union status of the victims, so that the Government can institute the relevant investigations concerning the victims listed in both the previous and the present examination of the case.
- (g) As regards those cases where the Government states that the data supplied by the complainants is insufficient to identify the Prosecutor's Offices conducting the investigations, the Committee must again strongly remind the complainant organizations of their duty to substantiate their allegations to the Committee in all cases where so requested, observes that to date the complainants have not provided any additional information and once again urges them to do everything in their power to provide the Government with the necessary information concerning the victims on whom the Government claims that it does not have sufficient data, listed in the 333rd Report as well as in the present report, so that the Government can state whether investigations have been instituted into these allegations and what stage they have reached. In turn, the Committee urges the Government to continue to endeavour to send all available information concerning the allegations made.
- (h) Regarding the allegations submitted by FECODE concerning threatening telephone calls, harassment by armed persons, public statements designating them as military targets, warnings to resign their union office, raids on their homes, warnings not to take part in union activities and numerous murders, the Committee requests the Government to send its observations without delay.
- (i) The Committee requests the Government to provide its observations on the new allegations of violence against trade unionists transmitted by the complainants.
- (j) The Committee will examine the latest information submitted by the Government when it next examines this case.

B. New allegations

- 493.** In its communication of 2 November 2004, the ICFTU reports that on Saturday, 30 October and Monday, 1 November 2004, the Bogotá “El Dorado” airport immigration authorities deported the following trade union members who were going to participate in the annual coordination meeting for cooperation with the Colombian trade union movement, organized by the international trade union federations and the ICFTU, which was planned for 2 November:
- Víctor Báez Mosqueira, General Secretary of ICFTU/ORIT;
 - Rodolfo Benítez, Regional Secretary of Union Network International (UNI);
 - Antonio Rodríguez Fritz, Regional Secretary of the International Transport Workers’ Federation (ITF); and
 - Cameron Duncan, Regional Secretary of Public Services International (PSI).
- 494.** The ICFTU adds that trade union delegates from the United Kingdom, Spain and Ireland who were due to participate in the 4th Conference of Working Women of the Single Confederation of Workers of Colombia (CUT) were also questioned upon their arrival and were only authorized to spend 72 hours in the country as opposed to being granted the usual six-month visa. The ICFTU expresses its fear that all these trade union members have been included on a government blacklist.
- 495.** The ICFTU attaches a communication dated 4 November 2004 (also attached by the Government) that was sent by the Government of Colombia in which the Government reiterates its commitment to the defence and respect of trade union rights and the right to organize, and reports that – in a meeting held in the Ministry of External Relations with the participation of those responsible for the consular area, the Director of the Administrative Department of Security and a representative of the Ministry of Social Security, as well as trade union leaders and members of Congress – they discussed what had happened and it was clear that it was due to a narrow interpretation of Decree No. 2107 (2001). It was also made clear that the people whose entry was granted subject to regularization of their migratory status within 72 hours had this restriction lifted by the Immigration Division of the Administrative Department of Security and that those people who were refused entry can come whenever they wish.
- 496.** In its communications of 3 and 15 March 2005, the World Federation of Trade Unions alleges that on 2 March, Rafael Cabarcas Cabarcas, a former member of the national board of directors of the USO, and who is currently working as a USO adviser, Cartagena division, was attacked, and his guard, Andrés Bohórquez, was also injured.
- 497.** The Cali Municipal Enterprises Workers’ Union (SINTRAEMCALI) and the World Federation of Trade Unions (WFTU) sent new allegations in communications dated 21 April and 2 May 2005 respectively. The Committee will examine these allegations at its next meeting.

C. The Government’s reply

- 498.** In its communications dated 28 September, 3, 17 and 23 November 2004 and 2 February, 8 and 16 March and 20 April 2005, the Government indicates that it approached the various trade union organizations to try to obtain information regarding the acts, places and dates of the threats, kidnappings and assaults. The Government adds that the trade union organizations have not as yet replied as to the date and place where the offences took

place, or the type of allegations. The following is a list of all the cases for which no information as to the place, date or type of allegation made has been received.

Trade union organization	Name
ASEDAR	Jaime Carrillo
ASEDAR	Celedonio Jaimes
ASEDAR	Francisco Rojas
USO	Roberto Vecino
SINTRAMUNICIPIO	
Bugalagrande	Yesid Escobar
ASTDEMP	Martha Cecilia Díaz
CUT, Saravena	Alonso Campiño
Union of Workers at Saravena Town Hall	William Jiménez
CUT, Saravena	Orlando Pérez
SINTRAENAL	Blanca Segura
Construction Workers' Union	Fabio Gómez
Union of Workers at Saravena Town Hall	Carlos Manuel Castro Pérez
Construction Workers' Union	Eliseo Duran
Saravena Hospital Workers' Union	José López
SUTEV	Ever Cuadros
ASPU	José Moises Luna
SINTRAMINENERGETICA	Jimy Rubio
SINDEAGRICULTORES	Urdí Robles
SINDEAGRICULTORES	Ney Medrano
SINDEAGRICULTORES	Eliécer Flórez
SINDEAGRICULTORES	Apolinar Herrera
Quindío Agricultural Workers' Union	Policarpo Padilla
SINTRAGRIM	Víctor Oime
ACA	Nubia Vega
SINDIAGRICULTORES	Fanine Reyes
CUT, ARAUCA	Samuel Morales
ASEDAR	María Raquel Castro
SINTRAGRICOLAS, Ponedora	Víctor Jiménez
SINTRAMINENERGETICA	David Vergara
SINTRAMINENERGETICA	Seth Cure
ADEA	Luis Carlos Herrera
SINTRAPALMA	Julio Arteaga
SINTRAPALMA	Pablo Vargas
SINTRAPALMA	Alirio Rincón

Trade union organization	Name
SINTRAPALMA	Rauberto Rodríguez
SINTRANERGETICA	Alfredo Quesada
SINTRAUNICOL	Estiven García
SINTRAUNICOL	Carlos González
SINTRAUNICOL	José Luis Paez
SINTRAUNICOL	Carmelo José Pérez
SINTRAUNICOL	José Munera
SINTRAUNICOL	Antonio Flórez
SINTRAUNICOL	Luis Otalvaro
SINTRAUNICOL	Elizabeth Montoya
SINTRAUNICOL	Norberto Moreno
SINTRAUNICOL	Bessi Pertuz
SINTRAUNICOL	Luis Ernesto Rodríguez
SINTRAUNICOL	Alvaro Vélez
SINTRAUNICOL	Mario José López
SINTRAUNICOL	Alvaro Villamizar
SINTRAUNICOL	Eduardo Camacho
SINTRAUNICOL	Pedro Galeano
SINTRAUNICOL	Ana Milena Cobos
SINTRAINAGRO	Euclides Gómez
SINTRAINAGRO	Guillermo Rivera
ANTHOC	Noemí Quinayas
ANTHOC	María Hermencia Samboni
ANTHOC	Gilberto Martínez
ANTHOC	Carmen Torres
ANTHOC	Alvaro Márquez
ANTHOC	José Meriño
ANTHOC	Angel Salas
ANTHOC	Jesús Alfonso Naranjo
ANTHOC	Mario Nel Mora
SINTRINAL	José Onofre Luna
SINTRINAL	Alfonso Espinoza
SINTRINAL	Rogelio Sánchez
SINTRINAL	Freddy Ocoro
FENSUAGRO	Yorman Rodríguez
FENSUAGRO	Nubia González
FENSUAGRO	Perly Córdoba

Trade union organization	Name
FENSUAGRO	Juan de Jesús Gutiérrez
FENSUAGRO	Adolfo Tique
SINTRAHOSPICLINICAS	Harold García
SINTRAEMCALI	Oscar Figueroa
SINTRAEMCALI	Luis Hernando Rivera
SINTRAEMCALI	Rodrigo Escobar
SINTRAEMCALI	Gustavo Tacuma
SINTRAEMCALI	Luis Hernández

- 499.** As a result, the Government believes it impossible to begin the judicial process to investigate cases that are lacking the most basic information, The Government recalls that the Committee has indicated on a number of occasions that “complaints must be presented in writing, duly signed by a representative of a body entitled to present them and they must be as fully supported as possible by evidence of specific infringements of trade union rights”. As a result, the Government will refrain from responding to these allegations until the complainant organizations provide the information and proof of a trade union rights violation warranting the intervention of the Committee.
- 500.** Regarding certain cases presented as “new allegations”, the Government points out that this is not in fact the case and it has already supplied information. The Government again respectfully but energetically requests that the Freedom of Association Branch take more care in classifying the complaints presented by the trade union organizations and in analysing the elements of proof that back them up. Showing as “new allegations” [see 335th Report, para. 684], situations which are not so as they have already appeared in previous reports, not only confuses the members of the Freedom of Association Committee and the Governing Body as to the true situation of the country, but also contributes to creating the false impression that there have been no improvements made in that situation. The Government deeply deplores that in spite of repeated requests to this effect, the Freedom of Association Branch has not taken the necessary measures to avoid this sort of confusion, which does not contribute to the efforts of the Freedom of Association Committee and the Governing Body to strengthen freedom of association in the country.
- 501.** The cases that have been reported as “new allegations” which are not, are indicated in the following table:

Full name	Report in which it appears for the first time	The Government's reply	Freedom of Association Committee's comments
Espejo Ricardo	333rd as a new allegation	Initially reported as abduction, the body was found later. Ibagué Prosecutor's Office No. 4 Human Rights National Unit, File No. 1893. Investigation at the preliminary stage and active. Was not covered by the protection programme. Had not requested protection. He was not known to have received any threats.	In the 335th Report it records that the Government has stated the case to be at the preliminary and active stage of investigation.
Rodríguez Marco Antonio	333rd as a new allegation	Initially reported as abduction, the body was found later. Ibagué Prosecutor's Office No. 4 Human Rights National Unit, File No. 1893. Investigation at the preliminary stage and active. Was not covered by the protection programme. Had not requested protection. He was not known to have received any threats.	In the 335th Report it records that the Government has stated the case to be at the preliminary and active stage of investigation.
Céspedes José Orlando	333rd as a new allegation	Initially reported as abduction, the body was found later. Ibagué Prosecutor's Office No. 4 Human Rights National Unit, File No. 1893. Investigation at the preliminary stage and active. Was not covered by the protection programme. Had not requested protection. He was not known to have received any threats.	In the 335th Report it records that the Government has stated the case to be at the preliminary and active stage of investigation.
Friás Parada Orlando	333rd as a new allegation	Prosecutor's Office No. 15, Monterrey branch, File No. 2574. Investigation at the preliminary stage.	Did not note the Government's reply.

- 502.** The Government would like to point out that, as on previous occasions, the information diligently submitted by the Government on the state of the ongoing judicial investigations is not always noted. This omission, which is unjustifiable given the zeal with which the Committee is investigating Colombia, does not allow the members of the Governing Body or the international community access to the Committee's report, to duly understand the efforts that the Colombian State is making to investigate and punish those responsible for endangering the lives and the safety of trade union members and leaders.
- 503.** The Government deplores that in those cases where it has drawn attention to the lack of evidence in the judicial investigations confirming that the victim was a trade union member or leader, the Government's reply was distorted, saying that "the Government denies" that they were so. The Government rejects this modus operandi of the Committee and demands that in such cases, in its report, it should at least stick to the exact information submitted by the Government, so as to avoid creating false impressions about the Government's attitude in cases where there is no evidence of trade union activity.
- 504.** The Government demonstrates its disagreement with the recommendations contained in the 335th Report referring to the impunity surrounding the cases related to the murders of trade union members and leaders. As explained at the beginning of this report, the

investigating bodies have begun their investigations, either on their own initiative or following complaints presented by the leaders of the various trade union organizations, as can be seen in the table sent on 28 October 2004 [see 335th Report, para. 691].

- 505.** Now, it is advisable to note that at each stage of the proceedings proof is needed that leads to the solving of the crime, which is why the proceedings are often long, this is no reason to state that impunity is rife in Colombia when trade union members are victims of offences such as murder because, as has been explained, criminal law requires that a trial be completed before a sentence can be given. If stages of the criminal proceedings were forgotten, it would be a violation of the right of Colombian citizens to be judged in full accordance with the proper proceedings, as in article 29 of the Political Constitution on due process.
- 506.** The Government adds that one of the reasons why it cannot always respond in certain cases is that the complainant organizations are not clear about the events that should be investigated (name of the trade union member, trade union post, place and date).
- 507.** The Government sends a list of the ongoing investigations regarding the allegations contained in the “new allegations” section of the 335th Report, paragraph 684, which reads as follows:

- (1) Wilson Rafael Pelufo Arroyo, member of SINTRACOLECHERA, murder, 21 November 2003, Olaya de Barranquilla district, aggravated homicide, illegal carrying of weapons and aggravated theft. Through letter No. 33/undh-dih.0407-mfm. The city's sitting criminal circuit judge's proceedings were remitted so that he could get on with the corresponding distribution and the trial stage has begun.

Authors of the crime: Rodrigo Esteban Benavides Ospina and Arturo Alexander Pinedo Rivadeneira, non-commissioned officers in the National Army, resolution of accusation, police custody.

File No.:	1821
Branch:	national
Investigating authority:	National Unit for Human Rights and International Humanitarian Rights based in Barranquilla
Stage of proceedings:	trial
Current status:	active

- (2) Jhon Jairo Iglesia Salazar, Wilson Quintero, José Céspedes, Ricardo Espejo Galindo, Marco Antonio Rodríguez Moreno, Germán Bernal Baquero and anon., Public Prosecutor, SINTRAAGRITOL, 10 November 2003, Cajamarca, murder, wanted: José Luis.

File No.:	1893
Branch:	national
Investigating authority:	Public Prosecutor No. 9 specialized in UDH
Stage of proceedings:	preliminary
Current status:	active

- (3) José de Jesús Rojas Castañeda, member, ASEM, 3 December 2003, Barrancabermeja, murder.
- File No.: 203453
 Branch: Bucaramanga
 Investigating authority: Eighth Public Prosecutor, Barrancabermeja district
 Stage of proceedings: preliminary
 Current status: active
- (4) Orlando Frías Parada, member, Colombia Workers' Union, 9 December 2003, Villanueva, murder.
- File No.: 2574
 Branch: Santa Rosa de Viterbo
 Investigating authority: Public Prosecutor No. 15, Monterrey Branch
 Stage of proceedings: preliminary
 Current status: active
- (5) Severo Bastos, member, SINTRADIN, 4 December 2003, Villa del Rosario, Cúcuta, murder.
- File No.: 80183
 Branch: Cúcuta
 Investigating authority: Second Public Prosecutor, municipality of los Patios branch
 Stage of proceedings: preliminary
 Current status: active
- (6) Ricardo Barragán Ortega, member of SINTRAEMCALI, Cali Municipal Enterprises Workers' Union, 16 January 2004, Cali, murder.

The victim was with colleagues when intercepted by two motorbikes and shot five times in the head, one of the union members is Carlos William Olave Zamora; samples have been given to Bogotá CTI for final results.

- File No.: 627693
 Branch: Cali
 Investigating authority: Public Prosecutor No. 26, Cali branch
 Stage of proceedings: preliminary
 Current status: active

- (7) Alvaro Granados Rativa, Bogotá branch Vice-President, SUTIMAC – Construction Industry and Materials Workers' Union, 8 February 2004, Cundinamarca, murder.

File No.:	743989
Branch:	Bogotá
Investigating authority:	Public Prosecutor No. 31, branch
Stage of proceedings:	preliminary
Current status:	collecting evidence

- (8) Yesid Hernando Chicangana, member, ASOINCA, 9 February 2004, Santander de Quilichao, murder.

File No.:	14403
Branch:	Popayan
Investigating authority:	Public Prosecutor No. 2, Santander de Quilichao branch
Stage of proceedings:	preliminary
Current status:	collecting evidence

- (9) Janeth del Socorro Vélez Galeano, member, Janeth del Socorro Veles, member, ADIDA, 15 February 2004, Lejanías District, Remedios, murder.

File No.:	4439
Branch:	Medellin
Investigating authority:	Public Prosecutor No. 110, Segovia branch
Stage of proceedings:	preliminary
Current status:	active

- (10) Camilo Arturo Kike Azcarate, Manager, SINTRAGRACO, 24 January 2004, Bugalagrande, murder, Oscar Alonso, detained. Oscar Alonso Rivera Mendoza detained as the motives of the crime appear to be passionate.

File No.:	91550
Branch:	Buga
Investigating authority:	Second Public Prosecutor, Buga branch
Stage of proceedings:	preliminary
Current status:	active

(11) Carlos Raúl Ospina, treasurer of the MERTULUA Union, SINTRAEMSDES, 24 February 2004, Tulúa, murder, case under investigation. In the preliminary proceedings there is no note of his being a member of any trade union and there were no known threats to his life. Carlos Raúl Ospina (in the preliminary reports as James Raúl Ospina).

File No.: 98910
 Branch: Buga
 Investigating authority: Public Prosecutor No. 33, Buga branch
 Stage of proceedings: preliminary
 Current status: collecting evidence

(12) Ernesto Rincón Cárdenas, information and press secretary, SINDIMAESTROS – Boyacá Teachers' Union, 27 January 2004, Caldas, murder.

File No.: 1395
 Branch: Tunja
 Investigating authority: Public Prosecutor No. 25, Chiquinquirá branch
 Stage of proceedings: preliminary
 Current status: active

(13) José Luís Torres Pérez, member, ANTHOC, 4 March 2004, Barranquilla, murder, actions took place in front of Barranquilla Hospital.

File No.: 184081
 Branch: Barranquilla
 Investigating authority: Public Prosecutor No. 12, representative
 Stage of proceedings: preliminary
 Current status: collecting evidence

(14) Rosa Mary Daza Nieto, member of ASOINCA – Cauca Teachers' Association, 15 March 2004, Bolívar, murder.

File No.: 2320
 Branch: Popayán
 Investigating authority: Public Prosecutor, Bolívar branch, Cauca
 Stage of proceedings: preliminary
 Current status: collecting evidence

(15) Hugo Palacios Alvis, member of SINDISENA – National SENA Workers’ Union, 16 March 2004, Vertulia (Sincelejo), murder.

File No.:	43709
Branch:	Sincelejo
Investigating authority:	Public Prosecutor No. 9, Sincelejo branch
Stage of proceedings:	preliminary
Current status:	collecting evidence

(16) Ana Elizabeth Toledo Pubiano, teacher and member of ASEDAR – Arauca Educators’ Association, 18 March 2004, Arauca, murder.

Branch:	Cúcuta
Investigating authority:	TAME’s only branch
Stage of proceedings:	preliminary
Current status:	collecting evidence

(17) Segundo Rafael Vergara Correa, member, SINTRACONTAXCAR – Cartagena Taxi Drivers’ Trade Union, 22 March 2004, Campestre Milagro, murder.

File No.:	142729
Branch:	Cartagena
Investigating authority:	Public Prosecutor No. 9, Cartagena branch
Stage of proceedings:	preliminary
Current status:	collecting evidence

(18) Alexander Parra Díaz, member, SINDIMAESTROS – Boyacá Teachers’ Union, 28 March 2004, Chiquinquirá, murder, case under investigation.

File No.:	68139
Branch:	Tunja
Investigating authority:	Public Prosecutor No. 22, Chiquinquirá branch
Stage of proceedings:	preliminary
Current status:	collecting evidence

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- (19) Juan Javier Giraldo Diosa, member of ADIDA – the Antioquia Teachers' Association, 1 April 2004, Medellín, murder, case under investigation.

File No.: 800867
Branch: Medellín
Investigating authority: Branch Public Prosecutor
Stage of proceedings: preliminary
Current status: collecting evidence

- (20) José García, member of ASEDAR, 12 April 2004, TAME, murder, case under investigation. Based on the information brought by the DNF, in the petition, it was noted in the record of proceedings that the victim was a member of the abovementioned union, there was no written proof of this in the file.

File No.: 86343
Branch: Cúcuta
Investigating authority: Unico, TAME branch
Stage of proceedings: preliminary
Current status: collecting evidence

- (21) Jorge Mario Giraldo Cardona, member of ADIDA, 14 April 2004, Medellín, murder, case under investigation.

File No.: 77950
Branch: Medellín
Investigating authority: Public Prosecutor No. 156, branch
Stage of proceedings: preliminary
Current status: collecting evidence

- (22) Raúl Perea Zúñiga, 14 April 2004, JPCTO delegate, murder, case under investigation. Raúl's murder began proceedings. The Judicial Information System of the Prosecutor's Office is not dealing with the attack on Edgar Perea, Vice-President, it was not reported as such, it is referred to in this investigation.

File No.: 651376
Branch: Cali
Investigating authority: Fiscal 23, branch, JPCTO delegate
Stage of proceedings: preliminary
Current status: active

(23) Carlos Alberto Chicaiza Betancourth, Manager of SINTRAEMSIRVA, 15 April 2004, Cali, murder, case under investigation.

File No.:	650784
Branch:	Cali
Investigating authority:	Public Prosecutor No. 46, Vioda branch
Stage of proceedings:	preliminary
Current status:	collecting evidence

(24) Jesús Fabián Burbano Guerrero, member of USO, 31 May 2004, Mocoa, murder,

File No.:	2611
Branch:	Mocoa
Investigating authority:	Public Prosecutor No. 51, Orito branch
Stage of proceedings:	preliminary
Current status:	active

(25) Luís Alberto Toro Colorado, member of SINALTRADIHITEXCO, 22 June 2004, Bello, Antioquia, murder, case under investigation. Public Prosecutor's Office, Dr. Díaz Muñoz Edelmira, when the body was recovered it was not initially identified.

File No.:	138833
Branch:	Antioquia
Investigating authority:	Public Prosecutor No. 5, Bello branch
Stage of proceedings:	preliminary
Current status:	collecting evidence

(26) Hugo Fernando Castillo Sánchez, ID No. 94506632, 21 years old, and Diana Jimena Zúñiga Urbano, ID No. 31305573, civil servant, DAS and wife, 22 June 2004, Cali, Calle 27, Carrera 31, El Jardín, murder, case under investigation. Inspection of the body carried out by Public Prosecutor No. 71, Acts Nos. 1869, 1870, personal effects of the DAS worker were found (communications radio, Avantel and others). Difficulties in the investigation: Hugo Fernando Castillo Sánchez, ID No. 94506632, 21 years old, and Zúñiga Urbano Diana Jimena ID No. 31305573.

File No.:	667370
Branch:	Cali
Investigating authority:	Fiscal 47, Cali branch
Stage of proceedings:	preliminary
Current status:	active

- (27) Carmen Elisa Nova Hernández, auxiliary nurse, Bucaramanga Clinic, SINTRACLINICAS, 15 July 2004, Provenza Bucaramanga district, murder, case under investigation.

File No.:	172
Branch:	national
Investigating authority:	Specialized Public Prosecutor, Bucaramanga
Stage of proceedings:	preliminary
Current status:	collecting evidence

- (28) Héctor Alirio Martínez, (1) President, ANTHOC, Arauca; (2) Treasurer, CUT, Arauca, and (3) member of the CUT Arauca, 5 August 2004, Caserío Caño Seco, municipality of Saravena, Arauca, aggravated homicide, security measure, 16 September 2004, four detained, preliminary. The legal situation is resolved against the four suspects with a security measure involving detention, for the suspected co-offenders of the offence of aggravated homicide. The soldier Walter was investigated on 26 October 2004, and is in charge of ongoing military criminal justice proceedings. The conflict of jurisdiction is being resolved in the Superior Judicial Council.

Offenders: Juan Pablo Ordoñez Cañón (sub-lieutenant Colombian Army); Jhon Alejandro Hernández Suárez (professional soldier Colombian Army); Oscar Saúl Cuta Hernández (professional soldier Colombian Army); Daniel Caballero Rozo alias Patilla (civilian); and Walter Loaiza Culma (professional soldier).

Status of offenders: three members of the National Army and one civilian.

File No.:	2009
Branch:	national
Investigating authority:	National Unit for Human Rights – International Humanitarian Rights (office 27)
Stage of proceedings:	preliminary
Current status:	active and collecting evidence

- (29) Jorge Eduardo Prieto Chamucero, President, ANTHOC, Arauca; killed on 5 August 2004, Caserío Caño Seco, municipality of Saravena, Arauca, aggravated homicide, security measure, 16 September 2004, four detained. The legal situation is resolved against the four suspects with a security measure involving detention, for the suspected co-offenders of the offence of aggravated homicide. The soldier Walter was investigated on 26 October 2004, and is in charge of ongoing military criminal justice proceedings. The conflict of jurisdiction is being resolved in the Superior Judicial Council.

Offenders: Juan Pablo Ordoñez Cañón (sub-lieutenant Colombian Army); Jhon Alejandro Hernández Suárez (professional soldier Colombian Army); Oscar Saúl Cuta Hernández (professional soldier Colombian Army); Daniel Caballero Rozo alias Patilla (civilian); and Walter Loaiza Culma (professional soldier).

Status of offenders: three members of the National Army and one civilian.

File No.:	2009
Branch:	national
Investigating authority:	National Unit for Human Rights – International Humanitarian Rights (office 27)
Stage of proceedings:	preliminary
Current status:	active and collecting evidence

- (30) Leonel Goyeneche Goyeneche, Treasurer, CUT, Arauca, killed on 5 August 2004, Caserío Caño Seco, municipality of Saravena, Arauca, National Unit for Human Rights – International Humanitarian Rights (office 27), aggravated homicide, security measure, 16 September 2004, four detained, preliminary, active and collecting evidence. The legal situation is resolved against the four suspects with a security measure involving detention, for the suspected co-authors of the offence of aggravated homicide. The soldier Walter was investigated on 26 October 2004, and is in charge of ongoing military criminal justice proceedings. The conflict of jurisdiction is being resolved in the Superior Judicial Council.

Offenders: Juan Pablo Ordoñez Cañón (sub-lieutenant Colombian Army); Jhon Alejandro Hernández Suárez (professional soldier Colombian Army); Oscar Saúl Cuta Hernández (professional soldier Colombian Army); Daniel Caballero Rozo alias Patilla (civilian); and Walter Loaiza Culma (professional soldier).

Status of offenders: three members of the National Army and one civilian.

File No.:	2009
Branch:	national
Investigating authority:	National Unit for Human Rights – International Humanitarian Rights (office 27)
Stage of proceedings:	preliminary
Current status:	active and collecting evidence

- (31) Yorman Rodríguez, SINDIAGRICULTORES, 23 October 2003, municipality of Coloso, rape and attempted theft of a mobile phone, preliminary, active, report submitted to the Office of the Ombudsman No. 27 on 21 January 2004 explains the events relating to attempted sexual assault and physical abuse by members of the police in a police post on 23 October 2003.

File No.:	41853
Branch:	Sincelejo
Investigating authority:	Public Prosecutor No. 7, Sincelejo branch
Stage of proceedings:	preliminary
Current status:	active

(32) Edgar, Perea Zúñiga, leader, SINTRAMETAL, 14 April 2004, attempted murder, case under investigation, Raúl's murder began proceedings. The Judicial Information System of the Prosecutor's Office is not dealing with the attack on Edgar Perea, Vice-President, it was not reported as such, it is referred to in this investigation.

File No.:	651376
Branch:	Cali
Investigating authority:	Public Prosecutor No. 23, branch, JPCTO delegate
Stage of proceedings:	preliminary
Current status:	active

(33) Mario Nel Mora Patiño, President, ANTHOC, 30 January 2001, personal threats.

File No.:	58375
Branch:	Ibagué
Investigating authority:	Ibagué
Stage of proceedings:	preliminary
Current status:	active

(34) Jesús Alfonso Naranjo, member of the national board of directors of the union, ANTHOC, 21 January 2004, Honda, personal threats.

File No.:	1059
Branch:	national
Investigating authority:	National Unit for Human Rights and International Humanitarian Rights
Stage of proceedings:	preliminary
Current status:	active

(35) Rodolfo Vecino Acevedo, Hernando Meneses Velaides, Rafael Cabarcas Cabarcas, members of SINCONTAXCAR, 7 February 2004, personal threats. Attached: letter No. 0973 from the Public Prosecutor's Office, consultant Myriam Paola Acevedo. Immediate action threats directed at USO, signed by the Collective Corporation of Lawyers reporting to the National Community. The accusers are José Franqui. It was impossible for the investigating units to travel to the scene of the acts as there are apparently self-defence groups there.

File No.:	140376
Branch:	Cartagena
Investigating authority:	Public Prosecutor No. 48, branch
Stage of proceedings:	preliminary
Current status:	active

(36) Domingo Rafael Tovar Arrieta, Manager of the CUT, Bogotá, personal threats.

File No.:	54125
Branch:	Pereira
Investigating authority:	Specialized Public Prosecutor's Office No. 16
Stage of proceedings:	active

(37) Domingo Rafael Tovar Arrieta, Manager of the CUT, Bogotá, personal threats.

File No.:	54262
Branch:	Pereira
Investigating authority:	Specialized Public Prosecutor's Office No. 42
Stage of proceedings:	active

(38) Domingo Rafael Tovar Arrieta, President of the Single Confederation of Workers of Colombia – CUT, Bogotá, personal threats.

File No.:	54266
Branch:	Pereira
Investigating authority:	Public Prosecutor, delegate to CTI Bogotá
Stage of proceedings:	suspended

(39) Domingo Rafael, Tovar Arrieta, President of the CUT, Bogotá, personal threats.

File No.:	54273
Branch:	Pereira
Investigating authority:	Specialized Public Prosecutor No. 40
Stage of proceedings:	suspended

(40) Figueroa Oscar, member of SINTRAEMCALI, personal threats.

File No.:	568147
Branch:	Cali
Investigating authority:	Public Prosecutor No. 91, Cali branch
Stage of proceedings:	preliminary
Current status:	active

(41) Oscar, Figueroa, member of SINTRAEMCALI, personal threats.

File No.:	568147
Branch:	Cali
Investigating authority:	Public Prosecutor No. 91, Cali branch
Stage of proceedings:	preliminary
Current status:	active

(42) Yesid Plaza Escobar, President – trade union member (leader-president), National Union of Workers in Departmental Territorial Entities – SINTRAENTEDDIMCCOL. In the course of his work, 13 February 2004, Bugalagrande, personal threats, under investigation, unknown, union under investigation. The report is in writing by Mr. Plaza Escobar Yesid, he attached the threatening letter he had received, it refers to a fact known locally in the municipality of Bugalagrande – Valle, where the events took place.

To date the suspected authors of this act have not been identified and singled out, which means that the case cannot be opened while the initial, preliminary investigation is ongoing.

File No.:	3313
Branch:	Buga
Investigating authority:	Public Prosecutor No. 32, branch
Stage of proceedings:	preliminary
Current status:	active

(43) Víctor Manuel Jiménez Fruto, Vice-President of the Union of Small Farmers of the Atlantic SINTRAGRICOLAS-FENSUAGRO-CUT, 22 October 2002, Ponedera, forced disappearance.

File No.:	139121
Branch:	Barranquilla
Investigating authority:	Public Prosecutor No. 32 Specialized Life Unit
Stage of proceedings:	preliminary
Current status:	active

(44) Luís Carlos Herrera Monsalve and Ahymer de Jesús Velásquez Urrego, Vice-President of ADEA, free, 17 March 2004, Vereda los Sauces, municipality of Caicedo, abduction, case under investigation, Front 34 of the FARC, apparent guerrilla abduction. Reported by Herrera Monsalve's son, José Mauricio (information updated on 3 August 2004). Free on 22 June 2004 Herrera Monsalve and on 30 May Aimer Velásquez Urrego.

File No.:	799170
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Branch:	Medellín
Investigating authority:	Specialized Public Prosecutor No. 48 Medellín
Stage of proceedings:	preliminary
Current status:	active

(45) Alfredo Rafael Francisco Conea de Andrés and his guard Eduardo Ochoa Martínez, File No. 2030 National Human Rights Unit preliminary stage.

(46) Luis Hernández Monroy, member of SINTRAEMCALI, personal threats on 6 February 2004, active preliminary investigation.

508. Regarding the events in the municipality of Arauca on 5 August 2004, in which three trade union leaders – Jorge Eduardo Prieto Chamucero, President of ANTHOC, Arauca branch, Leonel Goyeneche, Treasurer of ASEDAR and Treasurer of the Arauca CUT subdivision and Héctor Alirio Martínez, former President of FENSUAGRO, Arauca and CUT member, numbers 28, 29 and 30 of the above list – were killed, the Government reports that this was an armed confrontation between the National Army, Pizarro Network Group, and ELN subversives. The Government points out that according to information given by the National Army, the trade union members were killed in an armed confrontation with members of the guerrilla group ELN of which they were alleged members, appearing linked to investigation No. 61427 carried out by Public Prosecutor No. 12 of the National Terrorism Unit for terrorism offences which is why the three people had an outstanding capture order at the time of the events. The army seized weapons, explosives and propaganda relating to ELN. An official committee of Specialized Public Prosecutors from the Human Rights National Unit of the National Public Prosecutor's Office are currently carrying out investigation No. 2009 into those events, and are in the active trial stage. The investigating authority ordered the entailment and capture of sub-lieutenant Juan Pablo Ordóñez Cañón and professional soldiers Oscar Saúl Cuta Hernández and John Alejandro Hernández Suárez as well as the civilian Daniel Caballero Rozo. The Public Prosecutor's Office requested that the soldiers be made available to the body in the Fifth Brigade of the Army's facilities based in Bucaramanga.

509. The Government points out that Samuel Morales Flórez and Raquel Castro were detained at the same time, linked in file No. 61427 being carried out by the National Counter Terrorist Unit, office No. 12 of the Specialized Public Prosecutor's Office for the offence of rebellion, in preventative detention. The Government stresses that there are 32 people involved in this file number.

510. The Government adds that humanitarian aid was given to the family of Prieto Chapucero to help with the burial.

511. In addition, information was obtained about the detention of two trade union members on Wednesday, 11 August 2004 in Arauca for alleged rebellion and conspiracy to offend: Weimar Cetina, member of ANTHOC detained on Capture Order No. 210854 for the offence of rebellion, investigation filed under No. 63142, carried out by Specialized Public Prosecutor No. 12 of the National Counter Terrorism Unit, for extortion and Juan Rueda Angarita, secretary of the union of various services in Arauca, detained on Capture Order No. 210855, for the offence of rebellion and alleged member of the FARC, investigation file No. 63141 carried out by Specialized Public Prosecutor No. 21 of the National Counter Terrorist Unit. A rapid and independent investigation is under way to clarify events and assign responsibility so that the offenders may be duly punished.

- 512.** The Government adds that additional information has been brought by trade union organizations about the detentions of four trade union members in August in Saravena and TAME for alleged rebellion and conspiracy to offend. Henry Nerira, member of SINDESS detained in Saravena; Sergio Velásquez, member of SINDESS detained in Saravena, Francisco Javier Castro, member of ANTHOC, detained in Saravena and Luis Alfonso Cairá, member of ANTHOC, detained in TAME. The Government points out that the National Directorate of the Prosecutors' Offices, Assignments Office reported that the Public Prosecutor's branch units in Saravena and TAME do not have any information on the capture of these men.
- 513.** In light of these facts, the Government reports that the trade union offices requested a meeting on 24 August with the Vice-President of the Republic in which it was agreed to ratify the authorities' commitment to maintain the guarantees and measures to protect the trade union movement; the results of the investigation into the events of 5 August in Caño Seco, being carried out by the National Public Prosecutor's Office, are awaited. Meetings will be held about the guarantees for trade union work, intelligence archives, permanent mechanisms for dialogue between the governor, the police and the trade union leaders, the first of which is planned for 22 September 2004; the national Government took up the suggestion to invite the Inter-American Committee on Human Rights to visit the Arauca department. The national Government will implement a project of support for communities at risk in Arauca, and the Vice-President will convey to the Public Prosecutor's Office and to the National Public Prosecutor the suggestions to have a public report on the human rights investigations and to transfer the Public Prosecutor's support system outside the facilities of the 18th Brigade in the Arauca department. The Government will talk to the competent authorities, about the request made regarding the ILO. There will be a follow-up meeting on this agreement in November.
- 514.** Regarding the members of the UNIMOTOR union, the Government reports the following:
- José Edgar Jiménez Cardona, President of UNIMOTOR, personal or family threats, November 2004, File No. 707030, Public Prosecutor Branch No. 91 of the offences against individual freedom unit, preliminary stage;
 - José Héctor Ramírez Sabogal, President of the UNIMOTOR union, personal threats, November 2004, File No. 707030, Public Prosecutor Branch No. 91 of the offences against individual freedom unit, preliminary stage;
 - José María Villalba Esquivel, President of UNIMOTOR, personal or family threats, November 2004, File No. 707030, Public Prosecutor Branch No. 91 of the offences against individual freedom unit, preliminary stage;
 - Delio Gómez Ledesma, member of UNIMOTOR, killed on 14 August 2002 in Laflora, File No. 507533, Public Prosecutor Branch No. 23, inhibitory and archive;
 - Luis Hernando Caicedo León, member of UNIMOTOR, killed on 24 January 2003, file No. 54275, Public Prosecutor Branch No. 41, inhibitory and archive;
 - Nelson Vergara Castro, member of UNIMOTOR, killed on 27 June 2003, in Ciudad Mode, file No. 574406, Public Prosecutor No. 26 from Cali, preliminary stage, collecting evidence; and
 - José María Villalba Esquivel, Manager of UNIMOTOR, threats on 24 January 2003, file No. 58319, Public Prosecutor No. 93 from Cali, preliminary stage, collecting evidence.

- 515.** Regarding the detention of Mrs. Fadime Candelaria Reyes Reyes, member of the board of directors of SINDEAGRICULTORES and national FENSUAGRO delegate, the Government, through the National Public Prosecutor's Office, reports that she is on trial for the offence of extortion before investigating authority No. 1 of Sincelejo File No. 46587, preliminary hearing, with an appeal dated 13 September 2004 and file No. 30132 against the same woman for the offence of rebellion in January 2003 in Sucre, before Public Prosecutor No. 16 from Sincelejo.
- 516.** Regarding clause (h) of the Committee's recommendations in the previous examination of the case, regarding the aggression suffered by members of FECODE, the Government points out that in order to clarify the events and make inquiries into the state of the investigations, it wrote to that trade union organization and has not received any response.
- 517.** Regarding the allegations presented by ASODEFENSA, the Government points out that one of the functions of the National Ministry of Defence is to contribute to keeping the peace and tranquillity for Colombians endeavouring to provide security which facilitates economic development, protection and conservation of natural resources and to promote and protect human rights, as well as maintaining the necessary conditions for the exercise of and right to public freedoms to ensure that the inhabitants of Colombia can live together peacefully. So, the job of the National Ministry of Defence is not only to protect the lives of individuals but also the lives of its civil servants, as in the case of Armando Cuellar Valbuena, making effective all the efforts to protect his life, officiating at DAS for the relevant security study (another matter is the fact that Mr. Cuellar changed his transfer at the last minute to the Isla de San Andrés, a place where the National Army does not have any units, which is why it was decided to transfer to the city of Leticia, Amazonas, where no illegal armed groups operate). The Government points out that Mr. Cuellar, sued before the judicial authority, where he received a ruling in Labour Court No. 19 of the Bogotá Circuit, through which the reinstatement of the civil servant at the site in the city of Neiva was ordered.
- 518.** Regarding the cases related to Lilian Oveida Landínez Vásquez, Isidro Benítez Aldana, Víctor Hugo Mendieta Candela, Enrique Ruiz Vargas and Luz Amanda Lozano Bocanegra, the Government reports that the Ministry acted in accordance with domestic law.
- 519.** The Government adds that the Ministry denies preventing trade union meetings from being held, but for reasons of security it is not advisable for these meetings to be held in the brigades, as they have been the target of terrorist attacks. In particular, it is pertinent to note that the Committee on Freedom of Association declared that: "The right of occupational organizations to hold meetings in their premises to discuss occupational questions, without prior authorization and interference by the authorities, is an essential element of freedom of association and the public authorities should refrain from any interference which would restrict this right or impede its exercise, unless public order is disturbed thereby or its maintenance seriously and imminently endangered."
- 520.** The National Ministry of Defence grants trade union permits whenever they do not interrupt the normal running of service, and to date has granted 498. This is based on ruling No. T-502 of 1998 given by the Constitutional Court, according to which, trade union permits for civil servants cannot affect good public service, that is that the absence of the civil servant must not affect the running and the services that the body should provide. Because of this, we point out that at no time has the trade union jurisdiction been violated nor has the right to freedom of association been attacked, bearing in mind that the trade union has not presented any evidence of this, to date there are no judicial proceedings that indicate so.

Measures of protection

- 521.** Regarding the measures of protection for members of SINALTRAINAL from Nestlé and Coca-Cola, the Government states that:

Through Act 47 of 18 May 1999

- Reinforcement of the Bogotá headquarters

Act 03 of 10 February 2000

- Reinforcement of the Barrancabermeja headquarters

Act 08 of 14 April 2000

- Reinforcement of the Cali headquarters

- Reinforcement of the Barranquilla headquarters

Act 16 of 4 September 2000

- Means of communication for directors

Act 18 of 22 November 2000

- Ten (10) mobile phones and reinforcement of the Bugalagrande branch headquarters

- Juan Carlos Galvis: medium risk, protection scheme made up of two (2) men

Act 17 of 20 October 2000

- Wilson Castro Padilla: medium risk, Bolívar branch President, one (1) land transport support while vehicles are available

- Luís Miguel Castrillón: medium risk, Bolívar branch member, one (1) temporary land transport support

Act 20 of 19 December 2000

- Azael A. Ceballos: mobile phone

- Rómulo Serna: mobile phone

- Eberth Suárez: mobile phone

- Jesús E. Gordon: mobile phone

- Alonso Rodríguez: mobile phone

- María Becerra: mobile phone

- Darío Henao: mobile phone

- Jaime Flor Lame: mobile phone

- Argemiro Mosquera: mobile phone

- María Lilia Mojica: mobile phone
- José de J. Correales: mobile phone
- Luz Mila Díaz: mobile phone

For the Bucaramanga branch:

- Alvaro González: mobile phone
- Jimmy Fontecha: mobile phone
- Luis Eduardo García: mobile phone
- Domingo Flórez: mobile phone
- Pedro Nel Carreño: mobile phone
- Jaime Díaz: mobile phone
- René Córdova: mobile phone
- Rugero Moisés: mobile phone
- Germán Pinto: mobile phone
- Mauricio Luna: mobile phone
- Orlando Durán: mobile phone
- Nelson Pérez: mobile phone
- Pedro Ciro López: mobile phone

Act 06 of 2001

- Bugalagrande board of directors: collective protection scheme made up of three (3) men and one (1) vehicle

Act 05 of 11 and 12 May 2001

- Guillermo Antonio Quiceno Quiceno: one (1) mobile phone
- Saúl Rincón Camelo: three (3) temporary relocation supports

Act 19 of 2001

- Hernán Manco: mobile phone
- Martín Emilio Gil Gil: mobile phone
- Luis Adolfo Cardona Usma: mobile phone
- National board of directors: collective scheme, change means of communication to mobile phone
- Barranca board of directors: collective protection scheme

Doncello-Florencia (Caquetá) branches:

- Gerardo Plazas Perdomo: one (1) communication device subject to coverage
- Fabio Vargas Trujillo: one (1) communication device subject to coverage
- Hernando Giraldo: one (1) communication device subject to coverage
- Avantel for the Barrancabermeja DAS branch for emergency network

Act 08 of 7 May 2002

- Mareluis Mieles (Víctor Mieles's daughter): three (3) international tickets, and two (2) national relocation supports in one payment

Act 05 of 23 April 2002

- National board of directors: six (6) monthly air tickets
- Luis Adolfo Cardona: extension of temporary relocation support
- Wilson Castro: extension of temporary relocation support, Cartagena director
- Luis Hernán Manco: three (3) temporary relocation supports, Bogotá director
- Oscar Giraldo: three (3) temporary relocation supports
- Oscar Tascón: Vice-President, Valledupar branch, one (1) Avantel, Bogotá director
- Oswaldo Enrique Silva Ditta: President, Valledupar, one (1) Avantel, Bogotá director
- Luis Adolfo Cardona: one (1) vest and one (1) Avantel
- Wilson Castro: one (1) vest and one (1) Avantel
- Juan Carlos Galvis: armoured vehicle for the assigned protection scheme
- Extra Avantel for the approved protection scheme in Bogotá

Act 03 of 26 March 2002

- Wilson Cartro Padilla: President, Cartagena branch. Two (2) temporary relocation supports and one individual protection scheme

Act 01 of 10, 14 and 21 January 2002

- Luis Adolfo Carona Usma: three (3) temporary relocation supports and one (1) move support
- Reinforcement of the Bugalagrande Cúcuta headquarters

Act 15 of 18 September 2002

- William Mendoza Gómez: President, Barrancabermeja branch, medium-high risk, two (2) relocation supports and one (1) Avantel

- Efraín Guerrero: President, Bucaramanga branch, medium risk, individual protection scheme and one (1) transport support while the scheme is implemented

Act 14 of 24 July 2002

- Adolfo Munera López: Barranquilla branch, three (3) temporary relocation supports, payable monthly
- Juan Carlos Galvis: Barrancabermeja branch, one (1) extra guard, precautionary measures

Act 11 of 19 June 2002

- Jaime Santos Dean: Cartagena complaints committee, medium risk, high-level protection scheme
- William Mendoza Gómez: President, Santander branch, medium-high risk, individual protection scheme and transport support for 192 while the scheme is implemented
- Sub-director of Barrancabermeja: three (3) vests for the collective protection scheme
- Robinsón Domínguez Romero: Treasurer, Bolívar branch, medium risk, individual protection scheme

Act 12 of 8 August 2003

- Bolívar branch board of directors: all the protection schemes assigned to this branch are collective for the whole board of directors
- Reassess Lidys Jaraba of CUT Atlantic's protection scheme to reassign it to the board of directors of SINALTRAINAL Atlantic
- Recommend only one protection scheme for SINALTRAINAL Bolívar, there were two (2)

Act 9 of 16 July 2003

- The Barranquilla protection scheme remains collective for the board of directors

The DAS delegate reported that SINALTRAINAL Bolívar's protection schemes are being underused, so the CUT delegate asked that these schemes remain collective, one for SINALTRAINAL Bolívar and another for SINALTRAINAL Barranquilla. Dr. Sanjuán declared that there would be budget problems and that the transfer could happen but it would take too long. CRER welcomed the recommendation and suggested that the administration of the scheme be transferred to Barranquilla, initially being done in Cartagena.

Act 07 of 26 May 2003

- Gerardo Cajamarca Alarcón: one (1) Avantel, one (1) vest and one (1) protection scheme
- Efraín Guerrero Beltrán: transport support suspended from June 2003

Act 02 of 14 February 2003

- Oscar Giraldo: one (1) temporary relocation support
- Hernán Manco: dos (2) temporary relocation supports
- Luis Alberto Díaz: one (1) Avantel
- Edwin Molina: one (1) Avantel communication device
- Jaime Santos Dean: one (1) Avantel communication device

Act 05 of 17 March 2003

- Inspection of the reinforcement of the Dos Quebradas branch headquarters requested

Act 05 of 18 February 2004

- José Onofre Esquivel: medium-low risk, Avantel communication device
- Alvaro González: medium-low risk, self-defence course
- Rafael Ramón Suárez Díaz: low risk, self-defence course and police patrol
- Alvaro Rafael Aguilar Acuña: medium-low risk, self-defence course and police patrol
- Robinson Domínguez Romero: medium-low risk, self-defence course and police patrol

Summary of reinforced headquarters

- Bogotá headquarters: Carrera 15, No. 35-18, approved by Act 47 of 1999, worth 29,688,558 Colombian pesos
- Barranquilla headquarters: Carrera 14, No. 41-23, approved by Act 07 of 2000, worth 15,929,322 Colombian pesos
- Cartagena headquarters: Transversal 44, No. 21 C-30, approved by Act 51 of 1999, worth 16,463,956 Colombian pesos
- Barrancabermeja headquarters: Calle 71, No. 21-89, approved by Act 02 of 2000, worth 30,041,206 Colombian pesos
- Cali headquarters: Calle 47, No. 2 N-23, 2nd floor, approved by Act 07 of 2000, worth 16,510,643 Colombian pesos
- Medellín headquarters: Carrera 46, No. 49 A-27, office 713, worth 14,111,791 Colombian pesos
- Bugalagrande headquarters: Carrera 7, No. 6-35, approved by Act 01 of January 2002, worth 33,756,055 Colombian pesos
- Bucaramanga headquarters: Carrera 14, No. 41-73, 1st floor, worth 11,703,650 Colombian pesos
- Valledupar headquarters: worth 29,615,520 Colombian pesos

- Cúcuta headquarters: Calle 8, No. 0-99, Latin Quarter, 24,008,640 Colombian pesos

Summary of protection schemes

- Bolívar:
 - in August 2003, it was recommended to leave only one (1) protection scheme for this branch for the board of directors, there had been two assigned, one for Wilson Castro Padilla and another for Robinson Domínguez Romero
- Barrancabermeja:
 - one (1) individual protection scheme for Juan Carlos Galvis with an armoured vehicle and an extra guard
 - one (1) collective protection scheme and three extra vests
- Bugalagrande:
 - one (1) collective scheme made up of three men and one vehicle
- National
 - one (1) collective scheme
- Bucaramanga:
 - one (1) individual scheme for Efraín Guerrero
- Santander:
 - one (1) individual scheme for William Mendoza Gómez
- Atlantic:
 - one (1) collective scheme
- Facatativa:
 - one (1) individual scheme for Gerardo Cajamarca Alarcón

Communication devices

- Antioquia: 2
- Atlantic: 4
- Bolívar: 1
- Cauca: 2
- César: 4
- Cundinamarca: 11
- Magdalena: 1

- North Santander: 4
- Santander: 21
- Valle del Cauca: 10

Other matters

- 522.** Regarding the ICFTU's allegations that the Government denied entry to international trade union members, the Government deplores the fact that what constitutes an act of state sovereignty, not contrary to the Conventions on freedom of association and the right to organize, nor to the principles from which the ILO's supervisory bodies have derived them, can be presented as an "illegitimate action contrary to Colombia's international obligations before the International Labour Organization". It also rejects the tendentious and unfounded affirmations put forward by the complainants, suggesting that trade union members who participated in an international trade union meeting in the country "are now on a blacklist drawn up by the Government Immigration Service". Colombia, like any sovereign State, can, regarding matters of state sovereignty (article 3 of the Political Constitution) including migration, establish procedures which, in accordance with article 4 of the Political Constitution, must be respected by nationals and foreigners. As stated above, exercising these powers does not contravene the ILO Conventions on freedom of association or the supervisory bodies' derivative principles.
- 523.** That the workers' organizations use their complaints, as in this case, to so mislead the Committee on Freedom of Association and the Governing Body, does nothing to contribute to the ILO's work in favour of freedom of association in the world. Only if the matters are not distorted and wrongly described, can the supervisory bodies of the Organization make recommendations that reflect reality.
- 524.** Lastly, the Government considers that just because the ICFTU mentioned it in their complaint, it does not mean that this allegation should be incorporated into Case No. 1787. The Government asks the Freedom of Association Service why this communication was not given the procedure corresponding to an intervention.
- 525.** The Government of Colombia wishes to make clear that it, at no stage, "deported" the listed trade union members, as the complaint submitted to the ILO wrongly states. In the Immigration Office of the "El Dorado" airport, the foreign workers who wished to enter were submitted to the normal short interview that takes place in all countries and with any traveller regardless of their nationality, race, gender, destination or origin, with an aim to establishing what they had come to do in the country. Wanting to know this information is something that is completely within the bounds of sovereignty and is something that is done by immigration authorities every day in thousands of airports around the world without the governments of those countries being accused of violating international agreements or these powers being called illegitimate. In this vein and given the responses of the foreigners, mentioning their participation in the 4th Conference of Working Women organized by CUT on 2, 3 and 4 November and that they were part of the committees, the officers dealing with the situation had to establish the procedure to follow and what treatment they should be given, which took approximately two hours, counting from when they arrived in the immigration zone until their exit from the zone, as logged in the DAS registers at the airport.
- 526.** Going ahead with these procedures is not contrary to the principles and norms regulating the power to determine who can or cannot enter a sovereign State. So, after carrying out the procedures outlined above with the aforementioned citizens, including the Spanish citizen Pilar Morales, they were granted entry into Colombia and an initial stay of

72 hours, which was properly explained to them; then, the same Security Administration Department changed their status, granting them a stay of 30 days. The Government states that these people were not in any way detained or deprived of their liberty, as has been tendentiously claimed, they were also allowed to contact their respective delegations. Some of them chose not to enter the country and returned to their countries of origin and it is these people who falsely claim to have been deported.

- 527.** The Government wishes to recall that the Committee has stated on a number of occasions in particular that: "... measures taken by the authorities in application of a law concerning immigration and nationality related to the sovereign right which every country has to decide who shall and who shall not be admitted to its territory". In the same way, the Government recalls that the Committee has also indicated that only when the application of the measures adopted by the authorities to enforce their immigration laws results in "... workers being dismissed or otherwise prejudiced because of their trade union affiliations, [these measures] might infringe the principle that workers have the right to join trade unions of their own choosing". In this case, the measures did not lead to the workers being dismissed nor did they affect their right to join trade unions of their own choosing.
- 528.** The Government notes that the Committee has stated that "it is not competent to express an opinion on questions concerning the validity of a residence permit or to pronounce upon the right of a government to extend or not to extend the validity of such a permit". As described above, the DAS took the decision to initially authorize a permit for a stay of 72 hours, which was later increased to 30 days.
- 529.** The Government sent new observations in a communication dated 4 May 2005, received on 25 May.

D. The Committee's conclusions

- 530.** *The Committee notes the new allegations and the Government's observations that consist of information regarding acts of violence against trade union members and leaders and the safety measures adopted for the members of certain trade union organizations. The Committee also notes the Government's considerations of the Committee's conclusions in its previous examination of the case.*
- 531.** *In this respect, the Committee notes that according to the Government some of the cases presented as "new allegations" in the Committee's 335th Report are not in fact new, as they appear in previous reports on the case. The Government refers specifically to the allegations regarding Ricardo Espejo, Marco Antonio Rodríguez, José Orlando Céspedes and Orlando Frías Parada. The Committee observes that the first three allegations featured in the 333rd Report as abductions and in the 335th Report as murders and as such were correctly brought up as "new allegations" on both occasions but in different categories. Regarding Orlando Frías Parada, the Committee observes that among all the allegations presented in the recent examinations of the case, this allegation was presented twice. As for the Government's observations regarding Mr. Frías Parada, these same observations appear in paragraph 689 of the 335th Report in the section on murders, item 58.*
- 532.** *The Committee also notes that the Government denounces the Committee for not always taking note of its observations about the state of the ongoing judicial investigations and attaches a list of those investigations that, it believes, were not taken into account in the Committee's conclusions in the previous examination of the case. The Committee finds that in looking carefully at this list and the observations presented by the Government in the previous examination of the case it seems that all the investigations to which the Government refers were correctly recorded in the section on the Government's reply,*

paragraph 689 and after of the 335th Report, and were taken into account in the drawing up of the Committee's conclusions (which is why this list was not included again in this examination of the case). The Committee must point out in general that the Committee's conclusions are not a reproduction of the complainants' allegations and the Government's observations but rather the result of a careful examination of them which highlights in a general way the concerns outlined by the former and the Government's efforts to investigate the allegations.

533. Regarding the substance of the issues dealt with in this case, the Committee notes that the Government reports on the investigations of:

- 34 murders, of which two cases have been dismissed for lack of evidence, one case has reached the trial stage and the rest are in the preliminary active stage;
- 17 threats, of which one investigation has been suspended and the rest are in the preliminary stage;
- one abduction, in the preliminary stage;
- one forced disappearance, in the preliminary stage;
- one attempted murder, in the preliminary stage;
- one relocation, in the preliminary stage; and
- one other type of violent act, in the preliminary stage.

534. The Committee observes that most of these investigations, corresponding almost in their entirety to acts of violence alleged in the 335th Report, had already been reported to the Committee at its last examination of the case [see 335th Report, para. 718].

Investigations and the situation of impunity

535. In general, the Committee deplores that the reigning situation of impunity instils a climate of fear which prevents the free exercise of trade union rights. The Committee recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, para. 47].

536. Regarding impunity in particular, the Committee observes that most of the information submitted by the Government in this examination of the case had already been submitted in the previous examination, and that of the 56 investigations, one is at the trial stage, one has been suspended, two have been dismissed for lack of evidence and archived, and the rest are in the preliminary active stage, so that there have been no effective convictions.

537. In addition, the Committee notes that the Government declares its disagreement with the recommendations contained in the previous examination of the case regarding impunity as it believes that having begun the relevant investigations, the stages of proceedings designed to clarify the facts should be respected, which can mean long procedures before reaching a verdict. In this respect, the Committee must emphasize that it does not in any way mean that due process should be altered. On the contrary, the Committee expects the investigations to be carried out and developed to their end, attempting by all possible means to find out who are the true authors of the violent acts reported so that they may be

properly punished. The Committee recognizes in this regard that respecting the necessary stages of the proceedings can mean that the investigations are long and complex.

- 538.** *However, from reading all the information submitted by the Government throughout the successive examinations of the case, regarding the investigations that have begun into the acts of violence committed against trade union leaders and members, the Committee observes that most of the investigations are in the preliminary stage or end in a dismissal for lack of evidence (which has already been observed by the Committee on previous occasions). The latter means that the case will not be investigated further unless new evidence is produced and therefore there will not be a ruling on the substance of the case and, ultimately, no sentence. The Committee observes that according to the information submitted by the Government, of the 34 murders for which investigations had begun, two had been dismissed for lack of evidence, one was in the trial stage and the rest were in the preliminary stage; of the 17 investigations into threats, one was suspended and the rest were in the preliminary stage; the other investigations into abductions, disappearances, attempted murders and other acts of violence were all in the preliminary stage. The situation is even worse when one also takes into account that since the last direct contacts mission which took place in January 2000, the Government has reported fewer than five effective sentences out of all the acts of violence towards trade union leaders and members. In these circumstances, the Committee can only conclude that there is indeed a serious situation of impunity. The Committee recalls 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" [see **Digest**, op. cit., para. 55].*
- 539.** *In these conditions, the Committee is bound to reiterate the conclusions it reached in its previous examinations of the case, namely, that the lack of investigations in some cases, the limited progress in the investigations already begun in other cases and the total lack of convictions underscore the prevailing state of impunity, which inevitably contributes to the climate of violence affecting all sectors of society and the destruction of the trade union movement. The Committee once again urges the Government, in the strongest terms, to take the necessary measures to carry on with the investigations which have begun and to put an end to the intolerable situation of impunity so as to punish effectively all those responsible.*
- 540.** *The Committee notes that the Government reports that in some cases the trade union members and leaders are targets of acts of violence because of their participation in, or links to, guerrilla movements. On this point, the Committee observes that such affirmations should only be made after the relevant judicial investigations have been carried out.*

Allegations for which the Government states that it has insufficient information

- 541.** *The Committee notes that the Government states that one of the reasons why it cannot respond in certain cases is that the complainant organizations did not send sufficient information about the events to be investigated (the name of the trade union member, the trade union post, the place and the date of the events) in spite of the Government's request to this effect. The Committee also notes the list drawn up by the Government regarding the allegations of threats, abductions and disappearances of trade union leaders and members on which the Government indicates that it will not respond until the complainant organizations provide the information and proof of a trade union rights violation warranting the intervention of the Committee.*
- 542.** *On this point, the Committee observes that those allegations already appeared in the previous examination of the case in the sections on threats, abductions and disappearances*

and that in almost all cases the place and date of the events were listed, while in some cases, the people or institutions that made the threats and the trade union to which the victims belonged were also listed. The Committee believes that as these are serious acts of violence, there is sufficient information to begin investigations on them or to find out if the investigations have already begun. In addition, it should be noted that these allegations have been systematized in the examination of the case, but that in accordance with the Committees' procedures, copies of the complaints containing more detailed information have been sent to the Government. In these conditions, as these are serious allegations of abductions, disappearances and threats, the Committee requests the Government to take all the necessary measures so that, on the basis of the information recorded in this case, the corresponding investigations begin on these and all the other alleged acts of violence up to March 2005, on which there is no report that investigations or judicial proceedings have begun (Appendix I) and it asks the Government to continue sending its observations on the progress of the investigations that have already begun and on which it has already provided information.

- 543.** *In addition, the Committee once again urges the complainant organizations to take all possible measures to provide the Government with all the information they have on the allegations presented so that it can properly carry out investigations into them.*

Trade union status of some victims

- 544.** *Regarding the trade union status of some victims queried by the Government, the Committee regrets that, once again, the complainant organizations did not submit that information to the Government and urges them once again to do so without delay.*

Measures of protection for trade unions and their members

- 545.** *The Committee notes the Government's information on the measures of protection for the SINALTRAINAL trade union leaders and members within the Coca-Cola and Nestlé corporations and the measures of protection adopted in some regions. The Committee requests the Government to continue to keep it informed of the measures of protection and of the security schemes implemented as well as those adopted in the future for other trade unions and other departments or regions.*

Other matters

- 546.** *Regarding clause (h) of the recommendations regarding aggression against FECODE members, the Committee asks the complainant organization to submit the necessary information to the Government so that it can carry out the relevant investigations.*

- 547.** *Regarding the ICFTU's allegations that the Government denied entry to international trade union members, the Committee notes the Government's questioning of their inclusion in this case and states that in exercising their sovereign rights, the immigration authorities did not deny entry but rather questioned the leaders about the purpose of their visit, which entailed staying in the airport facilities. The Committee takes note of the communication sent by the Government to the complainant organization indicating that the trade union members' stay in the airport was due to a narrow interpretation of the relevant legislation on the part of the immigration officers and had nothing to do with a government policy to limit the movement of trade union members, and that their situation was sorted out within 72 hours. The Committee also notes that the Government states in its communication that the trade union members who decided not to enter into Colombian territory are welcome.*

In addition, the Committee notes that the Government reports that none of the leaders has been included on any kind of blacklist.

- 548.** *Firstly, the Committee draws the attention of the Government to the fact that these allegations were included in this case because the complainant organization addressed its communication to the Committee on Freedom of Association in the framework of this case. Secondly, taking into account that according to the communications from both the complainants and the Government, the situation has now been resolved and, trusting that it will not be repeated in the future, the Committee will not proceed with an examination of these allegations.*
- 549.** *Lastly, and generally, the Committee considers that taking into account the violent situation which the trade union movement must face due to the serious situation of impunity, and the numerous cases that have not been resolved and the fact that the last mission of this Office to the area took place back in January 2000, it would be highly desirable to collect further and more detailed information from the Government and the workers' and employers' organizations, in order to have an up-to-date understanding of the situation. Consequently, the Committee suggests that the Chairperson of the Committee meet with the Government representative at the International Labour Conference in June 2005 with a view to determining possible future action so as to obtain the fullest information on the matter to place before the Committee.*
- 550.** *The Committee takes note of the communication sent by the Cali Municipal Enterprises Workers' Union (SINTRAEMCALI) dated 21 April 2005, which makes reference to serious allegations relative to anti-union acts against the Colombian trade union movement. The Committee also takes note of the communication of the World Federation of Trade Unions (WFTU) of 2 May 2005 which contains a list of trade union leaders who were assassinated in 2004 (some of these allegations have already been taken into account in previous examinations of the case). The Committee requests the Government to send without delay its observations in this respect. Finally, the Committee will examine the Government's observations dated 4 May 2005 and received on 25 May 2005 at its next meeting.*

The Committee's recommendations

- 551.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *In general, the Committee deplores that the reigning situation of impunity instils a climate of fear which prevents the free exercise of trade union rights. The Committee recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected.*
- (b) *Regarding the serious situation of impunity, the Committee is bound to reiterate the conclusions it reached in its previous examinations of the case, namely, that the lack of investigations in some cases, the limited progress in the investigations already begun in other cases and the total lack of convictions underscore the prevailing state of impunity, which inevitably contributes to the climate of violence affecting all sectors of society and the destruction of the trade union movement. The Committee once again urges the Government, in the strongest terms, to take the necessary measures to*

carry on with the investigations which have begun and to put an end to the intolerable situation of impunity so as to punish effectively all those responsible.

- (c) *Regarding those allegations on which the Government states that it does not have sufficient information, as these are serious allegations of abductions, disappearances and threats, the Committee requests the Government to take all the necessary measures so that, on the basis of the information recorded in the case, the corresponding investigations begin on these and all the other alleged acts of violence up to March 2005, on which there is no report that investigations or judicial proceedings have begun (Appendix I) and it asks the Government to continue sending its observations on the progress of the investigations that have already begun and on which it has already provided information.*
- (d) *The Committee once again urges the complainant organizations to take all possible measures to provide the Government with all the information they have on the allegations presented so that it can properly carry out investigations into them.*
- (e) *Regarding the trade union status of some victims, queried by the Government, the Committee regrets that once again the complainant organizations did not submit that information to the Government and urges them once again to do so without delay.*
- (f) *Regarding the measures of protection for trade unions and their members, the Committee requests the Government to continue to keep it informed of the measures of protection and of the security schemes implemented as well as those adopted in the future for other trade unions and other departments or regions.*
- (g) *Regarding the allegations of aggression against FECODE members, the Committee asks the complainant organization to submit the necessary information to the Government so that it can carry out the relevant investigations.*
- (h) *Lastly, and generally, the Committee considers that taking into account the violent situation which the trade union movement must face due to the serious situation of impunity, and the numerous cases that have not been resolved and the fact that the last mission of this Office to the area took place back in January 2000, it would be highly desirable to collect further and more detailed information from the Government and the workers' and employers' organizations, in order to have an up-to-date understanding of the situation. Consequently, the Committee suggests that the Chairperson of the Committee meet with the Government representative at the International Labour Conference in June 2005 with a view to determining possible future action so as to obtain the fullest information on the matter to place before the Committee.*
- (i) *The Committee requests the Government to send without delay its observations with regard to the new allegations presented by SINTRAEMCALI and the WFTU.*

Appendix I

Acts of violence alleged against trade union leaders or members up until the March 2005 meeting of the Committee for which the Government has not communicated its observations or for which the Government does not report that investigations or judicial proceedings have been started particularly because it considers the information submitted by the complainants to be insufficient

Murders

- (1) Edison Ariel, 17 October 2000, SINTRAINAGRO.
- (2) Francisco Espadín Medina, member of SINTRAINAGRO, 7 September 2000, in the municipality of Turbo.
- (3) Ricardo Florez, member of SINTRAPALMA, 8 January 2001.
- (4) Alberto Pedroza Lozada, 22 March 2001.
- (5) Ramón Antonio Jaramillo, Prosecutor of SINTRAEMSDES-CUT, on 10 October 2001, in the Department of Valle del Cauca, when paramilitaries were carrying out a massacre in the region.
- (6) Eriberto Sandoval, member of the National United Federation of Agricultural Workers (FENSUAGRO), on 11 November 2001 in Ciénaga, by paramilitaries.
- (7) Eliécer Orozco, FENSUAGRO, on 11 November 2001 in Ciénaga, by paramilitaries.
- (8) Alberto Torres, member of the Antioquia Teachers' Association (ADIDA), on 12 December 2001, in Antioquia.
- (9) Edison de Jesús Castaño, member of ADIDA, on 25 February 2002, in Medellín.
- (10) Nicanor Sánchez, member of ADE, on 20 August 2002, in Vista Hermosa, Department of Meta.
- (11) José del Carmen Lobos, member of ADEC, on 15 October 2002, in Bogotá.
- (12) Edgar Rodríguez Guaracas member of ADEC, on 15 October 2002, in Bogotá.
- (13) Cecilia Gómez Córdoba, member of SIMANA, on 20 November 2002, in El Talón de Gómez, Department of Nariño.
- (14) Julio Vega, regional official of SINTRAINAGRO, by a group of paramilitaries and Colombian soldiers from the 5th Mobile Brigade Units, Counter-Insurgency Battalion No. 43 of the 18th Brigade, and the Narváez Pardo Battalion, together with 12 other residents of the communities of Flor Amarilla y Cravo Charo of the Department of Arauca, on 21 May 2004.
- (15) (34) Miguel Espinosa, former union official and founder member of the CUT, in the district of La Pradera, Barranquilla, Department of El Atlántico, on 30 June 2004.
- (16) Camilo Borja, member of the USO, in Barrancabermeja, on 12 July 2004.
- (17) Benedicto Caballero, Vice-President of the National Federation of Agricultural Cooperatives of Colombia (FENACOA), in the municipality of Mesitas, Department of Cundinamarca, on 22 July 2004.

- (18) Henry González López, member of the San Carlos Sugar Refinery Workers' Union (SINTRASANCARLOS), in Tulúa, on 5 August 2004.
- (19) Gerardo de Jesús Vélez, member of the San Carlos Sugar Refinery Workers' Union (SINTRASANCARLOS), in Tulúa, on 7 August 2004.

Abductions and disappearances

- (1) Iván Luis Beltrán, member of the executive committee of FECODE-CUT, on 10 October 2001.
- (2) Luis Alberto Olaya, member of the Valle Single Education Workers' Trade Union (SUTEV), in the Department of Valle del Cauca, on 15 July 2003.
- (3) David Vergara and Seth Cure, officials of SINTRAMIENERGETICA, on 29 September 2003.

Attempted murders

- (1) César Andrés Ortiz, member of the CGTD, on 26 December 2000. The CGTD provided the Government with the necessary information but there is no investigation.
- (2) Euclides Gómez, official of SINTRAINAGRO, in Ciénaga, on 31 July 2003.
- (3) Miguel Angel Bobadilla, Education Secretary of FENSUAGRO, on 19 November 2003.
- (4) Explosive device at the headquarters of SINTRAEMCALI, on 6 February 2004.
- (5) Berenice Celeyta, adviser to SINTRAEMCALI, on 6 February 2004.

Death threats

- (1) Giovanni Uyazán Sánchez.
- (2) Reinaldo Villegas Vargas, member of the "José Alvear Restrepo" Society of Lawyers.
- (3) against SINTRHOINCOL workers on 9 July 2001.
- (4) Jorge Eliécer Londoño, member of SINTRAEMSDES-CUT, received death threats on 2 November 2001.
- (5) against trade union officials in Yumbo.
- (6) the headquarters of SINTRAHOINCOL.
- (7) workers and members of the Arauca Power Company, by paramilitaries.
- (8) in Arauca, activists of the Arauca Educators' Association (ASEDAR) and National Association of Workers and Employees in Hospitals and Clinics (ANTHOC).
- (9) the members of SINALTRAINAL, Bucaramanga branch, 14 March 2003.
- (10) Leónidas Ruiz Mosquera, chairman of the ASODEFENSA coffee sector subcommittee.
- (11) Jorge León Sarasty Petrel, National President of SINALTRACORPOICA, on 9 June 2003, in Montería, where he was advising on the formation of the union's Córdoba branch.
- (12) Workers of the Drummond company (2,000 in all) working in conflict zones where paramilitary groups operate and consider them as military targets. Five officials and members have already been murdered and have been considered in previous examinations of the case. Currently, workers are being sent to remote areas where there is no security.
- (13) José Moisés Luna Rondón, member of the Association of University Professors (ASPU), on 31 July 2003.
- (14) David José Carranza Calle, son of Limberto Carranza, an official of SINALTRAINAL, on 10 September 2003.

- (15) José Luis Páez Romero and Carmelo José Pérez Rossi, respectively President and member of the National Union of Workers and Employees of the University of Colombia (SINTRAUNICOL), on 29 September 2003.
- (16) José Onofre Luna, Alfonso Espinoza, Rogelio Sánchez and Freddy Ocoro, members of SINTRAINAL in Barrancabermeja, on 11 October 2003.
- (17) Jimmi Rubio, official of the National Union of Mining and Power Industry Workers (SINTRAMIENERGETICA).
- (18) José Munera, President of SINTRAUNICOL, Antonio Florez, inter-union secretary, Luis Otalvaro, Secretary-General of the National Executive Board of SINTRAUNICOL, Elizabeth Montoya, Chairman of the Medellín Executive Subcommittee of SINTRAUNICOL and Norberto Moreno, activist, Bessi Pertuz, Vice-President of SINTRAUNICOL, Luis Ernesto Rodríguez, Chairman of the Bogotá Executive Subcommittee of SINTRAUNICOL, Alvaro Vélez, Chairman of the Montería Executive Subcommittee of SINTRAUNICOL, Mario José López Puerto, Treasurer of the National Executive Board of SINTRAUNICOL, Alvaro Villamizar, Chairman of the Santander Executive Subcommittee of SINTRAUNICOL, Eduardo Camacho and Pedro Galeano, activists of the Tolima Executive Subcommittee; Ana Milena Cobos official of the Fusagasugá Executive Subcommittee, Carlos González and Ariel Díaz, Treasurer and Human Rights Secretary of the Executive Subcommittee of the CUT-Valle were declared military objectives by the Self-Defence Units of Colombia, on 27 November 2003.

Arrests

- (1) Alonso Campiño Bedoya, Vice-President of the CUT Saravena, William Jiménez, member of the Union of Workers of the Saravena Town Hall, Orlando Pérez, official of the CUT Saravena, Blanca Segura, President of the Educational Workers' Union (SINTRAENAL), Fabio Gómez, member of the Construction Workers' Union, Carlos Manuel Castro Pérez, member of the Union of Workers of the Saravena Town Hall, Eliseo Durán, member of the Construction Workers' Union, and José López, member of the Saravena Hospital Workers' Union, were arrested in the course of an operation conducted by members of the XVII Brigade and agents of the Public Prosecutors' Office. According to the ICFTU, which lodged the relevant complaint, although some of those arrested were subsequently released others are still in prison.
- (2) Noemí Quinayas and María Hermencia Samboni, activists of the National Association of Workers' and Employees in Hospitals and Clinics (ANTHOC), were held without charge, on 27 September 2003.
- (3) Ruddy Robles Secretary-General of SINDEAGRICULTORES, Ney Medrano and Eliécer Flores, members, on 14 October 2003, apparently without a warrant for their arrest.
- (4) Apolinar Herrera, Ney Medrano (SINDIAGRICULTORES), Policarpo Padilla, President of the Quindío Agricultural Workers Union, Calarcá branch, and more than 80 officials in the municipality of Cartagena del Chairán, including Víctor Oime of SINTRAGRIM, in November 2003.
- (5) Perly Córdoba and Juan de Jesús Gutiérrez Ardila, President of the Peasants' Association of Arauca (ACA) and Director of Human Rights of FENSUAGRO-CUT and Treasurer of the ACA respectively, on 18 February 2004; two of their bodyguards have disappeared and their defence lawyer has received numerous threats.
- (6) Search of the private residence of Nubia Vega, official of the ACA, and arrest of her bodyguard, Víctor Enrique Amarillo.
- (7) Nubia González, daughter of the former President of SINDEAGRICULTORES and national delegate of FENSUAGRO.

- (8) Adolfo Tique, official of the Tolima Agricultural Workers' Union, an affiliate of FENSUAGRO, was arrested by the army in the municipality of Dolores, Department of Tolima on 18 July 2004.
- (9) Samuel Morales Flórez, President of the CUT Arauca, María Raquel Castro, member of the Arauca Educators' Association (ASEDAR), María Constanza Jaimes Fernández, partner of Jorge Eduardo Prieto Chamusero, who was murdered on the same day.
- (10) Jaime Duque Porras, arrested during a demonstration on 1 May 2004 by members of the Administrative Department of Security (DAS), and subsequently released.

Abductions and disappearances

- David Vergara and Seth Cure, officials of SINTRAMIENERGETICA, on 29 September 2003.

Forced relocations

- Ariano León, Julio Arteaga, Pablo Vargas, Alirio Rincón and Rauberto Rodríguez, members of SINTRAPALMA, in November 2004.

Appendix II

Acts of violence against trade union leaders or members mentioned in Appendix I of the Committee's 335th Report or in the "new allegations" section of that report on which the Government has communicated its observations

(1) Uriel Ortiz Coronado; (2) Wilson Rafael Pelufo Arroyo; (3) Ricardo Espejo; (4) Marco Antonio Rodríguez; (5) Germán Bernal; (6) José Céspedes; (7) José de Jesús Rojas Castañeda; (8) Orlando Frías Parada; (9) Severo Bastos; (10) Ricardo Barragán Ortega; (11) Alvaro Granados Rativa; (12) Yesid Chicangana; (13) Yanet del Socorro Vélez Galeano; (14) Camilo Kike Azcárate; (15) Carlos Raúl Ospina; (16) Ernesto Rincón; (17) Luis José Torres Pérez; (18) Oscar Emilio Santiago; (19) César Julio García; (20) Rosa Mary Daza; (21) Hugo Palacios Alvis; (22) Sandra Elizabeth Toledo Rubiano or Ana Isabel Toledo Pubiano; (23) Rafael Segundo Vergara; (24) Alexander Parra; (25) Juan Javier Giraldo; (26) José García; (27) Jorge Mario Giraldo Cardona; (28) Raúl Perea; (29) Carlos A. Chicaiza Betancourt; (30) Fabián Burbano; (31) Luis Alberto Toro Colorado; (32) Hugo Fernando Castillo Sánchez; (33) Carmen Elisa Nova Hernández; (34) Héctor Alirio Martínez; (35) Jorge Prieto; (36) Henry González López; (37) Gerardo de Jesús Vélez; (38) Yorman Rodríguez; (39) Oscar Figueroa; (40) Edgar Perera Zúñiga; (41) Jesús Alfonso Naranjo and Mario Nel Mora Patiño; (42) Jaime Carrillo, Celedonio Jaimes and Francisco Rojas; (43) Roberto Vecino; (44), Domingo Tovar; (45) Luis Hernández and Oscar Figueroa; (46) Yasid Escobar; (47) Fanine Reyes Reyes.

CASE NO. 2331

DEFINITIVE REPORT

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

- the Federation of Workers' Unions in Public Undertakings (FENASINTRAP) and
- the Association of Workers and Employees of the State Social Enterprise METROSALUD (ASMETROSALUD)

Allegations: The complainant organization FENASINTRAP alleges that the arbitral awards handed down following the denunciation of the collective agreements in force by the Department of Antioquia, METROSALUD and the Municipality of Itagüí took account, not only of the lists of grievances presented by the workers but also denunciations by the employers, even in cases where these denunciations were not accepted by the workers. For its part, the trade union organization ASMETROSALUD alleges that the enterprise METROSALUD refused to enter into a collective bargaining process with the trade union, alleging failure to give effect to Conventions Nos. 151 and 154, ratified by Colombia

552. The complaint is contained in a communication from the Federation of Workers' Unions in Public Undertakings (FENASINTRAP) dated 12 March 2004 and in a communication from the Association of Workers and Employees of the State Social Enterprise METROSALUD (ASMETROSALUD) dated 15 July 2004.
553. The Government sent its observations in communications dated 28 January and 9 March 2005. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

554. In its communication dated 12 March 2004, FENASINTRAP made the following allegations.

***Trade Union of Workers and Employees
of the Department of Antioquia***

555. On 23 December 1998, there was a partial denunciation of the collective agreement in force until 31 December 1998 by the chairman of the Trade Union of Workers and

Employees of the Department of Antioquia, with regard to the duration of the agreement, salaries, assistance for studying, the housing fund and assistance regarding the running of the headquarters. The trade union stated that "those articles, clauses, paragraphs, items, sub-headings and subparagraphs not affected by the denunciation, shall obviously continue to remain in force and shall not be a source of conflict. That is to say, they shall not be discussed as a part of the dispute". The list of grievances, consisting of 16 points, was submitted by the trade union on 28 December 1998. The direct settlement stage to resolve the economic dispute began on 5 January 1999 ending on 24 January 1999 with no agreement being reached between the parties. According to the minutes signed by the parties, the representatives of the Department of Antioquia were only willing to discuss other points contained in the denunciation by the Department, a position considered unacceptable by the trade union organization.

- 556.** Through Ruling No. 0525 of 26 March 1999, the Ministry of Labour and Social Security ordered the establishment of a Compulsory Arbitration Tribunal in order to settle the dispute. The Tribunal was established on 26 May 1999 and summoned the parties to attend a hearing held on 1 June of the same year. Only the representatives of the Department of Antioquia attended this hearing, stating that they wished to make the Tribunal aware of the details of the denunciation by the Department. The abovementioned denunciation referred to the following points: old-age pensions, social security, promotion, travel expenses, replacement of employees due to the death of workers and payment of school fees of workers' children. On 11 June the Tribunal decided it was competent to hear the denunciation by the Department of Antioquia. The member of the Compulsory Arbitration Tribunal representing the workers did not support this decision, considering that the denunciation was not presented within the deadline set in accordance with article 478 of the Substantive Labour Code. As to the points contained in the denunciation presented by the trade union, the Compulsory Arbitration Tribunal accepted some, reducing them and rejected others. Finally, the Arbitration Tribunal issued an award dated 24 June with regard to the points related to: duration of the award, salary increases, the housing fund and loans, assistance for the running of the trade union headquarters and assistance concerning legal advice, assistance for studying. As to the denunciation by the Department of Antioquia, the Tribunal decided to repeal the clause in the agreement regarding sanctions and disciplinary procedures, with Law No. 200 of 1995, governing such matters in the future and, as to pensions, the Tribunal ruled that the General Pensions Regime established under Law No. 100 of 1993 should apply to those official workers who begin work following the execution of the award.
- 557.** The complainant organization states that both it and the Department of Antioquia lodged appeals against the arbitral award: the trade union for extemporaneous and incomplete presentation of the denunciation to the trade union and because the constitutional and legal orders do not allow the employer to bring about a collective labour dispute through the denunciation of a collective agreement. For its part, the Department of Antioquia requested that the health and pensions issues should be resolved. On 14 September 1999, the Supreme Court of Justice ruled that the case should be sent back before the Compulsory Arbitration Tribunal which, on 24 June 1999, issued a ruling on the health and pensions issues without taking into account the arguments put forward by the trade union stating that the denunciation of the collective agreement by the employer could not give rise to the collective dispute and that the Tribunal could only consider the points related to the denunciation by the Department when the parties coincided with regard to the points in the denunciations by both parties, or when the trade union agreed to discuss the points put forward by the Department during the direct settlement stage, scenarios which did not arise in this case. According to the complainant organization, the Supreme Court of Justice did not rule in accordance with the so-called "traditionalist" approach that it had maintained for a long time, instead it adopted a new stance.

***Trade Union of Official Workers of
METROSALUD (SINTRAOMMED)***

- 558.** FENASINTRAP alleges that the Trade Union of Official Workers of METROSALUD (SINTRAOMMED) presented a list of grievances on 17 December 1998, which did not include any points on health and pensions. For its part, the enterprise METROSALUD presented the denunciation of the collective labour agreement on 31 December 1998, with the aim of amending, revising and deleting various clauses of the agreement in order to bring them into line with Law No. 100 of 1993 on pensions. On 16 April 1999, the enterprise submitted a general formula for settling the labour dispute, one of the most noteworthy elements of which is the establishment of a complementary health fund and the bringing into line of the pensions regime with Law No. 100, due to apply to workers from January 2001.
- 559.** For its part, on 15 April the trade union presented a proposal consisting of points that were, in essence, identical to those contained in the list of grievances of 17 December 1998, but with lower economic demands. However, METROSALUD continued to insist on the revision, amendment and deletion of the clauses contained in the agreement that were related to those health and pensions issues that were not contained in the list of grievances presented by SINTRAOMMED and that had not been accepted by SINTRAOMMED at the direct settlement stage. When the two sides failed to reach any agreement and the direct settlement stage was exhausted, the Ministry of Labour and Social Security convened an arbitration tribunal to settle the dispute. This Tribunal first sat during a public hearing on 12 November 1999, during which the representatives of the trade union opposed discussion of the points presented by the enterprise. Despite this, on 18 November 1999, the Arbitration Tribunal decided to address both the list of grievances presented by the trade union organization and the denunciation presented by the enterprise, as, in accordance with the new Supreme Court of Justice jurisprudence, the Tribunal was now competent to do so.
- 560.** Thus, the Tribunal issued an arbitral award dated 6 December 1999, allowing the amendment of provisions related to health and the pensions system. The trade union organization lodged an appeal against the arbitral award in its entirety due to the fact that, in the award, the arbitrators accepted all the enterprise's demands, cancelling workers' rights included under the agreement, despite the fact that the clauses containing these rights had neither been discussed at the direct settlement stage, nor included in the list of grievances.
- 561.** FENASINTRAP states that, on 17 March 2001, the Supreme Court of Justice ruled against the appeal, therefore upholding the arbitral award, stating that its traditional position on the formalities surrounding the denunciation by an employer of a collective agreement and the competence of arbitration tribunals had changed in that it now allowed the Arbitration Tribunal to examine the content of the denunciation made by the employer and taking into account the fact that the Substantive Labour Code does not establish explicit and definitive rules with regard to all aspects of the issue. Thus, the Labour Division of the Court ruled that compliance with Law No. 100 of 1993 was compulsory and that collective labour agreements should be brought into line with the abovementioned law even on occasions when the denunciation of the respective clauses originated with the enterprise.

***Trade Union of Workers of the Municipality
of Itagüí (SINTRAMITA)***

- 562.** FENASINTRAP states that the Trade Union of Workers of the Municipality of Itagüí (SINTRAMITA) presented a list of grievances on 3 November 1998 to the Municipality of Itagüí, after having made a denunciation of the collective agreement. On the same day, the Municipality made a denunciation of the collective agreement. The direct settlement stage

began on 10 November but the parties did not come to an agreement, for which reason the Ministry of Labour and Social Security convened an arbitration tribunal to settle the dispute.

- 563.** FENASINTRAP states that, on 1 September 2001, the Tribunal issued an arbitral award which was opposed by one of the arbitrators who felt that the employer's denunciation should have been rejected for not displaying the criteria required for its reviewal, which are: blatant unfairness, drastic and evident change to economic and social factors, or a serious and evident threat to the survival of the enterprise, the source of work and the continuation of its essential activities, and that this implied a denial of workers' rights set out in the agreement such as: old age pensions, leave for urgent reasons, the sale of cement and job security.
- 564.** The trade union, SINTRAMITA, lodged an appeal against the arbitral award and the Supreme Court accepted the trade union's arguments with regard to job security, but rejected those concerning the sale of cement, leave owing to urgent reasons and the pensions regime, in accordance with recent case law.
- 565.** FENASINTRAP states in general that the collective bargaining process in Colombia is set against the wider background of collective labour disputes that begin with the presentation of a list of grievances by the trade union. The content of the dispute is set by the trade union. Although the denunciation of a collective agreement that is in force may be carried out both by the employer and by the trade union organization, according to the complainant organization, the list of grievances that determines the scope of the collective dispute may only be presented by the trade union. Once the list of grievances has been presented, the collective bargaining process begins with the direct settlement stage in which, through dialogue, the parties may put an end to the dispute by signing a collective agreement. Should the parties not reach an agreement, the workers may have recourse to strike action or request the establishment of an arbitration tribunal. The rulings of such tribunals are subject to legal checks and balances in the form of appeal against an arbitral award before the Supreme Court of Justice, the Labour Annulment Division in the case of disputes within public enterprises, or before the Superior Court of the Judicial District in the case of disputes in all other enterprises.
- 566.** The Supreme Court of Justice previously maintained a so-called "traditionalist" approach, as a part of which it considered that the arbitrators should only resolve collective labour disputes with regard to the points of disagreement, that is to say the contents of the list of grievances and those points that the workers might have accepted to discuss during the direct settlement stage. Points contained in the denunciation by the employer could only be considered by the Tribunal in those cases where they coincided with the contents of the list of grievances.
- 567.** The complainant organization states that, from 1993, following the introduction of Law No. 100 on pensions, the Court altered its traditional stance, for the first time accepting that arbitration tribunals should revise those clauses concerning pensions even when such a revision had not appeared on the list of grievances but was a part of the denunciation by the employer. In time, the arbitration tribunals' power to examine was extended to issues other than those concerning pensions, brought up in the employers' denunciations.
- 568.** In its communication dated 15 July 2004, ASMETROSALUD states that it is a trade union organization, established on 16 March 2001, with the aim of protecting the workers from the administration's threat to liquidate the enterprise. It adds that it is made up of public employees from all the health sector occupational organizations active within METROSALUD, that is to say: the Colombian Medical Trade Union Association (ASMEDAS), Antioquia Branch; the Colombian National Association of Nurses (ANEC);

the National Association of Qualified Nurses (ANDEC); and the Association of Qualified Bacteriologists (ASBAS).

569. ASMETROSALUD states that three trade union organizations are active within METROSALUD: SINTRAOMMED, the Association of Environmental Health Employees (ASAESA) and ASMETROSALUD.

570. On 13 December 2001, ASMETROSALUD presented a list of grievances. On 20 December, the enterprise sent a memorandum to the trade union organization stating that, in accordance with article 416 of the Substantive Labour Code, public employees may not present lists of grievances and although ILO Conventions Nos. 151 and 154 had been ratified by the Government of Colombia, they had not been given effect. The complainant organization states that, faced with the refusal on the part of the enterprise to negotiate, it filed a complaint for failure to respect the procedure before the Ministry of Labour and Social Security, with the aim of forcing the employer to the negotiating table. However, this action did not result in a ruling being issued by the Ministry.

571. ASMETROSALUD adds that, in February of 2002, SINTRAOMMED, another active trade union organization within the enterprise, presented a list of grievances. Faced with two parallel lists of grievances, the authorities of the enterprise requested legal advice from the legal adviser of the Ministry of Labour and Social Security as to how to go about negotiating with each of the trade unions. On 12 March 2002, the legal adviser gave an opinion stating that, in the case of public employees, as there was no existing bargaining procedure, the same rules that had been applied in similar cases should be applied in a parallel fashion and that within an entity where two minority unions are active it is possible to negotiate with both in order to establish a single collective agreement which takes account of both lists of grievances. The complainant organization states that the board of directors of the enterprise has not, as yet, acted upon this opinion.

B. The Government's reply

572. In its communication dated 28 January 2005, the Government responds in a general manner to the allegations presented by FENASINTRAP. The Government states that, taking into account the fact that this denunciation is related to the rulings handed down by the Honourable Supreme Court of Justice, Labour Annulment Division, on the exercise of trade union activities and the right to collective bargaining, it is as well to make the position of the abovementioned corporation clear, in accordance with the information provided by the President of the Labour Annulment Division.

573. Firstly, it is important to remember that the decisions adopted by the Supreme Court of Justice with regard to the right to collective bargaining are based on the principle of equality, in accordance with article 13 of the Political Constitution, in line with article 55 of the Charter currently in force which guarantees the right to collective bargaining in order to regulate labour relations, bar the exceptions laid down in law.

574. The Government stresses that the rulings referred to in this case guarantee, in accordance with existing standards, the right to collective bargaining within a framework of equality between the trade union and the employer, it being the duty of the State to encourage cooperation or agreement across the board in order to find an amicable solution to the dispute, without neglecting the economic balance existing between the parties to the agreement. In order to make things clearer, the Government sends transcriptions of certain chapters of rulings issued by the Supreme Court of Justice.

575. Thus, a ruling dated 27 March 1969, on the appeal lodged by both parties against the arbitral award handed down on 9 June 1967 by the Arbitration Tribunal, which settled the

collective labour dispute which arose between the Union of Workers of the National Coffee Growers Federation (SINTRAFEC) and the National Federation of Coffee Growers and Coffee Warehouses SA (ALMACAFE) and its enterprises:

... Given that the alleged indefinite duration of the collective agreement would not only contravene the principles expressed but would also violate the very text of the Constitution, if the law truly does not set out a specific procedure for dealing with the employer's denunciation, then the most sensible approach would be to accept the existence of a legal vacuum and that it falls upon the authority interpreting the law to overcome this problem by applying the abstract principles put forward by the same legislation to this effect. Article 481 of the Colombian Judicial Code forbids the judge from refusing to issue a ruling on a case brought before him/her, making it compulsory for a ruling to be issued, it therefore being implicit that the judge shall fill any gaps and resolve any apparent contradictions that the applicable provisions may contain. Although article 14 of Decree No. 616 grants the employer the right to unilaterally denounce the agreement, encouraging with this denunciation a decision on the points to which the denunciation refers, but, the means by which this aim may be achieved not having been defined, this is an incomplete standard and, if it is to have the intended effect, then the authority interpreting the law must refer to the provisions that the law states must be taken into account in such cases.

... Equity, simply as a reasoning or moral value, does not form a part of the decisions of judges; rather the resolution of disputes on this basis is reserved to adjudicators ruling in equity according to their reasoning, as in the case of arbitration tribunals. However, equity becomes a criterion that a judge should apply for the interpretation of the law and legal matters when the fair resolution of the case in question does not strictly correspond to the abstract or absolute rule under written law, in order to maintain or re-establish the balance or equality that the law has aimed to maintain between the parties; this is manifested among other things in labour cases, in the regime of collective agreement – making which compensates for the inequality between worker and enterprise. The aim of the agreement is to make up for the worker's lack of freedom to conclude an individual agreement with the employer, due to his/her economically weak position and to place both parties in a situation of equality in order to set the general terms and conditions of employment. Given the above, it is clear that, as all labour disputes originate from the natural desire of the labour sector to amend existing law in order to improve conditions of employment beyond the levels set by existing laws or agreements, anything related to this amendment is the exclusive competence of the adjudicators, falling within the scope of the reasoning and moral values of those who are charged with settling conflicts of interest; however, this is not the case when dealing with matters linked to the maintenance of the balance of the economic interests of those between whom the dispute has arisen, because the preservation of this balance involves not only a conflict of interests but a legal issue as well, i.e. the preservation of a legal order deemed to be an indispensable element of "social equilibrium"; hence the concept of equity must also be applied by judges.

... Denunciation of the agreement is in accordance with this need to maintain a balance; given that the equality of the parties linked through professional association is provided for by the law, this equality would be destroyed if one party was granted a concession not granted to the other party, thus obliging the business sector to bear an indefinite rise in wage and benefit levels which, in the long term, could endanger the very existence of the enterprise. Thus, denunciation of the agreement by the employer cannot be considered to be an abrupt divergence from the Colombian legal order – as suggested by the legal challenge – on the contrary, it is backed up by exceptions found within doctrinal and legislative precedents ...

It being an indisputable fact that written law accepts the denunciation of the agreement by the employer and that this denunciation is based on the type of labour dispute which must be settled through the conclusion of a new agreement in accordance with Articles 478 and 479 of the Substantive Labour Code, and it being understood that workers' and employers' associations must be on a par, for which reason they are treated equally, the granting of legal instruments ensuring that one party receives this treatment whilst the other does not, would constitute a betrayal of the equitable way in which employer-worker relations should be coordinated in order to ensure that conflicts of interest do not upset the balance between professional associations as set out by the law.

576. In turn, in the ruling of 8 July 1996 in File No. 8989, it is stated that:

... We need to take account of the fact that the ruling of the Compulsory Arbitration Tribunal convened to settle a labour dispute is characterized by the fact that it should be equitable and not subject to the strict application of legal arguments.

... In accordance with article 479 of the Substantive Labour Code, amended by article 14 of Legislative Decree No. 616 of 1954, this Division has reiterated the doctrine that denunciation of the collective agreement constitutes a right for those parties signatories to the agreement, a right expressed through the written desire to terminate the agreement, addressed to the other party and communicated through the Ministry of Labour.

... It should be emphasized that collective bargaining performs a regulatory function with regard to labour relations and follows the course of achieving the obligation of a peaceful resolution to labour disputes assigned to it by the legal texts in force, if it develops in a fluid and flexible fashion and in perfect harmony with the rights and duties bestowed upon the parties by the law in order to guarantee the equality of the antagonists during the dispute. Attempts to gain an advantage by claiming rights that the law does not bestow only serve to bring the dispute back to its original state, radically and undesirably polarizing the parties, who will fall back into entrenched positions, refusing to listen to each others' proposals, defending, rather, their own preconceived ideas ...

... When the agreement in force has been denounced by the employer, jurisprudence has specified the cases in which normally an arbitral award should be sought on the points referred to by the denunciation, limiting them to those which may have given rise to conflict during the direct settlement stage, but jurisprudence also indicates that "it is not legally acceptable to state that employers cannot denounce a collective labour agreement because this is contrary to what is sustained by law, in accordance with the ruling of 29 October 1982, File No. 9120, neither is it legally acceptable for the parties or the Arbitration Tribunal to vary the conditions previously agreed on and which have been legally denounced" (ruling of 17 October 1991). Naturally, regarding this final aspect, adds the Division, such a possibility is the exception and not the rule.

577. The Government stresses that, taking into account the abovementioned precedents, that the previous case law has had visible effects on the denunciation of the collective agreement by the employer, taking into account the fact that this is an essential right of all parties involved in concluding a collective agreement, a process which involves negotiation of conditions which govern the labour contracts of those workers affected by the collective bargaining process. In this respect, although the employer may not give rise to the collective dispute through the denunciation of the agreement or covenant, the employer is certainly aided by the right to link his/her concerns to the development of that dispute and to have his/her hopes and arguments heard by the other party in a reasonable fashion so that a bilateral, or, sometimes, multilateral dialogue develops, as should be the case with a contractual relationship.

578. As to the functions of the Supreme Court of Justice, the Government states that it examines arbitral awards for irregularities, taking into account the minimum conditions of employment laid down by the law and those stipulated in standards in force and the scope granted to the decision-making power of the arbitrators by the denunciation of the agreement, examining the nature of the dispute, whether the direct settlement or conciliation stages have been complied with, whether the Tribunal was established in accordance with the law, whether it is operating as it should, whether it has issued a ruling within the respective terms and on the relevant issue. In conclusion, the Supreme Court of Justice, Labour Division, examines whether the award is in accordance with the Political Constitution, the law and the relevant agreements, checking that the constitutional rights of the parties have not been violated owing to an absolute lack of material reasons or due to the unfounded and obvious non-recognition of such rights.

- 579.** The Government recalls that the Committee on Freedom of Association has repeatedly stated that “When the Committee requests a government to furnish records of judicial proceedings, such a request does not reflect in any way on the integrity or independence of the judiciary.” The Government and the Committee on Freedom of Association both consider that a solid, independent judicial system is an essential component of the democratic system and is fundamental in guaranteeing the freedom and independence of the trade union movement. In this respect, the Government supports the Committee’s statement that “The very essence of judicial procedure is that its results are known, and confidence in its impartiality rests on their being known”, a knowledge guaranteed by the public information services of the Colombian judicial system and by the information that the Government provides to the Committee on the Freedom of Information. The Government agrees with the Committee in that “whereas the latter considers it within its mandate to examine the laws, including those interpreted by the high courts, the fact that the judicial system issues rulings that are not to the liking of the workers or workers organizations because they do not satisfy their interests or requests, or because they differ from the workers’ or workers’ organizations’ interpretation of the standards in force, does not constitute a valid reason for calling for an inquiry into the integrity and rulings of the judicial system, as well as the institution itself. The Government rejects such an inquiry or procedure. If the intention is to convert the Committee on Freedom of Association into a body that will replace the judicial system when the latter issues unpopular decisions, then the Government firmly and without hesitation rejects this stance which, should it become common practice, would, paradoxically, have the immediate consequence of above all weakening the judicial system with regard to freedom of association in Colombia.
- 580.** Based on this premise, the Government provides a consistent response through several rulings of the Supreme Court of Justice on the issue, with the sole aim of illustrating the current case law on the issue and the essential points on which it is based to the Committee and the Governing Body. The only route through which the Government encourages dialogue regarding the judicial system is through actions aimed at strengthening the Colombian judicial system through the empowerment and training of judges and magistrates, which is carried out within the framework of the special technical cooperation programme with the ILO, as such a framework of cooperation does not involve subjecting the Colombian judicial system to an inquiry.
- 581.** As to the allegations presented by ASMETROSALUD concerning the refusal by the enterprise METROSALUD to enter the collective bargaining process, the Government states that the judicial system governing public servants accepts two scenarios: one being the case of public employees of the executive branch, which is legal and statutory in nature and the other being that of official workers, which is contractual in nature. Basically, public employees’ employment relationships are governed by the law or by valid regulations that may only be amended by laws and regulations of equal standing. The main difference between the two scenarios is that, with contractual arrangements, it is possible to negotiate over the conditions of service and the amendment of the corresponding benefits, with regard to increases, following a unilateral decision on the part of the employer or through collective labour agreements.
- 582.** Thus, under the terms of article 414 of the Substantive Labour Code, freedom of association is extended to workers throughout the official services, with the exception of members of the national army and of the police force and any police body. However, trade unions representing public employees only carry out the following functions: (i) studying the characteristics of the relevant profession and the conditions of employment of its members; (ii) advising its members on the defence of their rights as public employees, particularly in the case of the administrative service; (iii) representing the common or general economic interests of the members, or of the relevant profession before the

authorities; and (iv) submitting appropriate written representations to the relevant heads of administration.

- 583.** For the authorities, and in particular the hierarchical superiors of the members, the functions referred to in the last two items represent a corresponding duty to receive trade union representatives appropriately and to find an appropriate solution to their requests (article 415 of the Substantive Labour Code (CST)).
- 584.** The Constitutional Court found the prohibition imposed by article 416 of the Substantive Labour Code on public employee trade unions presenting lists of grievances or concluding collective agreements to be legitimate, as stated in Ruling C-110 of 10 March 1994 which states that it may be applied. This restriction is supported by article 55 of the Constitution that guarantees the right to collective bargaining to govern employment relations except in the case of the exceptions laid out under the law.
- 585.** As to Ruling C-377 of 1998, upon reviewing the constitutionality of the Labour Relations (Public Service) Convention, 1978 (No. 151), and Law No. 411 of 1997 approving that Convention, the Court found that the different way in which official workers and public employees were viewed when dealing with the right to collective bargaining was in accordance with the Constitution, stating that the former are fully entitled to this right, whilst the latter are only partially entitled to the same right, in that although they (the public employees) have the right to seek and conclude concerted settlements in the case of dispute, this does not in any way affect the authorities' ability to unilaterally set conditions of employment.
- 586.** In Ruling C-201 of 2002, the Constitutional Court stated that "In order to determine whether these provisions are applicable in the case of trade unions of public employees, they must be brought in line with article 416 of the Substantive Labour Code which restricts the right to collective bargaining of trade unions of public employees in the sense that they are forbidden from presenting lists of grievances and concluding collective agreements, a restriction that the Court has repeatedly found to be in accordance with the Political Constitution."
- 587.** As to the trade union organization's statement that, when faced with the refusal by the board of directors of METROSALUD to negotiate, a complaint was lodged with the Ministry of Labour and Social Security, the Government states that the Ministry of Labour and Social Security issued Ruling No. 00979 of 28 May 2002, exonerating the state social enterprise, METROSALUD, considering that the enterprise had initiated the appropriate dialogue but suspended this dialogue owing to legal doubts as to the legality of entering into a collective bargaining process with public employees. The abovementioned ruling stood, as no legal appeal was lodged against it. As to the advice issued by the Legal Office of the then Ministry of Labour and Social Security, as referred to by the complainant organization, the Government states that compliance with this advice is not compulsory, neither does it in any way represent an obligation for the Legal Office, in accordance with the terms of article 25 of the Code for administrative litigation.
- 588.** In conclusion, the collective bargaining process involving public employees is limited. Basically, it may not touch upon conditions of employment that the Political Constitution states are the preserve of the law, as is the case with issues connected to wages, benefits, disciplinary procedures and the administrative service, amongst others.

C. The Committee's conclusions

- 589.** *The Committee notes that this case refers to: (1) allegations presented by the Federation of Workers' Unions in Public Undertakings (FENASINTRAP) that the Colombian Supreme*

Court of Justice changed its criteria to allow arbitration tribunals, which are convened to settle collective disputes between workers and enterprises or public sector entities, to examine denunciations of collective agreements by employers, as well as lists of grievances presented by the workers, as a basis for issuing arbitral awards, an action which, according to the complainant organization, contravenes Convention No. 98; and (2) the allegations presented by the Association of Workers and Employees of the State Social Enterprise METROSALUD (ASMETROSALUD) that the enterprise METROSALUD refused to enter into a collective bargaining process with the trade union, arguing that effect had not been given to Conventions Nos. 151 and 154, ratified by Colombia.

- 590.** *As to the allegations presented by FENASINTRAP concerning the examination by the arbitration tribunals, not only of the lists of grievances presented by the workers but also of the denunciations of the collective agreements presented by the employers during the collective disputes which arose between: the Department of Antioquia and the Trade Union of Workers and Employees of the Department of Antioquia; the enterprise METROSALUD and the Trade Union of Official Workers of METROSALUD (SINTRAOMMED); the Municipality of Itagüí and Trade Union of Workers of the Municipality of Itagüí (SINTRAMITA), the Committee notes the complainant organization's statement that traditionally, the Colombian Supreme Court of Justice held that arbitration tribunals should base their competence regarding the issuing of arbitral awards solely on the lists of grievances presented by the workers. Denunciations by employers could only be taken into account in those cases where they coincided with the points contained in the list of grievances, or on those occasions when the workers would have accepted to discuss the points during the direct settlement stage, prior to the establishment of the Arbitration Tribunal. The Committee notes that FENASINTRAP states that owing to a change in case law at the level of the Supreme Court of Justice, currently, although the collective disputes are still only initiated by the denunciation by the workers and the subsequent presentation by them of a list of grievances, arbitration tribunals may issue their awards based not only on the lists of grievances but also on the denunciations by the employer, even in those cases where the workers are opposed to the discussion of the points contained in those denunciations. The Committee notes that according to FENASINTRAP, this radically alters the content of the collective agreements in force up until now and, in many circumstances, implies a worsening of conditions of employment and employment benefits, especially with regard to pensions and health issues.*
- 591.** *The Committee also notes the Government's reply in which it stresses that the Supreme Court has competence when examining the regularity of arbitral awards, which must meet the criteria of equality and the right to participate. The Government sends transcripts of certain paragraphs of rulings concerning these matters, issued by the Supreme Court of Justice, in which the importance of allowing the parties involved to participate in the collective bargaining process and the need to treat the parties equally during discussion of the collective dispute are highlighted.*
- 592.** *In noting that, according to the Government's reply and the rulings of the Supreme Court, the collective dispute may only originate from an initiative taken by the workers and taking into account the fact that, in accordance with Colombian legislation, if no denunciation of the agreement exists, then this agreement will be automatically extended by increments of six months (article 477 and related articles of the Substantive Labour Code), the Committee feels that, although once a collective dispute arises, an arbitration tribunal may take into account the points put forward by the employer even though those points have not been accepted by the workers, this fact does not contravene the principle of free and voluntary negotiation. Thus, the Committee highlights the importance of active participation by both parties in negotiation and furthermore recalls that "The opportunity which employers might have, according to the legislation, of presenting proposals for the purposes of collective bargaining – provided these proposals are merely to serve as a*

basis for the voluntary negotiation to which Convention No. 98 refers – cannot be considered as a violation of the principles applicable in this matter” [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, 4th edition, para. 849]. The Committee therefore does not consider that the new case of law of the Supreme Court violates the principles of Convention No. 98 related to free and voluntary collective bargaining.

- 593.** As to the allegations presented by ASMETROSALUD concerning the refusal by the state enterprise METROSALUD to enter into a collective bargaining process with the complainant organization, owing to the failure to give effect to Conventions Nos. 151 and 154, the Committee takes note of the information provided by the Government to the effect that public employees do not have the right to present lists of grievances in accordance with the terms of article 55 of the Political Constitution which establishes the right of workers to enter into collective bargaining processes within the limits imposed by the law and article 416 of the Substantive Labour Code which prohibits collective bargaining in the case of public employees.
- 594.** In this respect, the Committee notes that Colombia has ratified Conventions Nos. 98, 151 and 154 and that, as a consequence, public sector workers and those of the central public administration should have the right to collective bargaining. The Committee however states that, in light of Convention No. 154, in the case of collective bargaining within public administration, special modalities for application may be set. In effect, the Committee, sharing the point of view of the Committee of Experts in its General Survey of 1994, recalls that, even when the principle of the autonomy of the parties in the collective bargaining process remains valid with regard to public servants and public employees covered by Convention No. 151, this may be applied with a certain degree of flexibility given the particular characteristics of the public administration previously pointed out, whilst at the same time, the authorities should, to the greatest possible extent, promote the collective bargaining process as a mechanism for determining the conditions of employment of public servants. The Committee therefore feels that, in this case, the limits imposed on public employees with regard to the possibility of collective bargaining are not in accordance with the terms of the abovementioned Conventions, as public employees may only present “appropriate written representations” which are non-negotiable, in particular with regard to conditions of employment, which may only be determined by the authorities who have exclusive competence in this matter. The Committee therefore requests the Government to take the measures necessary to ensure that, in consultation with the trade union organizations concerned, the legislation is amended in order to bring it into line with the Conventions ratified by Colombia, so that the workers in question may have the right to collective bargaining.

The Committee's recommendation

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

As to the refusal by the state social enterprise METROSALUD to enter into a collective bargaining process with the Association of Workers and Employees of the State Social Enterprise METROSALUD (ASMETROSALUD), the Committee requests the Government to take the measures necessary to ensure that, in consultation with the trade union organizations concerned, the legislation is amended in order to bring it into line with the Conventions ratified by Colombia, so that the workers in question may have the right to collective bargaining.

CASE NO. 2355

INTERIM REPORT

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

- the Single Confederation of Workers of Colombia (CUT)
- the General Confederation of Democratic Workers (CGTD)
- the Confederation of Workers of Colombia (CTC)
- the Workers' Trade Union (USO)
- the Association of Managers and Technical Staff of the Colombian Petroleum Industry (ADECO) and
- the International Confederation of Free Trade Unions (ICFTU), which has supported the complaint

Allegations: The complainants allege that after four months of meetings to negotiate a list of claims with the ECOPETROL S.A. enterprise, the administrative authority convened a compulsory arbitration tribunal; subsequently a strike began and was declared illegal by the administrative authority; in this context, the company dismissed more than 200 workers including many trade union officials

596. The complaints are contained in communications dated 7 June 2004 from the Single Confederation of Workers of Colombia (CUT), the General Confederation of Democratic Workers (CGTD), and the Confederation of Workers of Colombia (CTC), dated 8 June 2004 from the Association of Managers and Technical Staff of the Colombian Petroleum Industry (ADECO), and dated 18 June and 27 July 2004 from the Workers' Trade Union (USO). The International Confederation of Free Trade Unions (ICFTU) supported the complaint in a communication dated 28 June 2004.
597. The Government sent its observations in communications dated 22 September 2004 and 15 and 17 February and 11 and 20 April 2005.
598. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainants' allegations

599. In their communications of 7, 8 and 18 June and 27 July 2004, the Single Confederation of Workers of Colombia (CUT), the General Confederation of Democratic Workers (CGTD), the Confederation of Workers of Colombia (CTC) and the Workers' Trade Union (USO) state that in November 2002, the Workers' Trade Union (USO) presented a list of claims to the Government and the administration of ECOPETROL with the principal aim of defending and strengthening the Colombian national petroleum enterprise. At the same time, ECOPETROL lodged a set of counterclaims with the Ministry of Social Protection. The purpose of this was to terminate the collective agreement and negate the discussion on oil policy and the situation of the company. Once the direct settlement phase began and for

a period of four months thereafter, the administration refused to discuss the union's claims and insisted on imposing the counterclaims, as a result of which the process ended without achieving any result.

- 600.** The complainants add that ECOPETROL persuaded the Ministry of Social Protection arbitrarily to set up a compulsory arbitration tribunal in order to terminate the existing collective agreement. The USO, considering that this was arbitrary and contrary to the principles of freedom of association set out in Conventions Nos. 87 and 98 and interpreted in the jurisprudence of the Committee on Freedom of Association, declined to appoint an arbitrator as required under Colombian law. The Ministry then appointed the "workers' arbitrator" on the union's behalf.
- 601.** The complainants state that the arbitration tribunal was established and gave a ruling contrary to law and against the interests of the workers represented by the USO. The USO lodged an appeal against this ruling within the time allowed. The Labour Division of the Supreme Court handed down a ruling on 31 March 2004 in which it exceeded its competence and not only failed to set aside the original ruling but also referred the case back to the compulsory arbitration tribunal, in order to rule on a great number of issues on which it had handed down a decision without considering the records of the direct negotiations between the parties.
- 602.** The complainants state that, once the collective dispute was announced, the state enterprise ECOPETROL in November dismissed 11 USO officials in Cartagena (they do not indicate the names of the officials in question).
- 603.** The complainants indicate that the USO, faithful to its historical role not only of defending workers' interests but also, and especially, of promoting national development, made every effort to avoid strike action by giving preference to dialogue and negotiation. As the opportunity for settling the dispute by direct talks was lost, ECOPETROL employees affiliated to USO went on strike on 22 April 2004. On 23 April 2004, the Ministry of Social Protection in resolution No. 1116 declared the strike illegal. In the resolution, the Ministry authorized ECOPETROL to dismiss workers who promoted or participated in the strike.
- 604.** The Ministry of Social Protection based its ruling that the strike was illegal on the assumption that a strike in the oil industry concerned an essential public service. The state company, ECOPETROL, dismissed 248 workers on the basis of the resolution, and threatened a large number of USO members who remained on strike with sanctions and criminal proceedings.
- 605.** According to the complainants, the resolution of the Ministry of Social Protection which declared the strike illegal is unlawful in that it infringes Conventions No. 87 and 98, and disregards the concept of "essential service". The Ministry violates Convention No. 87 by its blatant administrative interference.
- 606.** The complainants add that during the collective dispute and strike, the company committed a number of acts of anti-union discrimination.
- 607.** The complainants allege that on the basis of the declaration of illegality of the strike, dismissals of the following workers took place:
- on 28 April 2004, the trade union officials Alirio Rueda Gómez, Fernando Coneo García, Juvencio Seija Mejía and Gregorio Alfonso Mejía Mancera;

- on 30 April 2004, Danilo Marín Sánchez, José Ramiro Luna Martínez, Manuel Jesús Coronado, Jairo Alberto Suárez Murcio, Luis Roberto Schmalbach, Luis Alberto Ramos Arenilla, Nelson Abril Hernández and Dagoberto Tovar Gómez;
- on 3 May 2004, Hernando Hernández Pardo, Rafael Enrique Torres Noguera, Abel Antonio Giraldo, José Antonio Meneses Becerra, Javier Antonio Calderón Chona, Carlos Eduardo Oviedo Barrios, César Muñoz Suárez, Gustavo Cardozo Ramírez, Dairo de Jesús Sánchez, and Fernando Tapias Ayal;
- on 4 May 2004, Fernando Tapias Ayala, Luis Carlos Zapata Araque, Víctor Julio Bayona Arévalo, Alfonso Acosta Viña, Cristóbal Salas Angulo, Javier Rodríguez Rincón, Bernardo Urrego Beltrán, Edwin Geliz Pérez, Salomón Ayala Vásquez, Arnulfo Núñez Herrera, Freddy Jair Díaz Rojas, Alvaro Gómez Lizarazo, Luis Carlos Días García, Roberto Plata Dueñas, José Miguel Vera Meza, Pedro Nel Quintero, Jaminthon Meza Alvarado, Julio César Mantilla Chinchila, Jaime Villadiego Hernández, Rusbel de la Rosa Morales, Luis Serrano Cifuentes, Alvaro Remolina Gutiérrez and Gabriel Alvis Ulloque – President of USO;
- on 5 May 2004, Eduardo Araujo Ortega, Gilberto Durán Higuera, Carlos García Chona, Emilio Manrique Alfonso, Raúl Atuesta Cano, Manuel Pianeta Matute, Alvaro Meléndez Arroyo, Héctor Carrillo Villamizar, Orlando Moreno Páez, Edwar Humberto Heredia Duarte, Julio Emilio Rico B., Leonardo Muñoz Velez, Juan Manuel Fonseca Beltrán and Pedro Nel González;
- on 6 May 2004, Luz Stella Acero de Forero, Elvia Vega de Escobar, Abelardo Gamarra Fonseca, Pedro Elías Herrera Ramírez, Olga Lucía Amaya Páez, Gladis Suárez Vertel, Yomber Sierra Ospina, José Vicente Morales, Carmen Helena Mármol Vásquez, Alfredo Cabarcas Martínez, Néstor William Parrado Ruiz, Joselito Cristancho Solano, Jaime Pachón Mejía, Ricardo Parrada Escano, Julio Flores Oses, Germán Alvarino Soracá, Jhon Freddy Henao Espitia, Jhon Freddy Certuche Vásquez, Víctor Manuel Pedraza Roa, Hermes Francisco Montiel, Nelson Fuentes Cabarcas, Gustavo Torres Castro, Pedro Julián Cote Parra, Jorge Alberto Zambrano Ramírez, Juan Carlos Aguilar Durán, Oscar Manuel Monsalve, Martín Emilio Rendón Castillo, Mario García Ochoa, Ludwing Fabián Villamizar, Omar Darío Gómez Galeano, Carlos Enrique Padilla Muñoz, Cynthia King Muleth and Guillermo Duque Pedrozo;
- on 7 May 2004, Fredys Jesús Rueda Uribe, José F. Blanco Landinez, Luz Miryam García Quivano, Rocío Sandoval Sánchez, Carlos Sarmiento Centeno, Alexander Giovann Campos Vega, Javier Hernández Acosta, Neil Armstrong Ramírez Delgado, Jorge Enrique Gómez Prada, Ricardo Forero Rondano, Carlos Alonso Ardila, Braulio Mosquera Uribe, Reinaldo Mantilla Florez, Wilson Alfredo Villaba Giraldo, Alfredo Salazar Díaz, Leonardo Mauricio González, Sergio Luis Peinado Barranco, Oscar Sánchez Pinto, Alfonso Plata Sarmiento, Ludwing Gómez Almeida, Pedro Pablo Moreno Cortés, Ariel Corzo Díaz, Juan Carlos González Canal, Ariel Rosero, Jhon Jairo Castillo, William Hernán Chanchi, Edmundo Julián Buchelly, Nelson Martín Luna, William Hernández Castaño, Jorge Coral Paladines, Néstor Cortés Oliveros, Iván Botero Osorio, Jorge Elicer Palencia Alvarino, Alonso Rangel Zambrano and Henry Valero Rincón;
- on 8 May 2004, Oscar Martínez González, Carlos Cevallos Castro, Jairo Eduardo Solarte, Nelson Franco Mendoza, Moisés Barón Cárdenas, José Oliveiros Arroyo;
- on 10 May 2004, Fernando Duarte Franco, Jesús Garrido Garrido, Alvaro Rueda Duque, Gabriel Sepúlveda Cáceres, Pablo Asensio Florez, Hugo Alexander Torres Rodríguez, Wilmer Guerrero Rendón, Edgar Correa González, Jairo Vidal Barón

Cárdenas, Alvaro Hernández Cuaran, Jorge Christopher Ortiz Yela, Mario Alberto Mora, Ordubey Cuartas Jaramillo, José Alexander Martínez, Ramiro Medina, Fernando Jiménez Chaparro, Geninser Parada Torres, Germán E. Sánchez Martínez, Honorio Lozano Pinzón, Pedro Becerra Padilla, Luis Fernando Martínez Becerra, José Luis Sepúlveda Jaimes, Richard Alfonso Díaz Caballero, Edgar Páez Sarmiento, Oscar Javier Celis Suárez, Oscar Javier Sánchez Villamizar, Jair Ricardo Chávez, Jhon Enrique Pérez Cáceres, Carlos David Quijano, Aldemar Vásquez Velásquez, Fernando Londoño Díaz, Adriano Ochoa Gómez, Héctor Rojas Aguilar, Alfonso Rafael Dovale Florez, Guillermo Lastre Castillo, Alberto Pérez Hernández, Reinaldo Rey Coronel, Raúl Alberto Gómez Buitrago, Héctor Meza Pulido, Luis Carlos Castillo Santos, Ramón Manduano Urrutia, Manuel Francisco Palomino, Henry Hernández Tamara, Carmelo José Ramos Herazo, Angel María Rueda Garzón; Nelson Miranda Gallardo, Saul Ospino Hernández and Jimmy Alexander Patiño Reyes; and

- on 11 May 2004, Pablo Emilio Valencia Torres, Sergio Páez Mantilla, Franklin Murgas Estrada, José Manuel Acosta Arrieta, Freddys Elpidio Nieves Acevedo, Miguel Antonio Gómez Calderón, Juliano Hernández García, Roberto Guerrero Ramírez, Mauricio Gómez, Gerben Linington Castro Salazar, Alirio Acevedo Rueda, Alexander Domínguez Vargas, Lino Caro Castellanos, Wilmer Hernández Cedrón, Germán Polanco Castillo, Orlando Robles Alvarez, Lavinis Arzuza Alcántara, Ernesto Carlos Martelo, Clemente Sals Yanes, Idael Betancour Parra, Oscar Carrillo Gómez, Orlando Fernández Mañara, Alejandro Blanco Becerra, Julio César Atencia, Gustavo Martínez Afanador, Ludys Torres Arias, Angela Fiallo Marín, María Luisa Niño de Prada, Mayra Alejandra Joya Bueno, Donaldo Alvarino Pinto and Mauricio Durán Gamarra.

- 608.** The complainants also allege that criminal proceedings were brought against USO members and officials for exercising their right to strike. During the strike by ECOPETROL workers belonging to USO, seven trade union officials were prosecuted on charges of insulting behaviour, issuing threats and damaging property. They were: Fredys Fernández Suárez, Luis Roberto Schmalbach Cruz, Ignacio Vecino, Fernando Jiménez, Humberto Rodríguez, Sandro Efrey Suárez and Ricardo Harold Forero. The inquiry was assigned by the office of the Attorney-General to two district attorneys in Bogotá who are currently based in the personnel department at the ECOPETROL industrial complex in Barrancabermeja, in other words, in the same premises where the non-striking workers are based. The USO members Hermes Suárez and Edwin Palma were detained on 3 and 11 June 2004 and are charged with conspiracy to commit offences and terrorism.
- 609.** The complainants state that on 26 May 2004, an agreement was reached to end the strike (the complainants provide a copy of the agreement signed by representatives of the Government, ECOPETROL S.A. and USO). With regard to the 248 dismissed workers, the agreement stipulates the following:

2.2.2. Ad hoc voluntary arbitration tribunal.

In the light of the complaint brought by representatives of the USO regarding the unilateral and justifiable decision by the company to terminate 248 individual contracts of employment in connection with a collective work stoppage declared to be illegal by the Ministry of Social Protection through resolution No. 001116 of 22 April 2004, a dispute contested by ECOPETROL S.A. on the grounds that it is without foundation in terms of fact and law, the parties agree to establish an ad hoc voluntary arbitration tribunal with a view to achieving a timely resolution of the dispute to rule in accordance with the substantive and procedural laws and regulations in force exclusively upon regarding the claims made by the former workers whose situation is not covered by paragraph 2.2.1 above and whose contracts of employment were terminated for justified reasons as a result of events that arose from the

collective work stoppage which began on 22 April 2004, that is to say, it will not examine or define matters other than dismissals that took place in connection with these facts.

As regards the ending of the strike, the agreement in point 3 stipulates the following:

3. Resumption of work, cessation of administrative measures and loan to the USO:

3.1. Resumption of work

In accordance with the previous agreements, the USO shall end the collective work stoppage, and to that end shall adopt measures and issue instructions to ensure that all the workers concerned are available to resume work, thereby ensuring normal commercial, industrial and administrative activities at ECOPETROL S.A., from 6 a.m. on 28 May 2004 onwards, in accordance with the timetable which the company shall establish for this purpose.

3.2. Cessation of administrative labour measures

In the spirit of finding a definitive resolution to the situations arising from the labour problems within ECOPETROL S.A., the parties agree that from that date onwards the company shall cease actions relating to the events of 22 April 2004 and justified terminations of employment contracts. Similarly, the company undertakes to cancel any administrative labour measures that had, as at the date on which this agreement is signed, already been initiated but of which no notice had been given.

In order to ensure the harmonious development and continuing soundness of relations between the company and the trade union, the parties shall be able to bring legal action only in connection with the declaration of illegality of the strike or of the arbitration ruling.

- 610.** In its communication of 8 June 2004, the Association of Managers and Technical Staff of the Colombian Petroleum Industry (ADECO) recalls that the Colombian national petroleum enterprise ECOPETROL was founded as a state industrial and commercial company under the terms of Act No. 165 of 1948. It was reorganized under the terms of Legislative Decree No. 1760 of 2003 as a public company ECOPETROL S.A., linked to the Ministry of Mines and Energy. Two trade unions, USO and ADECO, coexist within the company. ADECO refers to the process of presentation of the list of claims by USO already mentioned by the other complainants in their communications, and objects specifically to the convening of a compulsory arbitration tribunal by the Ministry of Social Protection through resolution No. 0382 of 25 March 2003. ADECO again objects to the appointment by the Government of the workers' arbitrator without consulting the trade unions.

B. The Government's reply

- 611.** In its communications of 22 September 2004, 15 and 17 February and 11 and 20 April 2005, the Government states that on 28 November 2002, the Workers' Trade Union (USO) and ECOPETROL, in accordance with the legal rights enshrined in section 479 of the Substantive Labour Code as amended by section 44 of Legislative Decree No. 616, 1954, presented a list of claims to the labour inspector of the Ministry of Social Protection, together with a partial denunciation of the collective labour agreement that had been in force from 1 January 2001 to 31 December 2002. Once the statutory deadline had elapsed without an agreement being reached by the parties during the direct settlement phase aimed at resolving the collective dispute, the Ministry of Social Protection, in resolution No. 000382 of 25 March 2003, in accordance with its mandate and with labour law, ordered the establishment of the compulsory arbitration tribunal to settle the collective labour dispute. To that end, it took into account the fact that the state oil company was responsible for providing an essential public service, as the Constitutional Court had stated in its ruling C-450 of 1995.

- 612.** The USO filed an application to annul the order to establish the compulsory arbitration tribunal, and this application was rejected by the Ministry of Social Protection in its resolution No. 001273 of 29 May 2003 which upheld the original order. The compulsory arbitration tribunal gave its ruling on 9 December 2003 (clarified and supplemented on 17 December). Independently of the normal process within the tribunal as a legal body with binding decision-making power, informal talks also took place between the parties but despite these and despite the company's efforts, it was not possible to reach an agreement on all the issues raised and thus not possible to achieve a direct settlement of the collective dispute.
- 613.** The USO, in its national assembly of delegates, decided to go ahead with preparations for the general strike at the enterprise in accordance with resolution No. 001 of 16 January 2004. The Ministry of Social Protection in resolution No. 000936 of 4 March 2004 advised the union to reconsider its decision within a period of eight working days from the date on which the administrative act came into effect. The USO lodged appeals against the resolution, but these were quashed by resolutions Nos. 001235 and 001512 of 26 March and 16 April 2004 respectively, which upheld the original decision.
- 614.** The USO and ADECO lodged appeals against the ruling of the compulsory arbitration tribunal. These were settled by the Labour Cassation Chamber of the Supreme Court in ruling No. 23556 of 31 March 2004, which upheld the arbitration ruling of 9 December 2003. The judicial authority ordered that the case be referred back to the arbitrators to allow them within ten days to give their decision regarding those points of the notice of partial termination of the collective agreement and the list of claims that had not been dealt with by the compulsory arbitration tribunal.
- 615.** The Government adds that despite the fact that national legislation prohibits strikes in enterprises that provide essential public services, as is the case with ECOPETROL S.A., the trade union on 22 April 2004 declared a collective suspension of work at the enterprise. For this reason, the Ministry of Social Protection, through resolution No. 1116 of the same date, declared the strike illegal.
- 616.** ECOPETROL S.A., citing relevant aspects of fact and law, unilaterally and for justified reasons, terminated the employment contracts of 248 employees between 30 April and 15 May 2004 for their active participation in the illegal strike. All this was done with due regard to the established procedure, which is designed to safeguard the rights of workers to a defence and due process of law, in accordance with the criteria established in this matter by the higher courts.
- 617.** The Government states that the direct settlement phase of the collective bargaining process began on 5 December 2002 and continued until 21 March 2003. The process got under way three times but the USO did not take part in discussions on all aspects of the collective dispute, including the list of claims and the employer's denunciation of the collective agreement. While the company was always prepared to engage in dialogue and consultation, the union failed to do what was needed to ensure that the direct settlement process, convened when it presented the list of demands, could succeed.
- 618.** The Government indicates that, according to the information provided by ECOPETROL S.A., the negotiations were consistent with the applicable laws and regulations, and respected the rights and prerogatives of each of the parties; as there was no agreement to terminate the collective agreement through arbitration, the company asked the Ministry of Social Protection to convene a compulsory arbitration tribunal as a legal mechanism for settling the dispute. This should not be understood as something "won" by ECOPETROL S.A., but as the normal consequence of labour law when the direct settlement phase of a collective dispute within an enterprise providing an essential public service ends without

an agreed settlement. The Government adds that under the terms of section 452 of the Substantive Labour Code, collective disputes arising in essential public service enterprises must be referred to a compulsory arbitration tribunal, as in the present case. The fact that the union may have refused to exercise its right to appoint a member of the tribunal and subsequently criticized the appointment made for it by the Ministry of Social Protection is not the issue. The Ministry of Social Protection is the body empowered to convene arbitration tribunals and to appoint tribunal members when one of the parties fails to do so and when the parties cannot agree on the choice of a third arbitrator.

- 619.** As regards the alleged dismissal of 11 workers at the company, of the Cartagena Refinery Administration Centre, the Government states that, according to information provided by ECOPETROL S.A., this was not the result of the collective dispute. The employment contracts of the workers in question were terminated unilaterally and for justifiable reasons in accordance with established procedure. Of the 11 workers, only seven were members of the USO executive committee. The decision followed the active participation of the workers in the collective work stoppage on 19 and 20 November 2002, which was declared illegal by the then Ministry of Labour and Social Security through resolution No. 01878 of 20 November 2002. Such measures obviously pre-dated the presentation of the list of claims. The decision by ECOPETROL S.A. to dismiss the workers was the subject of an appeal before the ordinary labour court, which rejected the workers' claims for reinstatement. The workers then invoked the procedure for enforcing their constitutional rights (*amparo*) but this was not accepted on the grounds that other defence mechanisms already exist, such as the ordinary labour courts.
- 620.** As regards the alleged violation of the right to strike, the Government states that the Ministry of Social Protection acted in accordance with national law, as the resolution declaring the work stoppage by ECOPETROL workers illegal was based on section 430 of the Substantive Labour Code, as amended by section 1 of Extraordinary Decree No. 753 of 1956, which prohibits strikes in the public services, and which in clause (h) defines as a public service the activities of extraction, refining, transport and distribution of petroleum and its derivatives where these activities are intended, in the Government's view, to ensure the country's normal fuel supply. In this regard, the Constitutional Court in its ruling C-450 of 4 October 1995 stated that extraction, refining and transport of petroleum and its derivatives referred to in section 430(h) of the Substantive Labour Code are basic and fundamental activities which served to safeguard other essential activities such as transport, power generation, and so forth, and all these activities serve in turn to allow people to exercise their fundamental rights. Consequently, these activities are essential public services, and ECOPETROL S.A. therefore provides an essential public service, a reason considered valid by the Ministry of Social Protection for declaring the collective work stoppage illegal.
- 621.** As regards the allegation regarding the dismissal of 248 workers, ECOPETROL S.A. explains that Colombian labour law includes provisions concerning illegal work stoppages. Specifically, section 450(2) of the Substantive Labour Code, which was replaced with section 65 of Act No. 50 of 1990, stipulates that: "If a work stoppage has been declared illegal, the employer shall be at liberty to dismiss for that reason any employee who has been involved or participated in such stoppage and, as regards the workers who [normally] enjoy protection by virtue of [trade union] immunity, such dismissal shall not require any judicial authorization." ECOPETROL S.A. adds that as regards these dismissals, it acted in accordance with the aforementioned legal provisions which empower employers to terminate contracts of employment of workers who participate in the strike, as occurred in the present case, where the company notes that these decisions were taken only after the procedure established under the collective agreement to safeguard the rights of dismissed workers had been exhausted. The Government maintains that it is not possible to claim that, when a stoppage has been declared illegal, there will be no legal consequences, such

as (in the present case) the termination of individual contracts of employment of workers who participated in it. This applies especially where a collective work stoppage has been declared illegal and workers nevertheless persist in maintaining it.

- 622.** With regard to the declaration that the strike was illegal, the Ministry of Social Protection acted in accordance with domestic law, given that under the terms of section 451 of the Substantive Labour Code, the Ministry is the body authorized to declare a work stoppage illegal.
- 623.** As regards the criminal proceedings against USO members and officials in connection with their exercise of the right to strike, the Government indicates that according to the company, it sought assistance from the Office of the Attorney-General in order to ensure the safety of workers who continued to work in the General Administration Centre of Barrancabermeja during the USO stoppages. The company adds that Colombian law not only provides all types of safeguards for all persons considered to be subordinates in an employment relationship but also ensures that all citizens benefit from a coherent set of principles which it is the duty of the State to safeguard. These include reliable access to justice and the right to lodge a complaint if one's life, honour or property are threatened. Moreover, the Government indicates with regard to the investigations concerning Hermes Suàrez and Edwin Palma that its inquiries to the judicial authorities are hampered by the lack of precision concerning the circumstances (time and place) of the occurrence of the facts.
- 624.** Lastly, the Government states that on 26 May 2004, the parties signed an agreement to refer the situation of the 248 workers to a voluntary arbitration tribunal. The tribunal gave a ruling on 21 January 2005, resolving the situation of 161 of the 248 dismissed workers (the other workers accepted voluntary retirement). Specifically, the ruling stipulates the following: (1) full reinstatement of two workers (including payment of wages owed from the date of dismissal until the date of reinstatement); (2) legal termination of the employment contracts of 33 workers, without reinstatement or compensation; (3) compensation for 22 workers based on their final wages; and (4) reinstatement under the terms of the Single Disciplinary Code, with compensation, for 104 workers. The Government has supplied a copy of the ruling.
- 625.** In its communication of 15 February 2005, the Government reiterates that the compulsory arbitration tribunal was convened in accordance with section 452 of the Substantive Labour Code.
- 626.** As regards the alleged violations of sections 16 and 453 of the Substantive Labour Code and article 29 of the Political Constitution, for having appointed a tribunal member to represent the workers, the Government indicates that in accordance with resolution No. 01948 of 29 November 2002, the Ministry of Social Protection is empowered to convene arbitration tribunals and appoint arbitrators if one or other of the parties declines to do so. This has not been commented on by the ILO's supervisory bodies.
- 627.** The refusal to appoint an arbitrator is indicated in resolutions Nos. 001803 of 7 July 2003, 001908 of 17 July 2003, 002159 of 8 August 2003 and 002449 of 1 September 2003, in which the Ministry of Social Protection, in accordance with the powers conferred on it by law, appointed the USO arbitrator, taking into account the fact that the trade union had refused to appoint a suitable arbitrator even after the period stipulated in section 2 of resolution No. 000382 of 25 March 2003 had elapsed.

C. The Committee's conclusions

- 628.** *The Committee notes that in the present case the issues are as follows: (1) the declaration of a strike to be illegal by the Ministry of Social Protection; the strike was staged against the ruling by a compulsory arbitration tribunal convened unilaterally by the Ministry following talks over a period of months; (according to the Government, on November 2002, the complainants presented a list of claims and ECOPETROL filed notice of partial withdrawal from the collective agreement; the direct settlement phase of the collective talks took place from 5 December 2002 to 21 March 2003; on 25 March 2003, the Ministry of Social Protection convened the compulsory arbitration tribunal, which gave its ruling on 9 December 2003; during the tribunal's work, informal talks also took place between the parties; on 16 January 2004, USO decided to take strike action; on 22 April 2004, USO declared the strike and the Ministry of Social Protection declared it to be illegal on the same day; between 30 April and 15 May 2004, ECOPETROL S.A. terminated 248 contracts of employment); and (2) the dismissals carried out after the declaration that the strike was illegal concerned many trade union members and officials. The Committee notes in this regard that, according to both the complainants and the Government, an agreement was reached on 26 May 2004 to end the strike.*
- 629.** *As regards the allegations criticizing the convening of a compulsory arbitration tribunal and the declaration by the administrative labour authority that the strike was illegal on the grounds that the petroleum sector is an essential public service, the Committee notes the Government's statements to the effect that: (1) once the established deadline had elapsed without any agreement being reached in the direct settlement phase, the Ministry of Social Protection ordered the convening of the compulsory arbitration tribunal with a view to resolving the dispute, given that the state oil company is responsible for providing an essential public service according to the Constitutional Court, and that under the terms of section 452 of the Substantive Labour Code collective disputes in public service companies must be referred to a compulsory arbitration tribunal; and (2) the resolution by the Ministry of Social Protection declaring the strike to be illegal was based on section 430 of the Substantive Labour Code according to which: "In accordance with the National Constitution, strikes are prohibited in the public services. For this purpose, public service is understood to mean any organized activity intended to ensure that public needs are met in a regular and continual manner in accordance with special laws and regulations, whether this be undertaken by the State (directly or indirectly) or by private entities. The following activities, among others, are thus deemed to constitute public services: [...] (h): Extraction, refining, transport and distribution of petroleum and its derivatives where these activities in the judgement of the Government are intended to ensure the country's normal fuel supply"; the Ministry of Social Protection is competent to declare a collective work stoppage illegal under the terms of section 451 of the Substantive Labour Code.*
- 630.** *The Committee notes that the aspects of the work done by ECOPETROL S.A. that make it an essential public service led to the convening of the compulsory arbitration tribunal and the declaration of illegality of the strike in the public petroleum sector. In this regard, the Committee has on many occasions considered that the petroleum sector does not constitute an essential service in the strict sense of the term [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 545]. In this regard, the Committee emphasizes that the sector in question is not an essential service in the strict sense of the term (that is, one whose interruption would endanger the life, personal safety or health of the whole or part of the population) in which strikes may be prohibited. The Government may, however, consider the possibility of providing for a negotiated minimum service with the participation of the trade unions, the employers and the public authorities concerned. In this regard, the Committee has considered that the establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or*

part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance [see Digest, op. cit., para. 556]. The Committee also recalls that in other cases relating to Colombia, it has already objected to the imposition of compulsory arbitration in non-essential services such as the petroleum sector [for example, in the natural gas sector – see the Committee's 236th Report, Case No. 1140, para. 144]. In this regard, the Committee, in examining one case on the prohibition of strikes in the petroleum sector, considered that the sector "did not constitute an essential service in the strict sense of the term; however, it does constitute, in the circumstances of this case, a public service where a minimum service which is negotiated between the trade unions, the employers and the public authorities could be maintained in the event of a strike so as to ensure that the basic needs of the users of these services are satisfied" [see 327th Report, Republic of Korea (Case No. 1865), para. 488]. In these circumstances, the Committee requests the Government to take steps to make the necessary amendments to legislation (in particular section 430(h)) in line with these principles, and to keep it informed of any measures adopted in this respect.

- 631.** *As regards the declaration of illegality of the strike by the Ministry of Social Protection, the Committee notes the Government's statements to the effect that it acted within the terms of national law (section 451 of the Substantive Labour Code), according to which the Ministry is competent to declare a collective work stoppage illegal. In this regard, the Committee recalls that on many occasions it has stated that responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties involved [see Digest, op. cit., para. 522]. Under these circumstances, the Committee requests the Government to take steps to amend section 451 of the Substantive Labour Code in line with this principle.*
- 632.** *As regards the allegation regarding the appointment by the administrative authority of the workers' arbitrator on the compulsory arbitration tribunal, the Committee notes the Government's information that according to resolution No. 01948 of 29 November 2002, the Ministry of Social Protection is competent to convene arbitration tribunals and appoint their members in cases where one or other of the parties declines to do so, and that this has not been commented on by any of the ILO's supervisory bodies. In this regard, the Committee notes that paragraph 4 of section 453 of the Substantive Labour Code on special tribunals states that "Refusal by any of the parties to appoint an arbitrator shall give the Ministry of Labour the right to do so instead ...". In the light of this information, the Committee will not proceed with an examination of these allegations.*
- 633.** *Lastly, the Committee notes the statements of the complainants and the Government to the effect that on 26 May 2004, an agreement was reached to end the strike, and that the agreement signed by the parties included the following: (a) an end to the collective work stoppage and a resumption of work; (b) an end to terminations of employment contracts and a commitment by the company to cancel administrative measures initiated against workers who had not been notified; and (c) referral to a voluntary arbitration tribunal of the situation of the 248 dismissed workers. The Committee notes that, on 21 January 2005, the arbitration tribunal established for that purpose ordered the full reinstatement of two of the workers concerned, termination of the employment contracts of 33 workers, without reinstatement or compensation, reinstatement in accordance with the terms of the Single Disciplinary Code of 104 workers, and payment of compensation to 22 workers (the remaining workers accepted voluntary retirement). Under these circumstances, the Committee requests the Government to ensure compliance with the terms of the agreement of 26 May 2004, in particular with regard to the commitment by ECOPETROL to cancel the administrative measures initiated against workers without notice being given.*

Moreover, taking into account the fact that the sanction of dismissal as applied to the workers is based on legislation which raises certain problems of conformity with the principles of freedom of association, the Committee requests the Government to take steps to ensure that, if the situation of the dismissed workers is re-examined (following the reinstatement of some by order of the voluntary arbitration tribunal), account is taken of the principles referred to in the context of this case and sanctions are not applied for the mere fact of participation in the strike.

- 634.** *As regards the alleged dismissals of another 11 officials at the beginning of the dispute in November 2002, the Committee notes the Government's statements to the effect that: (1) only seven of the 11 dismissals referred to by the complainants concerned trade union officials; (2) the dismissals were due to their active participation in a collective work stoppage on 19 and 20 November 2002, before the list of claims referred to in the complaint was presented; and (3) the dismissals were challenged by appeals to the judicial authority and demands for reinstatement were rejected. In this regard, the Committee requests the Government and the complainants to inform it whether there are other judicial proceedings under way concerning these trade union officials.*
- 635.** *Lastly, as regards the allegations concerning the criminal proceedings against seven USO officials (mentioned by name in the complaint) for participating in the strike, the Committee notes that according to the Government, the company states that: (1) it sought assistance from the office of the Attorney-General to ensure the safety of workers who continued to work at the Barrancabermeja Administrative Centre during the stoppage promoted by USO; and (2) not only the Colombian legal system provides all types of safeguards for anyone deemed to be subordinate in an employment relationship but also all citizens benefit from a set of principles which it is the duty of the State to safeguard, including reliable access to justice and the right to file a complaint in the event of an attack against one's life, honour or property. In this regard, the Committee regrets that the Government has not provided any detailed information on the charges made against the trade union officials, or on the judicial proceedings. Under these conditions, the Committee requests the Government to inform it of the specific charges brought against the trade union officials mentioned by the USO, the status of any legal proceedings against them, and whether they are detained. Moreover, with regard to the detention and charges brought against Hermes Suárez and Edwin Palma (who according to the complainants were detained on 3 and 11 June 2004, at the end of the dispute, on charges of conspiracy to commit offences and terrorism), the Committee notes that the Government indicates that its inquiries to the judicial authorities are hampered by the lack of precision concerning the circumstances (time and place) of the occurrence of the facts. In this respect, taking into account the information provided by the complainant organization (dates of the detention, offences with which they are charged and that they were detained after the conflict in ECOPETROL) the Committee requests the Government to provide information on the proceedings concerning the workers in question.*

The Committee's recommendations

- 636.** *In the light of the foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government to take steps to make the necessary amendments to legislation (in particular section 430(h) of the Substantive Labour Code) so as to allow strikes in the petroleum sector with the possibility of providing for the establishment of a negotiated minimum service with the participation of the trade unionis, the employers and the*

public authorities concerned. The Committee requests the Government to keep it informed of any measure adopted in this regard.

- (b) *Recalling that responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved, the Committee requests the Government to take steps to amend section 451 of the Substantive Labour Code in line with this principle.*
- (c) *As regards the dismissal of 248 workers following the declaration that the strike at ECOPETROL S.A. was illegal, the Committee requests the Government to ensure compliance with the terms of the agreement of 26 May 2004 to end the strike, in particular with regard to the commitment by ECOPETROL to cancel the administrative measures initiated against workers who had not been notified. Moreover, taking into account the fact that the sanction of dismissal as applied to the workers is based on legislation which raises certain problems of conformity with the principles of freedom of association, the Committee requests the Government to take steps to ensure that, if the situation of the dismissed workers is re-examined (following the reinstatement of some by order of the voluntary arbitration tribunal), account is taken of the principles referred to in the context of this case and sanctions are not applied for the mere fact of participation in the strike.*
- (d) *The Committee also requests the Government to inform it whether there are other judicial proceedings under way concerning the other 11 trade union officials dismissed (according to the Government there were only seven).*
- (e) *As regards the allegations relating to criminal proceedings against seven USO officials (mentioned by name in the complaint) for participating in the strike, the Committee requests the Government to inform it of the specific accusations brought against the officials in question, the status of proceedings against them and whether they are detained. Moreover, the Committee requests the Government to provide information on state of the proceedings concerning Hermes Suárez and Edwin Palma (who according to the complainants were detained on 3 and 11 June 2004 on charges of conspiracy to commit offences and terrorism).*

CASE NO. 2356

INTERIM REPORT

Complaints against the Government of Colombia presented by

- the National Union of Public Employees of the National Service for Training SENA (SINDESENA)
- the Union of Employees and Workers of SENA (SINDETRASENA)
- the Single Confederation of Workers of Colombia (CUT)
- the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-U.P.T.C.) and
- Cali Municipal Enterprises Union (SINTRAEMLALI)

Allegations: The National Union of Public Employees of the National Service for Training (SINDESENA), the Union of Employees and Workers of the National Service for Training (SINDETRASENA.) and the Single Confederation of Workers of Colombia (CUT) allege the collective dismissal of trade union members and trade union leaders within the framework of a restructuring process; the refusal to register the SINDETRASENA trade union and the refusal by the National Service for Training (SENA) to negotiate with the trade union organizations; the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-U.P.T.C.) alleges the dismissal of Mrs. Nilce Ariza who was covered by trade union immunity and Cali Municipal Enterprises Union (SINTRAEMCALI) alleges that the administrative authority declared a permanent assembly meeting staged within the Municipal Enterprises of Cali (EMCALI) to be illegal and that this decision gave rise to the dismissal of 49 trade union members and leaders

637. The complaints appear in a communication from the National Union of Public Employees of the National Service for Training SENA (SINDESENA), the Union of Employees and Workers of SENA (SINDETRASENA.), and the the Single Confederation of Workers of Colombia (CUT) dated 30 May 2004, in a communication from the the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-U.P.T.C.) sent on 8 June 2004 and in communications from the Cali Municipal Enterprises Union (SINTRAEMCALI) dated 2 and 29 June 2004. Public Services International (PSI) associated itself with the complaint lodged by SINTRAEMCALI on 12 August 2004. SINDESENA sent additional information in a communication dated 21 June 2004, SINTRAEMCALI in communications dated 12 and 20 August 2004 and PSI in a communication dated 19 October 2004.
638. The Government sent its observations in communications dated 24 and 27 January and 25 February 2005.
639. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainants' allegations

640. In their communications of 30 May and 21 June 2004, SINDESENA, SINDETRASENA. and the CUT first of all allege that, through Decree No. 249 of 28 January 2004, the Government decided to restructure the National Service for Training (SENA) and through

Decrees Nos. 248 and 250 of the same date a decision was taken to suppress the posts of 1,093 public employees and 31 public officials. The complainant organizations state that these Decrees did not establish objective criteria for singling out those employees whose posts were to be suppressed and, as a consequence, those affected by the dismissals were unionized staff, especially trade union activists and trade union leaders. Similarly, article 8 of Decree No. 250 makes provision for the suppression of eight posts corresponding to those held by trade union leaders covered by trade union immunity. The complainant organizations state that, under the same article, prior to dismissal, a request shall be made to have the trade union immunity lifted and that the individuals involved shall be retained in their posts until that immunity had been lifted. According to the complainant organizations, this measure is an attempt to ensure that the trade union leaders are not re-elected to their trade union posts. The complainant organizations add that trade union leave had been unilaterally suppressed, reducing it to such a degree that trade union leaders can no longer travel to workplaces and advise the workers.

- 641.** Secondly, the complainant organizations allege interference on the part of the administrative authorities regarding the formation of a new trade union. They state that, in November 2003, a large group of members of the trade union organization SINDESENA decided to form a new trade union organization, SINDETASENA. The organization was established following the announcement of the Decrees concerning the restructuring of SENA, but prior to the effective dismissal of the workers. The complainant organizations state that, in accordance with Colombian legislation, the founders of a trade union organization are protected by trade union immunity against dismissal, transfer or demotion until the new trade union organization is registered and for a maximum period of six months. Similar protection is afforded to those who join the organization whilst the registration process is ongoing. According to the complainant organizations, the new organization was attempting to set up a forum within which it could open discussions with the administration concerning guarantees regarding the definition and application of criteria for determining the suppression of the posts and to establish itself as an organization for the defence of the rights of the workers remaining within SENA.
- 642.** The complainant organizations add that the administrative authority decided through Ruling No. 001661 of 26 April 2004 not to register the trade union, following a request from a high-ranking public servant within SENA who claimed that the request for registration was an “abuse of right” (the complainant organization attaches a copy of the abovementioned ruling). On 26 April 2004, SENA initiated the dismissal of 500 unionized workers, who are, at the same time, members both of SINDESENA and SINDETASENA., having also transferred and demoted another 60 trade union members and trade union leaders.
- 643.** Thirdly, the complainant organizations state that the public entity refuses to bargain collectively with SINDESENA and SINDETASENA.
- 644.** In its communication of 8 June 2004, ASOPROFE-U.P.T.C. alleges that the University of Pedagogy and Technology of Colombia did not renew the employment contract of Mrs. Nilce Ariza, a lecturer and trade union leader. According to the complainant organization, the Vice-Chancellor justified this measure by claiming that it was taken owing to the trade union activities of the trade union leader's husband who is the chairperson of the trade union in question. ASOPROFE-U.P.T.C. adds that the *tutela* action (action for protection of constitutional rights) initiated before the National Judicial Council was rejected owing to the existence of other means of recourse. The complainant organization adds that the university administration also violated the rights of association of several lecturers by not renewing their contracts or by clearly demoting them. The lecturers affected are: Víctor Hugo Vargas, Gilma Socorro Vanegas, Lida Zúñiga, Germán Bernal and Jorge Valcárcel.

- 645.** In the communications of 2 and 29 July 2004 of SINTRAEMCALI and in the communication of 19 October 2004 of the PSI, the complainant organizations allege that, on 26 and 27 May 2004, a permanent assembly meeting took place within the administrative offices of the enterprise located in the Municipal Administrative Centre (CAM) to protest against the imposition of an agreement concluded between the Government and the financial and commercial creditors, thus contravening an agreement concluded on 15 May 2003 between the national and regional authorities, the community and the workers to safeguard the independence of the enterprise and against pressures exercised on workers to renounce their collective agreement. The enterprise does not provide any essential public service in the installations that were affected and those installations where such service are provided continued to operate as normal. Faced with the permanent assembly meeting, the management staff of the enterprise withdrew from the installations of their own accord. The metropolitan police then proceeded to surround the premises, without allowing anyone to enter or to leave, preventing the public from going about their everyday administrative business. This encircling action also made it impossible to get food and drink to the workers attending the assembly. Those relatives wishing to approach the premises were beaten and detained by police officers. Furthermore, the power, water and phone lines were cut. The labour inspectors called in by the enterprise were prevented from entering the premises by the enterprise, which threatened them. It was only on 29 May that the workers were allowed to leave the municipal enterprises of Cali building. The complainant organization states that on 31 May 2004 a judicial examination of the EMCALI premises was carried out in order to determine the state of those premises and it was noted that no physical damage had been done to the premises.
- 646.** SINTRAEMCALI states that even though the public water, sewage, energy and telephone services were not interrupted, the Ministry of Social Protection issued Ruling No. 1696 of 2 June 2004 through which what the administrative authority considered to be a work stoppage was declared illegal, empowering the enterprise freely to dismiss those workers who had participated in the supposed stoppage, in accordance with article 450 of the Substantive Labour Code. An action for annulment was lodged with the Council of State against Ruling No. 1696 in accordance with article 451 of the Substantive Labour Code. This did not prevent the enterprise, on 14 July 2004, from dismissing 49 workers, 43 of whom were trade union members and six trade union leaders (the complainant organization attaches copies of the details of the procedures carried out by the labour inspectors and the judicial examiner and of Ruling No. 1696 and other documents).

B. The Government's reply

- 647.** As to the allegations presented by SINDESENA and SINDET RASENA., the Government states that, in accordance with article 209 of the Constitution, the administrative service serves the general interest and operates based on the principles of equality, ethicality, efficiency, economy, speed, impartiality and openness. The public administration has the legal authority to disband, merge or create bodies and offices and suppress or merge the posts required by those bodies and offices, powers which must be exercised according to objective technical criteria aimed at ensuring that the State, in the general interest, fulfils its commitments. The preceding points justify changes which respect to workers' rights and which affect staff within public bodies, regardless of whether they belong to a trade union organization or not.
- 648.** The Government adds that, in order to suppress posts, an objective process must be completed which is subject to reasoning exclusively linked to the provision of good service, independent of the post occupied by each public servant.

- 649.** The Government stresses that the restructuring procedure was not, under any circumstances, intended to weaken freedom of association and the right to organize. In this regard, eight of the posts due to be suppressed were occupied by public servants with trade union immunity. SENA, in compliance with article 8 of Decree No. 250 of 2004 proceeded to request that the labour court withdraw trade union immunity, that is to say, it is the judicial labour authority that will decide whether to accept or reject the request and the Colombian Government shall respect that decision.
- 650.** As to the restructuring itself, the Government states that articles 1 and 2 of Decree No. 250 suppress 1,116 posts out of the total of all posts within SENA, corresponding to regional sub-directors, advisors, heads of centre, heads of division, heads of office, secretaries, office workers, auxiliaries and public officials. In article 3, 542 posts corresponding to regional directors, central sub-directors, professionals and technicians are created. Out of a total of 2,656 unionized public servants, 187 were made redundant through the suppression of their posts, corresponding to 7 per cent, which demonstrates that the restructuring procedure was carried out in order to renovate the public service and not to weaken the right to organize and freedom of association. The restructuring of SENA was carried out following expert studies and in accordance with Law No. 790 of 27 December 2002, with the aim of using the savings made to increase coverage of the services provided. The restructuring procedure regarding SENA is based on policy. It is linked to the implementation of the programme to renovate the public service, with the Government having decided not to disband, liquidate or merge SENA, in order to optimize the quality and provision of service in an efficient form, appropriate for the aims of the State.
- 651.** As to the registration of the trade union organization SINDETRASENA., the Government states that the freedom to form trade unions and draft the internal rules of those trade unions is not unlimited, as it must remain within the bounds set by the law and it is for this reason that administrative checks are in place in the form of the Ministry of Labour, now the Ministry of Social Protection, which must comply with, and ensure that there is compliance with, the Political Constitution and the law. The Ministry, through Ruling No. 001661 of 26 April 2004, ruled against registering the trade union organization, as the trade union was not subject to the Political Constitution and the law. Applications for reconsideration and appeal were made, as can be seen from File No. 15768 of 15 May 2004. The appeal for reconsideration was ruled on through Ruling No. 2443 of 29 June 2004 that confirmed Ruling No. 001661. The Government attaches a communication drafted by SENA in which it is stated that the Ministry considered that SENA was going ahead with a process of restructuring and that registration of the new trade union organization would be a clear violation of the precepts of the Constitution and that the right to organize is relative and not absolute, since its purpose becomes distorted when protection of labour stability is sought and the abovementioned restructuring process is obstructed.
- 652.** On 8 July 2004, the Thirteenth Criminal Court of the Circuit, in response to a *tutela* action for protection of constitutional rights initiated by SINDETRASENA., ruled: (1) to protect the rights to due process and association; (2) to revoke Ruling No. 001661 dated 26 April 2004, so as to allow the corresponding procedure to continue according to the precise terms laid down in the applicable labour legislation; (3) consequently, to order the body requested to immediately continue with the procedure related to the registration of the trade union organization, a procedure which the Ministry rejected when issuing the ruling that was revoked by the court; (4) to release the present statement in accordance with article 30 of Decree No. 2591 of 1991 and should it not be contested, refer the action for eventual review by the Constitutional Court. Further to the ruling on the *tutela* action for protection of constitutional rights, the Ministry of Social Protection presented Ruling No. 002781 of 22 July 2004, through which it turned down the request for registration of the trade union organization SINDETRASENA. According to File No. 26104 of 12 August

2004, the counsel of SINDETRASENA applied for reconsideration of and appealed against the ruling. Through Ruling No. 003567 of 16 September 2004, a decision was handed down concerning the application for reconsideration, upholding Ruling No. 002781 of 22 July 2004 and the appeal was ruled on through Ruling No. 04630 of 25 November 2004, upholding the decision contained in Ruling No. 002781 of 22 July 2004, with that same ruling being duly executed.

- 653.** On 3 November 2004, the Chairperson of SINDETRASENA presented a *tutela* action for protection of the rights to association and to organize, concerning the violation of those rights, as a result of the issuing of Rulings Nos. 002781 of 22 July 2004 and 003567 of 16 September 2004, but this action was rejected as inappropriate in accordance with the ruling of 22 November 2004, it being considered that these were the same facts behind the *tutela* action for protection of constitutional rights of 8 July 2004.
- 654.** The Government states that this case is one of an abuse of rights; given that social objectives are disregarded, there is doubt regarding whether the trade union organization's real intention was to defend trade union rights. Trade union immunity, as far as it represents a constitutional concept protecting the right of freedom of association, is a mechanism established primarily for the benefit of the trade union; the protection of the labour stability of workers' representatives is only secondary. To put it another way, the law strengthens the protection of the labour stability of trade union representatives as a means of protecting the freedom of action of trade unions. Thus, in Ruling No. C-381 of 2000, the Constitutional Court states that this "immunity constitutes a guarantee of the rights of association and to organize, rather than the protection of the labour rights of the unionized worker".
- 655.** As to collective bargaining with SINDESENA, the Government states that the legal regime governing public servants accepts at least two scenarios: that laid out for the so-called "public employees" of the executive branch which is legal and statutory in nature and that of the "public officials" which is contractual in nature. Basically, the employment relationships of public employees are governed by the law or by valid regulations that may only be amended by laws and regulations of equal standing to those that created them. The main difference between the two scenarios is that, with contractual arrangements, it is possible to hold prior negotiations over the conditions of service and their amendment and the amendment of the corresponding benefits, with regard to improvements, following a unilateral decision on the part of the employer or through collective labour agreements.
- 656.** The Government states that, under the terms of article 414 of the Substantive Labour Code, freedom of association is extended to workers throughout the official services, with the exception of members of the national army and of the police force and any police body. However, trade unions representing public employees only carry out the following functions: (i) studying the characteristics of the relevant profession and the conditions of employment of its members; (ii) advising its members on the defence of their rights as public employees, particularly in the case of the administrative service; (iii) representing the common or general economic interests of the members, or of the relevant profession before the authorities; and (iv) submitting appropriate written representations to the relevant heads of administration. For the authorities, and in particular the hierarchical superiors of the members, the functions referred to in the last two items represent a corresponding duty to receive trade union representatives appropriately and to find an appropriate solution to their requests (article 415 of the Substantive Labour Code [C.S.T.]).
- 657.** With regard to the limitations imposed upon public employee trade unions, the Constitutional Court found the ban imposed by article 416 of the Substantive Labour Code on public employee trade unions presenting lists of grievances or concluding collective agreements to be legitimate, as is stated in ruling C-110 of 10 March 1994, which states

that it may be applied. This restriction is supported by article 55 of the Constitution that guarantees the right to collective bargaining to govern employment relations, except in the case of the exceptions laid out under the law. This restriction is one such exception, established under the provision with material legal force (that is to say, the power to suspend, amend or revoke legal provisions in force, as well as to restrict or overrule the exercise of rights, liberties and guarantees in exceptional circumstances). As to ruling C-377 of 1998, upon reviewing the constitutionality of the Labour Relations (Public Service) Convention, 1978 (No. 151) and Law No. 411 of 1997 approving that Convention, the Court found that the different way in which public officials and public employees were viewed when dealing with the right to collective bargaining was in accordance with the Constitution, stating that the former are fully entitled to this right, whilst the latter are only partially entitled to the same right, in that although they (the public employees) have the right to seek and conclude concerted settlements in the case of dispute, this does not in any way affect the authorities' ability to unilaterally set employment conditions.

- 658.** In Ruling C-201 of 2002, the Constitutional Court stated: "In order to determine whether these provisions are applicable to trade unions of public employees, they must be in line with article 416 of the Substantive Labour Code which restricts the right to collective bargaining of trade unions of public employees in the sense that they are forbidden from presenting lists of grievances and concluding collective agreements, a restriction that the Court has repeatedly found to be in accordance with the Political Constitution."
- 659.** As to trade union leave, the Government attaches a report from the Directorate of SENA which states that currently, taking into account the new way in which the body is organized, leave may not be granted on a fixed basis but must instead be granted according to the service's needs.
- 660.** As to the dismissal of Mrs. Nilce Ariza, temporary lecturer at the University of Pedagogy and Technology of Tunja, the Government states that the abovementioned university is a national public body, created through Presidential Decree No. 2655 of 1953. As such, it is subject to the regulations laid down regarding such issues as the selection and hiring of teaching staff. The main standard governing this issue is Law No. 30 of 1992 "through which the Public Higher Education Service is organized" and, in particular, Chapter III, on the "special regime of state universities and other state or official Higher Education institutions". The third point of article 57 of the abovementioned law establishes that "the special character of the regime of state or official universities shall encompass the organization and selection of executive boards, teaching and administrative staff ... in accordance with the existing law". The same law allows universities to lay down certain procedures regarding the hiring of teaching staff, within the framework laid out by Law No. 30. Based on this, the university issued Agreement No. 021 of 1993, Agreement No. 60 of 2002 and Resolution No. 57 of 2003, which govern the teaching staff selection process.
- 661.** Mrs. Ariza was appointed to a "temporary" teaching position, in accordance with article 74 of Law No. 30 of 1992. Her appointment was to cover the period between 26 February and 26 December 2002. Subsequently, Mrs. Ariza was again appointed to a temporary teaching position, for the period between 17 February and 17 December 2003, through resolution No. 0609 of 2003.
- 662.** On 23 January 2004, Mrs. Ariza exercised the right of petition, requesting that her contract be renewed. The university replied to her, saying that such a renewal was impossible under the law, given that her appointment was temporary, that is to say, for a set period, as is explained above and as was agreed to by her on her accepting the abovementioned appointment. Similarly, she was informed that if she wished to be hired again, then she

would have to undergo the recruitment process that the university was running to fill such vacancies. In the report elaborated by the rector of the university and that the Government sends attached, it is stated that the lecturer underwent the selection process and was selected and hired as a temporary member of the teaching staff.

- 663.** The Government adds that in the case of appointments “of a duration of less than a year”, the law does not require the university to provide the reasons why it did not renew the contract, and so the request for renewal that Mrs. Ariza believed she was justified in submitting could not be granted. In fact, article 5 of Agreement No. 60 of 2002 clearly states “employment of temporary teaching staff will be carried out through an administrative act of appointment, for a fixed period of no more than ten months, for teaching, research and extra-curricular activities, with employment coming to an end once the period has expired, with no need for a specific communication to be issued to that effect”.
- 664.** The Government adds that Mrs. Ariza was the founder of the trade union ASOPROFE-U.P.T.C. and, as such, the law afforded her the protection corresponding to the trade union immunity afforded to founders of trade unions. However, in accordance with Law No. 584 of 2000, this immunity covers the founders of the trade union organization from the time it is set up to two months after the registration of the trade union organization in the trade union registry, with a maximum duration of six months. Mrs. Ariza enjoyed trade union immunity from 10 June 2003 (the date on which the trade union organization was set up), until 7 December of the same year, owing to the fact that the registration of ASOPROFE-U.P.T.C. in the trade union register was carried out on 7 October 2003. In other words, during the period in which the founder of the trade union was covered by trade union immunity, she was in the employ of the university. Moreover, Mrs. Ariza was also registered as a substitute member of the executive committee of the abovementioned trade union. In accordance with the law, this means that she was covered by the trade union immunity corresponding to executive committee members. However, in the case of individuals employed for a fixed term, as is the case for temporary teaching staff, this immunity remains in place whilst the respective labour agreement or appointment is in force, being fixed term in nature, the latter must end on the date envisaged as a part of that agreement or appointment.
- 665.** As to the allegations that other lecturers whose appointments had come to an end were affected, the Government states that this was due to the fact that all of the temporary lecturers’ contracts ended in December 2003, with selection being carried out in 2005 from amongst those who had submitted their resumés to the corresponding schools, regardless of whether they were union members or not.
- 666.** With regard to the allegations presented by SINTRAEMCALI, the Government states that the Constitution establishes that public services are inherent to the social aim of the State and consequently the State may intervene to ensure the efficient provision of those services to all the inhabitants. The abovementioned services may be provided by the State, directly or indirectly through organized bodies or private individuals. In any case, the Government reserves the right to regulate, control and monitor public services. To this end, it set up the Superintendent for Domestic Public Services. The Government adds that EMCALI is a municipal state industrial and commercial enterprise, whose main task is the provision of public water and sewage services and the distribution and marketing of energy and telecommunications services.
- 667.** The Government states that, in April 2000, EMCALI was in the midst of a crisis. The enterprise was affected by various factors listed under the law as sufficient grounds for the Superintendent to decide to take possession of the enterprise’s assets for administrative

reasons (Ruling No. 002536 of 3 April 2000). EMCALI's end-of-year deficit was 489,962,000,000 Colombian Pesos, or US\$181,467,407.

- 668.** In April of 2002, through an executive ruling, the President of the Republic authorized the extension of the period during which the superintendent could retain possession of the enterprise by another year, that is to say, until April 2003. This presidential authorization was granted, amongst other reasons, because of the steps that the Superintendent implemented to correct the problems that gave rise to the enterprise being taken possession of, which included "... (e) refinement, adjustment and alternatives for financing the pensions liability; (f) revision and renegotiation of the collective labour agreement ..." (Executive Ruling No. 54 of 1 April 2002).
- 669.** By the beginning of 2003, EMCALI already had an annual deficit of around US\$104,000,000, resulting in non-payment of sums it had agreed to pay its creditors. Similarly, the enterprise did not have the necessary resources to carry out the repair work and technological expansion required in order to provide its users with an adequate public service and, on occasions, it did not even have the money to pay its workers' wages.
- 670.** Consequently, in January 2003, the superintendent issued Ruling No. 000141 which in item 6 listed the steps necessary to correct the problems which gave rise to the enterprise being taken possession of. In point (b), it establishes the need for EMCALI and SINTRAEMCALI to revise the collective labour agreement "... all of this in accordance with the due guarantees set down in law".
- 671.** In March of that year, the Superintendent issued ruling No. 000562 through which it was decided to amend the process by which possession was taken of the enterprise, with the aim of beginning liquidation proceedings. In the face of this dramatic situation, a huge effort was launched to restructure the enterprise's liability. All the enterprise's international and national creditors were summoned as part of a programme called "*Todos Ponen*" (We all contribute) to allow EMCALI to be saved; this programme included the revision of the collective labour agreement. The programme was headed by a committee, directly convened by the Office of the President of the Republic, in which SINTRAEMCALI participated. The other members of the committee were, amongst others, three distinguished senators of the Republic, six members of the Chamber of Representatives, the President of the Departmental Assembly, the President of the Municipal Council of Cali, the City Mayor, who chaired the committee, the Governor of the Department, trade union representatives, representatives of the communities, public watchdogs, the Special Agent for EMCALI and the members of the Bargaining Committee for the Revision of the Collective Labour Agreement.
- 672.** Of the five meetings that took place between February and June 2003, two were attended by the President of the Republic, meaning that they had to be held at the Marco Fidel Suárez airbase for security reasons. In September 2003 a pre-agreement document was signed with the creditors and discussions concerning debt restructuring began, discussions that were held within various working groups, which started to meet in January 2004. Within these groups EMCALI and the experts presented and explained the financial model used in the rescue package and the positive points contained in the agreement to the participants.
- 673.** The workers, represented by SINTRAEMCALI, actively participated in all the meeting of the working groups.
- 674.** In March and April of 2004 the working groups met in the boardroom of the general management of EMCALI with the participation of: the representatives of the national Government, the Superintendent, the City Mayor, the Governor of the Department, the

trade unions, the municipal council and the departmental assembly. The agreements concerning the future of the enterprise were presented and discussed during these meetings. The concerns of the trade union organization were heard and examined. These discussions were the basis of the document entitled: "Agreement for operational financial and labour adjustment for the restructuring of EMCALI's debts".

- 675.** It should be pointed out to the Committee that during the meetings, various city councillors proposed that the enterprise should be liquidated and that a new one should be created. This proposal gave rise to a meeting with the President of the Republic in the Nariño Palace (the official presidential residence) during which the President repeated that he did not wish to see the enterprise enter into liquidation and invited the Council of Cali and all the participants in the programme to do all that they could to save EMCALI.
- 676.** With regard to the revision of the collective labour contract, the Government states that this process was one of many efforts to save EMCALI. On 2 February 2003, the general assembly of members of SINTRAEMCALI gave its approval for the process of revising the agreement. In the complaint, the workers state that the meetings concerning this revision were held in "military and police barracks". In this respect, the Government states that in mid-February 2003, EMCALI and SINTRAEMCALI appointed negotiators and began the process of revising the agreement in meetings from February to June of that year which were held at the following locations: on seven occasions in the Friedrich-Ebert-Stiftung (FES) auditorium of Cali town hall; on nine occasions at the executives' club which is neither a military nor a police barracks; on 12 occasions in the boardroom of the general management of EMCALI.
- 677.** The negotiations progressed amidst a climate of dialogue and agreement to the point that, on 27 June, a pre-agreement document concerning the revision of the collective agreement was signed. In this document SINTRAEMCALI's support for the "*Todos Ponen*" programme to rescue EMCALI was clearly established. On 4 May, the agreement was signed and deposited with the Ministry of Social Protection, thus entering into force as the new collective labour agreement.
- 678.** Although the content of the collective agreement does not form a part of the complaint, the Government wishes to refer to all the critical aspects of the EMCALI rescue package. As to labour stability, the agreement states that EMCALI shall not terminate its workers' contracts unless there be just cause and following the completion of each and every one of the procedures set out in the collective agreement or under the law. Non-compliance by EMCALI shall give rise to the individual dismissed being reinstated; with regard to fixed trade union leave, the agreement states that the ten members of the executive committee and the two members of the claims committee may benefit from fixed leave; EMCALI recognizes SINTRAEMCALI as the sole valid representative of the workers; as to financial benefits, the Government provides the following comparative list:

Bonus	Under the law	Under the agreement in force
Half-yearly June payment	15 days' wages	15 days' average wages
Additional half-yearly payment	Not applicable	11 days' average wages
Christmas	30 days' wages	Same
Extra half-yearly Christmas payment	Not applicable	16 days' average wages
Holiday	15 days' wages	30 days' wages
Length of service	Not applicable	9 to 50 days' average wages depending on length of service
Continuity	Not applicable	130 days' average wages
Total	60 days' wages	130 days' average wages

- 679.** As to the financial benefits provided by EMCALI during the period when the agreement is in force (in US dollars):

Type	Value
Family medical service	2 240 000
Educational benefits	8 000 000
Social assistance	22 400
Domestic emergencies	44 800
Housing loans	800 000
Health services	2 800 000
Total	13 907 200

- 680.** As to wage raises, allowance was made for annual increments during the period in which the agreement was in force. Furthermore, with regard to the scope of SINTRAEMCALI's participation in the running of EMCALI, the Government states that in order to encourage the participation of SINTRAEMCALI regarding the most important decisions taken by EMCALI, a consultative committee was established with functions similar to those of an executive board, made up of five permanent members: (i) the Mayor of Cali who chairs the committee; (ii) the Deputy Minister for Mines and Energy; (iii) the Superintendent for Domestic Public Services; (iv) the Chairman of the Chamber of Commerce of Cali; and (v) the Chairman of SINTRAEMCALI. The High Presidential Adviser and the Chairman of the state oil company ECOPETROL and the legal representative of EMCALI also sit in on the committee as special guests. The work of the committee consists of advising the enterprise and the Superintendent on decisions that may be linked to the running of administrative, budgetary, financial and labour affairs. The abovementioned committee has met on six occasions, with the participation of the trade union organization, as can be seen from the minutes in the annex to the enterprise's reply. SINTRAEMCALI also takes part in the meetings of the committee for the revision of transactions in which investments planned by the enterprise for the year 2004 were approved.

- 681.** As to the permanent assembly meeting held in protest against privatization and for public ethics, the Government states that, on 26 May 2004, a group of workers from the enterprise entered the central EMCALI building, located in CAM, and once there, began to take over the enterprise's installations, without any apparent grounds or any reasons of a justifiable trade union nature during working hours and breaking completely with the environment of dialogue, cooperation and participation described above. Some of the protestors, their faces covered and armed with truncheons, proceeded to intimidate and frighten those members of the public present in the enterprise's installations at that time, as well as the employees, public servants and management staff working at those installations, ordering people to

leave, which led to the personnel immediately leaving the installations which were left in the hands of the trade union organization.

- 682.** 26 May was a Wednesday, that is to say, a working day when services are provided to the public and the occupation began at around 9 a.m., during working hours; this activity was not sanctioned by the enterprise's executive board. The Government states that the arguments that the permanent assembly meeting was held in protest against corruption and to prevent the privatization of the enterprise are in reality unfounded. Firstly, on several occasions the authorities have announced that the enterprise will not be privatized.
- 683.** Secondly, SINTRAEMCALI has a seat on EMCALI's consultative committee, which, as has already been explained, advises EMCALI with regard to decision-making in all the most important areas of the enterprise. Therefore, there was no need to resort to violence and threats to prevent something which, not only was not going to take place but which could also have been dealt with through the appropriate management forums by the trade union as a member of the abovementioned committee.
- 684.** Thirdly, SINTRAEMCALI is a member of the committee in charge of the revision of transactions, a forum through which it has every possibility of reporting and even preventing supposed acts of corruption. That the trade union should then be forced to resort to violence and intimidation to condemn corruption, when it could have done so through the mechanisms which allow it to participate in the management of the enterprise at the highest levels, rings very hollow indeed.
- 685.** The Government stresses that SINTRAEMCALI participated in the work of the different committees and working groups that debated and decided on the rescue of the enterprise and in the meetings in which a rescue package was put together. The Government also states that SINTRAEMCALI does not present any evidence concerning the supposed pressure brought to bear on the trade union organization during the revision of the collective agreement. On the contrary, the Government has given a detailed explanation of all of the procedures followed, the forums established and the guarantees provided. Moreover, it has granted some of the special benefits that the EMCALI workers enjoy in light of the jointly revised agreement.
- 686.** The Government recalls that on repeated occasions the Committee on Freedom of Association has reiterated that although trade union organizations have the right to hold meetings to discuss occupational questions, and that with regard to those meetings the authorities should refrain from any interference, it is also the case that such meetings not only should be held on trade union organization premises but that public order must not be disturbed, nor its maintenance seriously and imminently endangered, events which allow for the presence and intervention of the authorities.
- 687.** Given this state of affairs, the Government permitted the authorities to intervene, considering that intervention was a genuine necessity in this case and ensured that the abovementioned intervention was limited to that strictly necessary in order to avoid a further deterioration of public order. The measures adopted were limited, firstly, to closing the roads around the building where the EMCALI offices are located to motor vehicles and secondly to cordoning off the building. The Government states that the labour inspectors noted that the points of entry to the enterprise were closed off by the traffic and police authorities and that all the installations of CAM were protected by a National Police metal barrier manned by the national police riot squad.
- 688.** With regard to SINTRAEMCALI, its behaviour went beyond the boundaries established by the legislation governing public demonstrations because the violent occupation took place within the installations of the enterprise, during working hours, as can be seen from

the notes taken by the labour inspectors. This means that the trade union organization's behaviour was clearly not defensible under the terms of Conventions Nos. 87 and 98, as it carried out the occupation at the workplace, during working hours and without the consent of the employer.

- 689.** The Government states that when comparing, on the one hand, the forums for participation and decision-making it made available to SINTRAEMCALI with regard to any issues related to the financial, budgetary and labour situation within the enterprise and, on the other hand, the type of behaviour displayed on the day of the violent occupation, it is clear that the activities undertaken on that day were not undertaken on trade union grounds. SINTRAEMCALI had access to a sufficient number of forums to be able to condemn the supposed privatization process, corruption or immoral behaviour without resorting to a violent occupation.
- 690.** The Government recalls that the Committee on Freedom of Association has stated that whosoever participates in trade union activities in his employer's time, using the personnel of his employer for trade union purposes and using his business position to exercise improper pressure on another employee, may not invoke the protection of Convention No. 98 or to contend that, in the event of dismissal, his legitimate trade union rights have been infringed. This is in accordance with other statements made by the Committee in which it is stressed that the fact that a person holds a trade union office does not confer immunity against possible dismissal.
- 691.** In the present case the dismissal of the trade union members who participated in the occupation was carried out due to the seriousness of the fault committed. However, the Government should like to point out that EMCALI, in compliance with the principles of due process which all legal and administrative actions in Colombia follow under the mandate of the Constitution and also in applying all of the provisions contained in the collective labour agreement currently in force, called on those who participated in the occupation and whose identities could be clearly established thanks to video footage of the event, to answer the charges against them. Several of the workers who have now been dismissed did not attend the hearing to which they had been convened and thus voluntarily deprived themselves of that defence mechanism granted to them by the Constitution, under law and by the agreement.
- 692.** The Government states that in Colombia there exist a wide variety of recourses and judicial bodies to which those workers belonging to SINTRAEMCALI who took part in the occupation and who were dismissed could have turned. The workers are covered by a reinstatement procedure, which may be initiated by those workers who are covered by trade union immunity and who have been dismissed based on the declaration of the illegality of a work stoppage – as occurred in this case. Such actions go before the labour judges of the Republic and a special, streamlined, precise procedure exists for just such a circumstance.
- 693.** The legal order also provides for the possibility of those workers who are not covered by trade union immunity going before a tribunal in an attempt to be reinstated. There is also the *amparo* (enforcement of constitutional rights) action, or the *tutela* action for protection of constitutional rights, designed to protect the basic rights of citizens in the face of actions as much carried out by individuals as by the authorities.
- 694.** The executive board of SINTRAEMCALI began the *tutela* action on 7 July 2004 before the Higher Court of the Department of Valle. As a part of this procedure, both due process and the right to work were cited as basic rights. On 22 July the Court issued a ruling in which it took two important decisions. Firstly, it ordered EMCALI to abstain from requesting the courts to withdraw the legal personality of SINTRAEMCALI. Secondly, it

did not protect the rights to work and to due process, as it considered that the workers involved in the stoppage had been invited to mount a defence within due process. An appeal was launched and the Supreme Court of Justice upheld the decision of the first instance.

C. The Committee's conclusions

- 695.** *The Committee notes that this case refers to: (a) the allegations presented by the National Union of Public Employees of the National Service for Training SENA (SINDESENA), the Union of Employees and Workers of SENA (SINDETRASENA.) and the Single Confederation of Workers of Colombia (CUT) are related to the collective dismissal of trade union members and trade union leaders within the framework of the process of restructuring SENA, the refusal by the administrative authority to register SINDETRASENA. and the refusal by SENA to collectively bargain with SINDESENA and SINDETRASENA.; (b) the allegations presented by the Academic Trade Union Association of Lecturers of the University of Pedagogy and Technology of Colombia (ASOPROFE-U.P.T.C.) with regard to the dismissal, despite trade union immunity, of the lecturer Mrs. Nilce Ariza and the dismissal of other lecturers; and (c) the allegations presented by Cali Municipal Enterprises Union (SINTRAEBCALI) concerning the administrative authority's declaration that a permanent assembly meeting held on EMCALI premises was illegal, a declaration which led to the dismissal of 43 trade union members and six trade union leaders.*
- 696.** *As to the allegations presented by SINDESENA, SINDETRASENA. and CUT concerning the collective dismissal of trade union leaders and trade union members within the framework of the process of restructuring SENA, the Committee notes that, in accordance with the statements of the complainant organizations, Decrees Nos. 248, 249 and 250 ordered the restructuring of SENA, making provision for the dismissal of 1,093 public employees and 31 public officials (the complainant organization attaches copies of the abovementioned Decrees) and that, due to the fact that the abovementioned Decrees did not establish specific criteria for the dismissal procedure, the majority of those individuals dismissed were unionized workers, and eight posts occupied by trade union leaders were suppressed.*
- 697.** *Similarly, the Committee notes that according to the complainant organizations, once the Decrees became public knowledge, a large number of workers who were members of SINDESENA decided to set up a new trade union organization, SINDETRASENA, but the request for registration was refused in the same way as the administrative appeals that had been lodged. The Committee notes that according to the complainant organization, at the same time that registration was being denied, in April 2004, the Government began a collective dismissal procedure for over 500 workers who enjoyed immunity in their capacity as founders of the trade union SINDETRASENA and who were, at the same time, members of the trade union SINDESENA.*
- 698.** *The Committee notes that according to the Government, Decree No. 250 made provision for the dismissal of 1,116 workers from the total workforce of SENA and out of a total of 2,656 public servants, 187 were dismissed. As to the eight trade union leaders whose posts are to be suppressed, the Committee notes that the abovementioned Decree states that a request must be made to the judicial authority for the withdrawal of trade union immunity and that the Government undertakes to respect the ruling that is issued.*
- 699.** *The Committee notes that with regard to the collective dismissal procedure there is a discrepancy between the statements made by the complainant organizations and those made by the Government. The former state that the Decree ordered the suppression of 1,093 posts, including those posts currently occupied by eight trade union leaders, that the*

Decree does not establish clear criteria for the dismissal procedure, thus allowing SENA to proceed to dismiss mainly unionized workers and that as a consequence of the refusal to register the trade union SINDETRASENA, over 500 unionized employees belonging at the same time to both SINDESENA and SINDETRASENA were dismissed. The Government, on the other hand, states that orders were given for the suppression of 1,116 posts, with only 187 unionized workers being dismissed. This being the case, in order to be able to reach its conclusions based on all the facts, the Committee requests the Government to inform it of how many workers were dismissed in total, and how many of those dismissed were trade union members or trade union leaders.

- 700.** *As to the dismissal of the eight trade union leaders in particular, the Committee takes note of the Government's undertaking to abstain from dismissing them until the withdrawal of their trade union immunity by the judicial authority but considers that the Government should take into account Recommendation No. 143 concerning protection and facilities to be afforded to workers' representatives in the undertaking, which, amongst the specific protection measures, advocates "recognition of a priority to be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce" (paragraph 6(2)(f)). The Committee likewise recalls that in a case in which the government considered the dismissal of nine trade union leaders to be part of restructuring plans, the Committee emphasized the advisability of giving priority to workers' representatives with regard to their retention in employment in case of reduction of the workforce, to ensure their effective protection [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, 4th edition, paras. 960 and 961]. In this regard, the Committee requests the Government to take the necessary measures to retain the posts of the trade union leaders, so that they may carry out their duties during the restructuring process and, should it prove impossible to retain these posts, to transfer them to similar posts.*
- 701.** *As to the refusal to register the trade union organization SINDETRASENA, the Committee notes that according to the complainant organizations, SINDETRASENA was set up by a group of workers belonging to the trade union SINDESENA within the framework of a process of restructuring SENA which was already under way and which involved the dismissal of a large number of workers. The Committee notes that, having read the various appeals lodged by SINDETRASENA against the rulings refusing registration, copies of which were attached both by the complainants and the Government, it can be concluded that Ruling No. 1661 which refused registration was challenged through a tutela action because it was issued before the expiration of the period set aside for the correction of the defects contained in the request for registration. Consequently, the tutela ruling ordered that the registration procedure continue. The Committee notes that, in accordance with the terms of the tutela ruling, the registration procedure was allowed to continue, only to be refused yet again through Ruling No. 2781 for non-compliance with the legal requirements in the statutes. An appeal was lodged against this ruling, with the ruling being upheld on 25 November 2004.*
- 702.** *The Committee notes in this respect that in accordance with the statements made by the complainant organizations, SINDETRASENA was set up with the aim of protecting workers from dismissal through the trade union immunity afforded to founders of trade unions, given that the trade union organization SINDESENA already existed within the enterprise and that the workers retained their membership of SINDESENA whilst setting up the new organization, SINDETRASENA. This being the case, the Committee regrets the fact that the Government did not consult with the existing trade union organization (SINDESENA) prior to issuing Decrees Nos. 248, 249 and 250. The Committee recalls that rationalization and staff reduction processes should involve consultations or attempts to reach agreement with the trade union organizations, without giving preference to proceeding by decree and ministerial decision [see **Digest**, op. cit., para. 936]. Despite the*

fact that the decrees concerning restructuring have already been issued, within the framework of the restructuring process under way within SENA, the Committee requests the Government to take the measures necessary to carry out wide-ranging consultations with the trade union organization SINDESENA on the consequences of the abovementioned process prior to continuing with dismissal proceedings.

- 703.** As to the allegations concerning SENA's refusal to collectively bargain with SINDESENA and SINDETASENA, the Committee notes that, according to the Government, public officials do not have the right to present lists of demands, in accordance with the terms of article 55 of the Political Constitution which establishes the right of the workers to collectively bargain within the limits imposed by the law and article 416 of the Substantive Labour Code which forbids collective bargaining in the case of public employees. The Committee notes that, according to the Government, the employment relationship of public employees is governed by a "legal and regulatory" regime, that is to say, it is established by the law or by valid regulations that may only be amended by laws and regulations of equal standing to those that created them.
- 704.** In this regard, the Committee notes that Colombia has ratified Conventions Nos. 98, 151 and 154 and consequently public sector and central public administration workers should enjoy the right to collective bargaining. The Committee states however that, in light of Convention No. 154, collective bargaining within the public service allows for special modalities of application to be fixed. The Committee shares the point of view of the Committee of Experts in its general report for 1994, and recalls that, while the principle of autonomy of the parties to collective bargaining is valid as regards public servants and public employees covered by Convention No. 151, this may be applied with a certain degree of flexibility, given the particular characteristics of the public service, especially the budgetary limits with which it is faced. At the same time, the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants within the established budgetary framework [see *Digest*, op. cit., para. 899]. In this regard, the Committee considers that, in the present case, the limits imposed on public employees with regard to the possibility of collectively bargaining contravene the terms of the abovementioned Conventions, given that public employees may only submit "appropriate written representations" which will not be the subject of any negotiations, in particular with regard to employment conditions, the determination of which is the exclusive competence of the authorities. In this regard, the Committee requests the Government to take the necessary measures to ensure that, following consultations with the trade union organizations concerned, legislation be amended in order to bring it into line with the Conventions ratified by Colombia so that the workers in question may enjoy the right to collective bargaining.
- 705.** As to the suppression of trade union leave within SENA, the Committee notes that, according to the Government, such leave cannot be fixed in nature and consequently must be granted according to the needs of the service. Taking into account the principles referred to in the previous paragraph, the Committee expects that, in the future, leave will be the subject of negotiations between the trade union organizations and SENA.
- 706.** As to the allegations presented by ASOPROFE-U.P.T.C. concerning the dismissal, despite trade union immunity, of the lecturer Mrs. Nilce Ariza and the dismissal of other lecturers, the Committee notes that according to the Government, the trade union leader had signed two temporary work contracts, the first running from February to December 2002 and the second from February to December 2003. The Committee notes that the request for the renewal of the contract for the 2004 period submitted by Mrs. Ariza was refused because, according to the applicable legislation, such a request is not valid in the case of temporary contracts; instead, the university invited Mrs. Ariza to put herself forward as a candidate for the 2004 period, as she had done on previous occasions. The Committee notes that,

according to the Government, when Mrs. Ariza put herself forward as a candidate as a part of the selection procedure in previous years, she was chosen and hired as a temporary lecturer, but that last time Mrs. Ariza refused to put herself forward as a candidate. The Committee notes that temporary contracts for all temporary lecturers expired in December 2003 and that a procedure was initiated to select staff for 2004 from amongst those who had put themselves forward as candidates, independently of whether they belonged to a trade union or not.

- 707.** *On the other hand, with regard to the trade union immunity afforded to Mrs. Ariza as a founder of a trade union, the Committee notes that during the period in which the immunity was in force, the trade union leader was in the employ of the university. As to the trade union immunity granted to her as a substitute member of the executive committee of the trade union, the Committee notes that, according to the Government, both fixed-term and temporary lecturer contracts end once their period of duration has expired, with no need for a request for judicial authorization. As to the other lecturers whose contracts were not renewed, the Committee notes that according to the Government their circumstances are identical to those of Mrs. Ariza, as all temporary contracts expired in December 2003.*
- 708.** *The Committee considers that the fact that Mrs. Ariza was not hired for the year 2004 is due to her refusal to present her candidature as she did on previous occasions when she was hired, that the trade union immunity she enjoyed as a founder of a trade union organization was not affected because the trade union leader was employed by the university during the period when it was in force and that, with regard to her trade union immunity as a member of the executive committee, the very nature of a temporary lecturer's contract as a fixed-term contract implies that it will expire when the end of the term specified in the contract is reached and in these circumstances it is inappropriate to request that trade union immunity be withdrawn because in this case there is no attempt to dismiss a worker, rather the worker has simply completed the contract that was signed with the employer. The Committee considers that the same conclusions may be drawn regarding the other temporary lecturers whose contracts were not renewed. This being the case, the Committee considers that the principles of freedom of association have not been violated and consequently will not proceed with a further examination of these allegations.*
- 709.** *As to the allegations presented by SINTRAEMCALI concerning the administrative authority's declaration that a permanent assembly meeting held on EMCALI premises was illegal, a declaration which led to the dismissal of 43 trade union members and six trade union leaders, the Committee notes that, in accordance with the complainant organization's statements, the permanent assembly meeting was held between 26 and 27 May 2004 as a consequence of the failure of the negotiations which were held within the framework of a process aimed at restructuring EMCALI, which ended with a presidential decision to liquidate the enterprise. The Committee notes that, according to SINTRAEMCALI, the abovementioned assembly was carried out in a peaceful fashion in the administrative installations of the enterprise EMCALI. Although the enterprise provides water, sewage, energy and telecommunications services, these services are not provided through the administrative installations but through other installations belonging to the enterprise. Consequently, provision of public services was not interrupted. The Committee notes that, according to the complainant organization, once the management staff of the enterprise decided to leave the installations of their own free will, the Government decided to blockade the installations, preventing anyone from going in or out. The Committee notes that according to the copies of the documents sent in by SINTRAEMCALI, two labour inspections were carried out at the request of the enterprise, the first was scheduled for 26 May but could not be carried out because the police refused to allow the labour inspector into the building, and the second on 27 May, during which the labour inspector was only able to note that there was no-one on the first floor of the*

installations where members of the public are served and could not tell if there was anyone working on the other floors because access to these floors was denied. The Committee also notes that, according to the complainants, on 29 May the workers were allowed to leave and that, during the judicial procedures that took place on 31 May, it was noted that no damage had been done to the installations.

- 710.** *The Committee also notes that as a consequence of the permanent assembly meeting, the Ministry of Social Protection, in accordance with article 451 of the Substantive Labour Code, issued Ruling No. 1696 of 2 June 2004 through which it declared the collective work stoppage to be illegal, in light of which, on 14 July 2004, the enterprise proceeded to dismiss 49 workers, including 43 trade union members and six trade union leaders.*
- 711.** *The Committee notes the Government's extensive reply (and the documents attached) in which it reports on the economic situation affecting EMCALI and the various measures adopted in order to resolve the crisis the enterprise was undergoing, as well as the numerous rounds of bargaining carried out with creditors and the trade union organization SINTRAEMCALI, which took part in various committees set up for that purpose. As to the Permanent Assembly meeting, the Committee notes that, according to the Government, during the negotiations and for no apparent reason, SINTRAEMCALI proceeded to use violence to occupy the EMCALI installations, frightening those public servants and members of the public in the installations at the time, for which reason the authority proceeded to surround the installations in order to ensure that public order was not disrupted any further. The Committee notes that, according to the Government, the occupation of the installations took place during working hours, within the enterprise and without any request for the consent of the executive board of the enterprise having been made and the dismissals of the workers were a consequence of the seriousness of the offence committed (the occupation of the installations). Moreover, the Committee notes that, according to the Government, in accordance with due process, the workers were called upon to answer the charges against them prior to the dismissal proceedings but that they did not attend the hearings, that the tutela action initiated by SINTRAEMCALI in order to obtain the reinstatement of the workers was rejected owing to the fact that the accused had access to normal legal channels, as well as other relevant legal recourses.*
- 712.** *As to the permanent assembly meeting in particular, which involved the occupation of the installations, taking into account the fact that there are significant discrepancies between the accounts given by the complainant organization and the Government as to what actually happened, whether there was a work stoppage and who was responsible for the acts of violence, the Committee requests the Government to take the measures necessary to ensure that an independent investigation is carried out in order to determine the facts, find out whether or not a work stoppage took place and determine who was responsible for the acts of violence. The Committee requests the Government to send its observations in this respect.*
- 713.** *As to the dismissal of the 49 workers (43 trade union members and six trade union leaders), the Committee requests the Government, taking into account the results of the investigation referred to in the previous paragraph and in the light of the responsibility that the participants in the permanent assembly meeting may have incurred, to re-examine the situation of those individuals dismissed who did not take part in acts of violence.*
- 714.** *As to the declaration, through Ruling No. 1696 of 2 June 2004, issued by the Ministry of Social Protection, in accordance with article 451 of the Substantive Labour Code, that the permanent assembly meeting was illegal, the Committee notes that, as is shown in previous paragraphs, there are discrepancies between the accounts of events given by the complainant organization and the Government, making it difficult to determine whether a work stoppage occurred or not. On the other hand, the Committee recalls that on several*

occasions it has stated that responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties involved [see *Digest*, op. cit., para. 522]. In these conditions, the Committee requests the Government to take the necessary measures to amend article 451 of the Substantive Labour Code, in accordance with the principle set forth above.

The Committee's recommendations

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

- (a) As to the allegations presented by SINDESENA, SINDETRASENA and CUT concerning the collective dismissal of trade union leaders and members within the framework of the process of restructuring SENA, in order to be able to reach its conclusions based on all the facts, the Committee requests the Government to inform it of how many workers were dismissed in total, and how many of those dismissed were trade union members or trade union leaders.
- (b) As to the dismissal of the eight trade union leaders of SINDESENA, the Committee requests the Government to take the necessary measures to retain the posts of the trade union leaders, so that they may carry out their duties during the restructuring process and, should it prove impossible to retain these posts, to transfer them to similar posts.
- (c) Within the framework of the restructuring process under way within SENA, the Committee requests the Government to take the necessary measures to carry out wide-ranging consultations with the trade union organization SINDESENA on the consequences of the abovementioned process prior to continuing with dismissal proceedings.
- (d) As to the allegations concerning SENA's refusal to bargain collectively, the Committee requests the Government to take the necessary measures to ensure that, following consultations with the trade union organizations concerned, legislation be amended in order to bring it into line with the Conventions ratified by Colombia so that the workers in question may enjoy the right to collective bargaining.
- (e) As to the suppression of trade union leave within SENA, the Committee expects that, in the future, leave will be the subject of negotiations between the trade union organizations and SENA.
- (f) As to the allegations presented by SINTRAEMCALI concerning the administrative authority's declaration that the permanent assembly meeting held on EMCALI premises was illegal, a declaration which subsequently led to the dismissal of 43 trade union members and six trade union leaders, the Committee requests the Government:
 - (i) as to the permanent assembly meeting which involved the occupation of the installations, to take the necessary measures to ensure that an independent investigation is carried out to determine the facts, find out whether or not a work stoppage took place and determine who was

responsible for the acts of violence. The Committee requests the Government to send its observations in this respect;

- (ii) *as to the dismissal of the 49 workers (43 trade union members and six trade union leaders), the Committee requests the Government, taking into account the results of the abovementioned investigation and in the light of the responsibility that the participants in the permanent assembly meeting may have incurred, to re-examine the situation of those individuals dismissed who did not take part in acts of violence;*
- (iii) *as to the declaration, through Ruling No. 1696 of 2 June 2004, issued by the Ministry of Social Protection, in accordance with article 451 of the Substantive Labour Code, that the permanent assembly meeting was illegal, the Committee requests the Government to take the measures necessary to amend article 451 of the Substantive Labour Code, in accordance with the principle that responsibility for declaring a strike illegal should lie with an independent body which has the confidence of the parties involved.*

CASE NO. 2362

INTERIM REPORT

Complaints against the Government of Colombia

presented by

- the National Union of Employees of AVIANCA (SINTRAVA)
- the Single Confederation of Workers of Colombia (CUT) and
- the Colombian Association of Civil Aviators (ACDAC)

Allegations: Anti-union dismissals in the context of restructuring beginning in March 2004 within the AVIANCA-SAM-HELICOL group of companies; rehiring of dismissed workers through work cooperatives, depriving them of coverage under the collective agreement with the group; threats against trade union officials, failure to comply with the collective agreement, pressure on individuals to sign a (non-union) collective accord and dismissals of trade union officials; non-compliance with a collective agreement and signing of a (non-union) collective accord

716. The National Union of Employees of AVIANCA (SINTRAVA), the Colombian Association of Civil Aviators (ACDAC) and the Single Confederation of Workers of Colombia (CUT) presented their complaint in communications dated 3, 4 and 7 June 2004 respectively. SINTRAFA and ACDAC sent new allegations in communications dated 1 December 2004 and 27 February 2005 respectively.
717. The Government sent its observations in two communications dated 28 January 2005.

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

A. The complainants' allegations

- 719.** The National Union of Employees of AVIANCA (SINTRAVA) and the Single Confederation of Workers of Colombia (CUT) state that, since 1992, AVIANCA has been using cooperatives to obtain services previously provided by employees at the company who were laid off. This resulted in a considerable reduction in union membership and, as a result of the intimidation by senior company managers, workers are afraid to join the union. The complainants indicate that, in May 2002, the management of AVIANCA formed a conglomerate comprising the companies AVIANCA, ACES and SAM under the name ALIANZA SUMMA, enabling them to broaden their range of services. However, AVIANCA from that moment onwards launched a voluntary retirement programme, further reducing the payroll. The complainants recall that, during the collective talks that took place between the company and SINTRAVA in October 2002, the parties decided to resolve the problems that had arisen and had been the subject of a previous complaint to the Committee on Freedom of Association [see Case No. 1925, 309th, 313th, 316th, 326th and 328th Reports] by concluding a consultation agreement, but this did not have the success hoped for.
- 720.** This is clear from the fact that, on 17 June 2003, the company sought approval from the Ministry of Social Protection for laying off 1,351 workers. In resolution 00823 of 24 March 2004, the Ministry of Social Protection authorized the collective dismissal of 350 workers. According to the complainants, these dismissals served as a cover for dismissing trade union members and replacing them with staff from cooperatives, employment exchanges and other employees from the same group who did not enjoy trade union rights. The complainants add that, in early 2004, ACES, which formed part of the conglomerate, declared bankruptcy and its employees were hired by AVIANCA. They displaced former AVIANCA workers who, unlike their ACES counterparts, had been covered by a collective agreement. According to the complainants, these dismissals took place despite the company's claims to have made profits of US\$22 million in 2004.
- 721.** The complainants add that, on 29 April 2004, the company deceived workers into accepting retirement on disadvantageous terms. Many of these workers were subsequently hired by cooperatives offering services to AVIANCA but on inferior terms and without any social benefits. The company also hired another 60 workers to replace the dismissed workers.
- 722.** On 17 April 2004, the Ministry of Social Protection approved the new internal regulations drawn up by AVIANCA without consulting the trade unions, in contravention of labour legislation.
- 723.** Lastly, the complainants denounce threats against workers and union officials in Cali by the United Self-Defence Forces of Colombia (AUC).
- 724.** In its communications of 4 June 2004 and 27 February 2005, the Colombian Association of Civil Aviators (ACDAC) states that the National Helicopter Company of Colombia (HELICOL S.A.) has violated the collective agreement in force with pilots, disregarding the acquired rights of active and retired workers, unilaterally changing daily working hours, refusing to update their salaries, suspending flight simulator training programmes, disregarding the grade scale established long ago under the collective agreement, and refusing to assign them to their normal workplaces in multinational companies. The complainant also alleges that the company is putting pressure on workers to leave the

union and sign a (non-union) collective accord by means of intimidating measures, such as refusing to assign them to their normal workplaces or refusing to provide them with the training they need. The complainant states that 15 pilots have been dismissed; these include one with trade union immunity, another (Captain Leonardo Muñoz) with immunity by virtue of his role as negotiator, and a third who reported criminal contraventions within the company. The others were forced to accept a voluntary retirement plan, in violation of a written agreement between ACDAC and AVIANCA-SAM, which froze the pilots' payroll and allowed retired pilots to continue working for two years. In addition, the complainant alleges that the company has failed to respect the trade union immunity enjoyed by Captain Juan Manuel Oliveros.

- 725.** The ACDAC adds that the aviation company AEROREPUBLICA S.A. refuses to bargain collectively and that a number of trade union officials have experienced anti-union acts. These include: the dismissal of captains Héctor Vargas Fernández, David Restrepo Montoya, Jaime Patiño, Andrés Luna and Carlos Andrés Gómez; sanctions against captains Julio Wilches, Hernán Alvarez, Felipe Palomares and Roberto Ballén, for exercising their right to freedom of expression and other rights.

B. The Government's reply

- 726.** In its communications of 28 January 2005, the Government states that the complaint presented by SINTRAFA and CUT refers to restructuring undertaken at AVIANCA at the beginning of the 1990s, that is, more than ten years ago. The Government recalls the view expressed by the Committee on a number of occasions, to the effect that, even if no time limit has been established for examining complaints, it is very difficult or even impossible for a government to give a detailed response with regard to events that occurred long ago.

- 727.** The Government goes on to give its assessment of the situation in the aviation industry. It states that, at the global level, the industry for a number of years has been experiencing problems due to a number of factors, to the extent that the Governing Body itself decided at its 280th Session (March 2001) that it would be appropriate to hold a tripartite meeting to discuss restructuring in the civil aviation industry. For that purpose, the Office prepared a "reference document" (July 2001), which, following the events of 11 September of the same year, was supplemented by an "issues paper" for discussion at the Meeting on social and safety consequences of the crisis subsequent to 11 September 2001. The Government states that these documents will serve as a basis for attempts to explain the global crisis in the industry, a crisis that has also affected Colombian enterprises like AVIANCA, as will be shown later; this led to the adoption of measures which, understandably, were seen by some as a sign of a conspiracy against the trade union movement.

- 728.** In an age of globalization and internationalization, aviation is one of the sectors most affected. According to one of the ILO documents: "Three interlinked developments are combining to transform the structure of the industry: progressive liberalization of the product market, the drive to privatize or commercialize publicly owned carriers and other installations and services, and airline management's accelerated pursuit of globalization, in terms of both product market and labour market."

- 729.** In order to cope with the crisis, the airlines have adopted a number of different measures including concentration at the national level and outsourcing abroad. Similarly, the ILO document states that "... when airlines have to adopt cost-cutting measures because of declining operational results or restructuring, reductions in the number of employees are often high on the list. These reductions are mainly achieved either through natural attrition or through early retirement plans ...". The Government concludes that it is a fact of life, noted by the ILO itself, that the global aviation industry has been experiencing a serious crisis in recent years as a result of a number of different developments which have led to

the adoption of various measures including mergers, staff cuts, reductions in the number of aircraft, route modifications, etc.

- 730.** In Latin America, the situation is difficult as it is everywhere else, as the ILO document makes clear in terms that leave no doubt as to the seriousness of the problems. The Government states that, with regard to small enterprises, like those of Latin American countries which do not have the economic, technological or financial resources of the world's major airlines, the crisis has been worse and led to the loss, or at least the temporary paralysis, of a number of the region's most important companies. By contrast with what has been happening in European or North American companies, they are also affected by exchange rate fluctuations which are on occasion sufficient in themselves to create crises.
- 731.** In the case of AVIANCA, a number of other factors come into play, quite apart from those already referred to in connection with the regional and global crisis in the aviation industry. These other factors, for obvious reasons, create a burden on the company and include the following.
- 732.** Operating costs have risen considerably. Leasing and maintenance costs are 40 per cent higher than the international average. Some 60 per cent of costs are calculated in foreign currency, and this leads to vulnerability due to currency devaluation.
- 733.** The losses recorded by the company are severe. In 2001, they amounted to 278 billion pesos, (US\$111.2 million), and 204 billion pesos for 2002 (US\$81.6 million). The company's pension and financial liabilities account in part for the final profit and loss balance.
- 734.** At the time of requesting authorization from the Ministry for the layoffs, the company had not reached the point of operating equilibrium. In clearer terms, the company, at the end of the first quarter of 2004 (January to March), recorded operating profits of US\$23 million, which are not net profits as the trade union claims. That amount does not include various repayments, depreciation, projected expenditure or operating expenses. Once these are factored in, the operating profits are reduced to US\$18 million. The accumulated losses as of 31 December 2003 must then also be taken into account, amounting to US\$480 million. Accumulated losses for the first quarter of 2004 thus amounted to US\$462 million. The trade union passes over these figures in silence.
- 735.** Such figures, for a national company struggling to survive in the midst of fierce international competition and facing the same challenges as the world's biggest aviation companies, could result in the company ceasing to be viable if it does not adopt measures to ensure its own survival. In general terms, the national market has contracted by 4.2 per cent, which means that Colombian airlines have had to sell 2.3 per cent more tickets to make up for the 4.2 per cent drop in dollar sales of domestic tickets. In addition, between February 2002 and February 2003, the ten principal domestic routes showed a decline in sales of 14 per cent, while the dollar price of fuel rose during the same period by 58 per cent.
- 736.** The company realized that it had to adopt certain measures to remain in the market. These included: renegotiating the terms of major contracts and debts; redrawing its routes; restructuring its fleet in line with new itineraries; and general restructuring of the organization (size, number of employees and facilities).
- 737.** As regards the renegotiation of major contracts and debts, the Government states that in 2001 and 2003, AVIANCA had to cancel ten contracts with one company that supplied temporary staff, as a result of which the company lost the services of some 202 people. A

total of 508 contracts with third parties were terminated; these concerned such services as consultancy, transport, maintenance of ground facilities, surveillance and telephone maintenance.

- 738.** As regards redrawing the route network, the Government states that the exercise in 2003 reduced the total number of passenger trips by some 13 per cent compared to 2002 and reduced the number of flights by 18 per cent.
- 739.** The Government states that AVIANCA sought the approval of the Atlántico Regional Director of the Ministry of Social Protection for 1,351 dismissals. The company subsequently modified its request and reduced the number of requested dismissals by 30 per cent, to 1,084. The Ministry of Social Protection authorized the dismissal of only 350 workers. Of that number, only 46 were actually dismissed, and 102 accepted a conciliation settlement. The Government emphasized that, according to the company, no trade union official was affected by the collective dismissals.
- 740.** The Government states that Colombian legislation prohibits layoffs of workers by employers without prior authorization from the Ministry of Social Protection, and that such layoffs are permitted only for certain specific reasons. Similarly, the Government recalls that the country's highest courts have repeatedly indicated that such dismissals must not be a cover for anti-union discrimination, thus concurring with the principles established by the Committee in this matter. At the same time, actions by the administrative authorities are liable to investigation by the State's own supervisory authorities and their decisions can be challenged before the labour courts. These have a wide range of appeal mechanisms at their disposal to ensure that due process of law is respected.
- 741.** According to section 67 of Act No. 50 of 1990: "If any employer considers it necessary to carry out collective dismissals of workers, or to terminate employment contracts for reasons other than those indicated in section 5(1)(d) of this Act and in section 7 of Legislative Decree No. 2351 of 1965, he or she shall be required to obtain authorization from the Ministry of Labour and Social Security, explaining the reasons and providing supporting documents as appropriate, and shall also be required to inform the workers of the request in writing ..." Paragraph 3 of the same section states that: "The authorization referred to in paragraph 1 of this section may be given in cases where the employer is obliged to modernize processes, equipment or systems in order to increase productivity or product quality, to eliminate processes, equipment or systems and production units, or if the latter are obsolete or inefficient or result in systematic losses, or create a competitive disadvantage in relation to similar enterprises or products."
- 742.** The Supreme Court of Justice in its rulings has established that the authorization (given by the Ministry for the dismissals) does not suspend trade union immunity or provide exemption from paying appropriate compensation. At the same time, the Court has acknowledged that the purpose of requiring the employer to communicate to workers the request for authorization is "... to ensure their participation in the administrative process so that they can avail themselves of their right to a defence ...". An attentive reading of the provision and the jurisprudence in question clearly shows that it is by definition not possible for an employer to use the authorization mechanism as a cover for anti-union discrimination. The employer is required to provide cogent reasons for seeking the authorization; those reasons cannot be other than those set out in the relevant legislation; and workers have an opportunity to participate in the process in order to enforce their right to defence and, if they consider it to be the case, to expose any attempt at anti-union discrimination which the request may conceal.
- 743.** Furthermore, the law does not authorize collective dismissals that pursue or conceal anti-union objectives. According to section 354 of the Substantive Labour Code, as amended by

section 39 of Act No. 50 of 1990: “1. Under the terms of section 292 of the Penal Code, it shall be prohibited for any person to attempt to restrict the right of freedom of association; 2. Any person who does so in any manner shall be required to pay a fine equivalent to between five and ten times the highest minimum monthly wage; the fine shall be imposed by the competent labour official, without prejudice to any criminal penalties that may also apply.”

- 744.** The Government emphasizes that the administrative enactment by which the Ministry authorized the workers’ retirement was not challenged by the workers in the relevant jurisdiction. In conclusion, the Government states that the factors which prompted the company to adopt a series of survival measures were entirely without any anti-union motives and bore no relation at all to the trade union’s activities. At the same time, in view of the fact that the adjustment process at the company did not lead to the dismissal of trade union officials, and that those measures, as already indicated, were diverse in nature, entirely unrelated to freedom of association, and resulted from a crisis in the aviation industry at the global, regional and local levels, the Government recalls the Committee’s own words to the effect that it was established to carry out preliminary examination of complaints of violations of trade union rights, and has indicated, on more than one occasion, that it is not for the Committee to express an opinion on the termination of employment contracts in connection with dismissals unless these involve anti-union discrimination, which was not the case here.
- 745.** As regards the allegations presented by ACDAC, the Government states that the allegations made in the complaint are vague and do not indicate clearly the specific facts which supposedly constitute violations of freedom of association. It adds that the complaint also covers a number of issues outside the Committee’s remit, including the suspension of flight simulator training programmes, increased working hours, salary discrepancies and failure to bring salaries up to date.
- 746.** As regards the refusal to bring salaries up to date, the Government indicates that this was in fact done through the collective agreement and that, in the present case, the unionized workers chose not to formally denounce the agreement in question. Under the terms of legislation, formal denunciation of the agreement by the workers is the sole means of initiating a collective dispute with a view to amending the agreement. If the collective agreement is not denounced it cannot be modified and is automatically extended, as in the present case. It follows from what has been stated that the conditions set out in individual employment contracts are dependent on the terms of the relevant collective labour agreement in force. If the trade union or the employer decides not to denounce the collective agreement, it is not possible to modify the terms of individual contracts of employment.
- 747.** The Government goes on to state that ACDAC denounced the collective agreement in respect of the section concerning salaries. After the direct settlement phase ended without an agreement, the Ministry of Social Protection convened the arbitration tribunal. However, HELICOL S.A. appealed successfully against that decision, which was rescinded.
- 748.** With regard to allegations of violations of the existing collective agreement, disregarding the acquired rights of active, retired and deceased aviation staff, the Government states again that the claim is vague and imprecise. However, it states that administrative investigations into HELICOL S.A. have been carried out, and the company was fined, through resolution 003702 of 28 September 2004, the equivalent of 30 times the applicable minimum monthly salary (10,740,000 pesos). The Government states that appeals have been lodged against the fine and these are still pending. It adds that, in resolution 003794 of 4 October 2004, the parties were ordered within five working days to initiate the direct

settlement phase of an ACDAC legal action in connection with the company's refusal to negotiate a list of claims. The appeals are still pending.

- 749.** With regard to the violation of rights in connection with the grade scale established under the collective agreement, the Government states that the vagueness and imprecise nature of the claim prevents it from expressing a view on the matter.
- 750.** As regards the allegations regarding the imposition, on pain of dismissal, of a (non-union) collective accord, the Government states that national law allows the union and non-union agreements to coexist, an exception being provided for under section 481 of the Substantive Labour Code, according to which, if more than one-third of workers at a given enterprise belong to the union or unions, the enterprise cannot conclude (non-union) collective accords or extend any that are already in force. The employer's freedom to conclude non-union collective accords where these will coexist with union collective agreements is subject to certain constraints arising from a range of constitutional and legal rights, values and principles. Colombian law expressly recognizes the right not to join a trade union, and workers who choose not to do so are able to conclude a non-union collective accord. The Government recalls the Committee's stated view, based on the opinion of the Conference Committee on Industrial Relations in 1949, that legislation providing for a right not to join or belong to a trade union does not in itself constitute a violation of Conventions Nos. 87 and 98. Nevertheless, legislation does not allow for non-union collective accords where more than one-third of a company's employees belong to a union, which is not the case here. National laws and regulations allowing workers to choose not to join a union and to conclude non-union collective accords have not been commented on by the ILO's supervisory bodies.
- 751.** As regards the dismissal of 15 pilots, one of whom enjoyed trade union immunity, another was protected by his status as a negotiator, a third because of having reported contraventions of air safety regulations, while the others were forced to accept "voluntary retirement", the Government states that ACDAC invoked the constitutional protection (*amparo*) procedure but its claim was rejected in a ruling of 25 August 2004 by Municipal Civil Court No. 37 on the grounds that no violation of fundamental rights had been proven. The Government considers that the dismissals, which were claimed to be an attack against the trade union, were in fact based on the concept of an employer's freedom to terminate a contract of employment without a specific reason, provided that compensation is paid. Furthermore, with regard to the appointment of the ACDAC negotiator, this was nullified by provisions in the existing collective agreement. The Government states that the union did not appeal against the ruling, which was thus confirmed, and the workers concerned can bring an action for reinstatement before the labour courts.
- 752.** As regards the allegations that the company has been disregarding an agreement between ACDAC and AVIANCA-SAM, which froze the pilots' payroll and allowed retired pilots to continue working for a period of two years, the Government indicates that the agreement in question concerns only AVIANCA-SAM and refers to specified classes of aircraft, none of which is operated by HELICOL S.A.
- 753.** With regard to the allegations that the company did not assign ACDAC workers to their normal workplaces in multinationals to which HELICOL S.A. supplies services, the Government indicates that the complainants do not specify the particular circumstances in which it is claimed that pilots belonging to ACDAC were prevented from exercising their profession as pilots. The Government explains that neither Conventions Nos. 87 and 98, nor the principles derived from them by the ILO's supervisory bodies, consider as a violation of freedom of association the prerogative granted to employers by any legislation in the world to determine the normal course of a company's operations, including the schedules and workplaces of its workers. Except in the case of a "deliberate policy of

frequent transfers of persons holding trade union office" which could "seriously harm the efficiency of trade union activities", the employer may exercise the right known in law as *ius variandi* without violating the principle of freedom of association.

- 754.** In the present case, the Government indicates that, according to the company's explanation of events, operations to fulfil contracts with the BP Exploration Company Colombia Limited and with Occidental of Colombia require pilots to be qualified to fly by instruments only, and that of the five HELICOL S.A. pilots affiliated to ACDAC, only three are so qualified and included on the rosters established under these contracts. According to the company, one aircraft was also virtually grounded between 15 December 2003 and 23 August 2004, for commercial reasons, which meant that some pilots were put on flight rosters only as and when flights were scheduled, but this had no effect on the prompt payment of their salaries.

C. The Committee's conclusions

- 755.** *The Committee notes that the case concerns the following: (1) the allegations made by the National Union of Employees of AVIANCA (SINTRAVA) and the Single Confederation of Workers of Colombia (CUT) concerning the collective dismissals of workers affiliated to SINTRAVA and their replacement with workers in cooperatives or in other companies of the AVIANCA-SAM group without trade union rights; the adoption of new internal regulations without consulting the trade union, and threats against members and officials in Cali by the United Self-Defence Forces of Colombia (AUC); and (2) the allegations made by the Colombian Association of Civil Aviators (ACDAC) concerning violation by HELICOL S.A. of the collective agreement in force; pressure on workers to resign from the union and sign a non-union collective accord; dismissal of 15 HELICOL S.A. pilots, one of whom had trade union immunity, another (Captain Leonardo Muñoz) protection as negotiator, while a third had reported criminal contraventions within the company, while the rest were forced to accept voluntary retirement in violation of an agreement concluded with AVIANCA-SAM which froze the pilots' payroll and allowed retired pilots to continue working for a period of two years; and the refusal by the company AEROREPUBLICA S.A. to bargain collectively, and dismissals and sanctions applied against trade union officials for exercising their rights.*
- 756.** *The Committee notes that the trade union organization SINTRAVA and the CUT also refer to certain allegations which have already been examined in Case No. 1925.*
- 757.** *As regards the collective dismissal of workers affiliated to SINTRAVA and their replacement by workers in cooperatives or other companies in the AVIANCA-SAM group without trade union rights, the Committee notes that the Government refers in general terms to the current crisis in aviation enterprises, and in particular to the economic difficulties faced by AVIANCA (the Government supplies a company report on this subject). The Committee notes that, according to the Government, the company sought authorization to dismiss some 1,084 workers as a result of the crisis and without any anti-union motivation, but the Ministry of Social Protection authorized only 350 dismissals, of which in the end only 46 were actually confirmed, the other 102 workers agreeing to a conciliation settlement. The Committee notes that, according to the Government, no trade union official was dismissed and the trade unions did not bring any legal action for reinstatement of the dismissed workers. The Committee also notes, however, that the Government makes no reference to the replacement of workers who enjoyed trade union rights and were laid off collectively, by workers without union rights employed by other companies in the same group or by cooperatives. The Committee recalls in general terms that, under the terms of Article 2 of Convention No. 87, which has been ratified by Colombia, workers and employers, without distinction whatsoever, have the right to establish and join organizations of their own choosing. At the same time, recalling its*

recent conclusions in a different case concerning cooperatives in Colombia in the light of the Promotion of Cooperatives Recommendation, 2002 (No. 193), which calls on governments to ensure that cooperatives are not set up or used for non-compliance with labour law or used to establish disguised employment relationships, the Committee recalls its previous statement that “although [...] cooperatives represent one particular way of organizing production methods, the Committee cannot cease consideration of the special situation of workers with regard to cooperatives, in particular as concerns the protection of their labour interests [...] and considers that such workers should enjoy the right to join or form trade unions in order to defend those interests” [see 336th Report, Case No. 2239, para. 353]. The Committee consequently requests the Government to carry out an impartial investigation in order to ascertain whether in the AVIANCA enterprise the dismissed workers were in fact replaced by others from cooperatives, which were in fact disguised employment relationships, or other companies in the AVIANCA-SAM group to do the same work; whether these new workers have trade union rights and, if that is not the case, to take steps to ensure full respect for freedom of association in line with these principles. The Committee requests the Government to keep it informed in this regard.

- 758.** *As regards the allegations of threats against trade union members and officials in Cali by the United Self-Defence Forces of Colombia (AUC), the Committee regrets that the Government has not sent its observations on the matter and requests that it carry out an independent investigation into the allegations and, if they are found to be true, to immediately take steps to end these threats.*
- 759.** *As for the adoption by the company of new internal regulations without consulting the trade union, the Committee regrets that the Government has not sent its observations on the matter and requests that it do so without delay.*
- 760.** *As regards the allegations made by ACDAC concerning the violation by HELICOL S.A. of the collective agreement in respect of acquired rights, unilateral changes to daily working hours, failure to bring salaries up to date, suspension of flight simulator training, and infringements of the established grade scale, the Committee takes note of the Government's observations to the effect that various questions raised by the complainant, such as those relating to suspension of flight simulator training, increased daily working hours, and salary increases, do not come within the Committee's remit. In this regard, however, the Committee notes that, while such matters do not in themselves come within its remit, they are covered by a collective agreement between HELICOL S.A. and ACDAC. The Committee therefore considers that the issue concerns failure to honour obligations arising from a collective agreement, and recalls that collective agreements should bind the signatories thereto, and that mutual respect for the commitment undertaken in the collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground [see 325th Report, Case No. 2068 (Colombia), para. 329; and 329th Report, Case No. 2097 (Colombia), para. 473]. Under these circumstances, the Committee requests the Government to take the necessary steps to ensure full compliance with the collective agreement in force.*
- 761.** *As regards the matter of updating salaries, the Committee notes that the Government, in the same reply, states that this was in fact done through collective agreement and that the complainant did not denounce the collective agreement in respect of this point, but in the following paragraph states that the complainant denounced the collective agreement and, given the failure to reach agreement in the direct settlement phase, the matter was referred to an arbitration tribunal convened by the Ministry of Social Protection, although that decision was rescinded by the judicial authority at the request of HELICOL S.A. The Committee requests the Government and the complainant to clarify whether or not the collective agreement was denounced, whether an arbitration tribunal was actually*

appointed and, if so, whether the appointment was rescinded and whether the complainant appealed against that decision.

- 762.** *As regards the allegations concerning pressure on workers to force them to resign from the union and sign a non-union collective accord, by not assigning them to their normal workplaces and not giving them the technical training they needed, the Committee notes the Government's statements to the effect that the companies for which HELICOL S.A. provides services require flight crews to be qualified to fly by instruments, and that, of the five HELICOL S.A. pilots belonging to ACDAC, only three were so qualified and placed on flight rosters for the contracts in question; and that national law allows a collective agreement and a non-union collective accord to coexist, and allows workers not to join a trade union, so that employers are allowed to conclude collective agreements with non-union workers. The Committee notes the Government's additional statements to the effect that, where more than one-third of a company's workforce belong to a trade union, legislation does not permit collective accords between the company and the non-union workers. With regard to non-union collective accords, the Committee recalls that, in its examination of similar allegations in other complaints against the Government of Colombia, it has 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 accords should not be used to undermine the position of the trade unions" [see 336th Report, Case No. 2239, para. 356; and 325th Report, Case No. 2068]. The Committee emphasizes that direct negotiation between the undertaking and its employees, by-passing representative organizations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 786]. Under these circumstances, the Committee requests the Government to take the necessary steps to ensure that the HELICOL S.A. employees are not intimidated into entering into a collective accord against their will which would require them to leave their trade union.*
- 763.** *As regards the allegations regarding the dismissal of 15 HELICOL S.A. pilots, one of whom had trade union immunity, another enjoyed protection from dismissal as a negotiator (Captain Leonardo Muñoz), a third reported irregularities within the company, while the others were forced to accept voluntary retirement in contravention of a collective agreement with AVIANCA-SAM which froze the pilots' payroll and allowed retired pilots to continue working for a further two years, the Committee notes that two separate issues are raised here: on the one hand, the collective dismissal of pilots in contravention of an agreement concluded with AVIANCA-SAM; on the other, the dismissal, in the context of collective layoffs, of one pilot with trade union immunity, and of another with protection by virtue of his status as a negotiator.*
- 764.** *As regards non-compliance with the agreement, the Committee notes that the text of the agreement itself clearly indicates what the Government has already said, that it involved only AVIANCA-SAM, since the different classes of aircraft mentioned in it are not flown by HELICOL S.A. pilots.*
- 765.** *As regards the dismissals, the Committee notes the Government's statements in general terms to the effect that these were justified by the freedom of an employer to terminate a contract of employment without any specific reason, provided that compensation is paid, that the appeals against these dismissals were rejected by the judicial authorities, that the appointment of the ACDAC negotiator did not comply with the terms of the collective agreement in force, and that the trade union lodged no further appeals against the dismissals.*

- 766.** *The Committee notes, however, that, as regards in particular the dismissal of the trade union official, Colombian legislation requires judicial authorization (section 405 of the Substantive Labour Code). The Committee requests the Government to inform it whether authorization was sought before the dismissal.*
- 767.** *As regards the appointment of a negotiator in contravention of the collective agreement, the Committee requests the Government to inform it whether the irregularity of the appointment was established by the judicial authority and to send a copy of the ruling in question. The Committee requests the Government to inform it with regard to any legal proceedings in connection with the dismissal of the 15 pilots.*
- 768.** *As regards the failure to respect the trade union immunity of Captain Juan Manuel Oliveros, the Committee notes that the Government has not sent its observations on the matter. The Committee nevertheless considers the allegation to be formulated in vague terms, and accordingly requests the complainant to specify how the official's trade union immunity has been violated.*
- 769.** *As regards the allegations regarding the refusal of AEROREPUBLICA S.A. to bargain collectively and the dismissal and sanctions against trade union officials for exercising their rights, the Committee regrets that the Government has not sent its observations and requests that it carry out and impartial investigation and send its observations without delay.*

The Committee's recommendations

- 770.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *As regards the collective dismissal of workers affiliated to SINTRAVA and their replacement by workers in cooperatives or other companies in the AVIANCA-SAM group who do not have trade union rights, the Committee requests the Government to carry out an impartial investigation in order to ascertain whether the dismissed workers were in fact replaced by others from cooperatives, which were in fact disguised employment relationships, or other companies in the AVIANCA-SAM group to do the same work; whether these new workers have trade union rights and, if that is not the case, to take steps to ensure full respect for freedom of association in line with the principles mentioned in the conclusions. The Committee requests the Government to keep it informed in this regard.*
 - (b) *As regards the allegations of threats against trade union members and officials in Cali by the United Self-Defence Forces of Colombia (AUC), the Committee requests the Government to carry out an independent investigation into the allegations and, if they are found to be true, to immediately take steps to end these threats.*
 - (c) *With regard to the adoption by the company of new internal regulations without consulting the trade union, the Committee requests the Government to send its observations on the matter without delay.*
 - (d) *As regards the allegations made by ACDAC concerning the violation by HELICOL S.A. of the collective agreement, the Committee requests the*

Government to take the necessary steps to ensure full compliance with the collective agreement in force.

- (e) *As regards the failure to bring salaries up to date, the Committee requests the Government and the complainant to clarify whether or not the collective agreement was formally denounced, whether an impartial arbitration tribunal was actually appointed and, if so, whether that decision was rescinded, and whether the complainant appealed against that decision.*
- (f) *As regards the allegations regarding pressure on workers to leave their union and sign a non-union collective accord, the Committee requests the Government to take the necessary steps to ensure that the HELICOL S.A. workers are not intimidated into entering into a collective accord against their will which would require them to leave their trade union.*
- (g) *As regards the dismissal of 15 HELICOL S.A. pilots, one of whom had trade union immunity, another had protection from dismissal as a negotiator (Captain Leonardo Muñoz), a third reported criminal contraventions within the company, while the others were forced to accept voluntary retirement, the Committee requests the Government:*
 - (i) *to inform it whether judicial authorization was sought before the union official's dismissal;*
 - (ii) *with regard to the appointment of a negotiator in contravention of the collective agreement, to inform it whether or not the irregularity of the appointment was established by the judicial authority and to send a copy of the ruling;*
 - (iii) *to inform it of any legal proceedings regarding the dismissals of the 15 pilots.*
- (h) *As regards the failure to respect the trade union immunity of Captain Juan Manual Oliveros, in view of the vague wording of the allegation, the Committee requests the complainant to specify how the official's trade union immunity has been violated.*
 - (i) *As regards the allegations concerning the refusal by the company AERO REPUBLICA S.A. to bargain collectively and the dismissal and sanctions against trade union officials for exercising their rights, the Committee requests the Government to carry out an impartial investigation and send its observations without delay.*

CASE NO. 2367

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

**Complaint against the Government of Costa Rica
presented by
the Rerum Novarum Confederation of Workers (CTRN)**

Allegations: The complainant organization complains against excessive delays affecting cases of anti-trade union dismissal against the enterprise Fertilizantes de Centroamérica (FERTICA); alleges that representatives of the enterprise forced their way into the trade union office and storage space assigned to the Association of Workers of the Fertilizer Sector (ATF) as a consequence of the collective bargaining process, requisitioning documents and goods; and refers to a judicial decision which notes various violations of trade union rights by the aforementioned enterprise

771. The complaint is contained in a communication from the Rerum Novarum Confederation of Workers (CTRN) dated 16 June 2004.
772. The Government sent its observations in a communication dated 26 January 2005.
773. Costa Rica has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

774. In its communication dated 16 June 2004, the Rerum Novarum Confederation of Workers (CTRN) states that on two occasions the Committee on Freedom of Association (Cases Nos. 1879 and 1966) examined complaints related to violation of trade union rights by the enterprise Fertilizantes de Centroamérica (FERTICA). However, more than eight years after the presentation of the complaints, the enterprise has still not complied with the Committee's recommendations and the legal procedure that began as a result of the dismissal of trade union officials, who have not yet been reinstated to their posts within the enterprise, is still ongoing. Referring to previous statements made by the Government, according to which it is the parties involved who are, for the most part, responsible for the delay in procedure, the complainant organization states that, following manoeuvring on the part of the enterprise in 1995, the Labour Inspectorate only lodged a judicial complaint for violation of the collective agreement a year later which led the judicial authority to revoke the action, as requested by the enterprise.
775. The complainant organization adds that on 6 June 2003, representatives of the enterprise FERTICA forced their way into the storage space assigned to the Association of Workers of the Fertilizer Sector (ATF) as a consequence of the collective agreement, forcing the locks and seizing all the articles stored inside. The legal procedure launched as a

consequence of this action is still ongoing. Likewise, on 27 August 2003, representatives of the enterprise broke into the trade union office, breaking the lock and requisitioning all the documents contained within (lists of members, registers, confidential strategic documents, etc.), filing cabinets and other objects. The enterprise justified its actions by saying that there were rats and other pests present on the premises but the complainant organization considers this move to be yet another attempt at disbanding the trade union organization by depriving it of its possessions and resources. The fact that it will take some time for the Ministry of Labour to process these new facts may mean that future cases brought by the trade union organization might not be heard.

- 776.** The complainant organization states that, in its ruling dated 2 April 2001, the Lower Small Claims Court of Puntarenas ruled that the enterprise FERTICA was “guilty of employment practices which have been condemned by the Ministry of Labour and Social Security, to the detriment of the Association of Workers of the Fertilizer Sector (ATF) represented by Marco Antonio Guzmán Rodríguez with regard to: (1) promoting the formation of an executive board in parallel to the ATF; (2) unjustified refusal to enter into the collective bargaining process in accordance with established legal procedures; (3) withholding the ordinary membership fees deducted from wages of ATF members and transferring them to a group or executive board not established in accordance with the law”. In the same document, the complainant organization states that FERTICA’s Superintendent of Administration admitted that correspondence addressed to the workers (telegrams in which the trade union called on them to attend an assembly) had also been opened and withheld; the employer carried out other actions such as compiling blacklists of trade unionist members (including the Secretary-General) within the various companies and workplaces.

B. The Government's reply

- 777.** In its communication dated 26 January 2005, the Government states that it regrets the fact that the complainant organization refers yet again to issues which have already been examined by the Committee on Freedom of Association when studying Cases Nos. 1966 and 1879, for example, the delay in the legal procedure concerning the enterprise FERTICA where it was the opposing parties who were for the most part responsible for slowing up proceedings through the use of delaying tactics. The Government reiterates its previous replies in the abovementioned cases, recalling the Committee's previous conclusions highlighting the positive measures taken and states that to circumvent due process would be to contravene national legislation as laid out in the Constitution, and, in the case in question, the Ministry of Labour fulfilled its function as a mediator whilst taking into account all of the Committee's recommendations and repeatedly urging the parties to comply with the abovementioned recommendations during numerous meetings with those same parties. The Government refutes the accusation that it ignored the Committee's recommendations.
- 778.** The Government states that the courts have exclusive competence concerning the reinstatement of the workers who were dismissed. The Government recalls that it submitted a draft reform to the Labour Code on protection of association to the Legislative Assembly that introduces a less lengthy legal procedure to which trade union officials and members may have recourse in cases of dismissal for reasons linked to membership of a trade union. Such a legal procedure would provide a response to comments referring to the delays affecting cases of anti-trade union discrimination. Furthermore, a process of consultation, study and observations is currently under way concerning a draft reform concerning labour procedure. The Supreme Court of Justice, the Ministry of Labour and workers' and employers' organizations are all participating in this process, which is aimed at modifying the Labour Code and introducing the principle of oral proceedings with the aim of expediting the procedure and reducing the legal backlog. The ILO is providing

technical assistance, supporting the interested parties so that they may contribute to the draft prior to its submission to the Legislative Assembly.

- 779.** The Government regrets the fact that the complainant organization has issued a series of subjective statements regarding the case in question and the suggestion that the authorities are somehow responsible for the delays and inefficiency affecting the proceedings concerning anti-trade union discrimination. In any case, the Government makes it clear that it is fully committed to resolving the issue of the supposed delays affecting administrative procedures related to unfair employment practices, through the definition of reasonable policies protecting the rights of workers belonging to trade unions, guaranteeing swift procedures without infringing upon constitutional guarantees concerning due process and legitimate defence.
- 780.** As to the “fresh allegations” made by the complainant organization, the Government points to the constant work carried out by the administrative authorities in accordance with the existing legal order to resolve any instances of unfair employment practices which might arise within the enterprise FERTICA, in accordance with the application of due process and the principle of fair defence.
- 781.** As to the fact that the enterprise FERTICA cleared out the storage space belonging to the ATF, the Government states that according to the administrative investigation carried out by the Labour Inspectorate on 16 June 2003 and based on the evidence gathered.
- The enterprise stated that it had requested the Secretary of the ATF to be present when the storage space was being cleared out but the Secretary chose not to attend.
 - The enterprise entered a storage space which had been made available to the ATF as a consequence of a collective agreement and which has not been used since 1995.
 - Once the consultants on labour affairs and the higher echelons of the administrative authorities had been consulted, it was decided that the Ministry could not take any legal action against the enterprise, rather it was up to the ATF itself to take the appropriate action before the relevant legal body.
 - The Labour Inspector's ruling, as indicated above, was duly communicated to the ATF which at no time challenged it.
- 782.** With regard to the entry effected by employees of FERTICA into the trade union office of the ATF and the transfer of furniture, office equipment and documents to another premises, based on the evidence collected, in a ruling dated 18 May 2004, the Labour Inspectorate concluded that there was no doubt whatsoever that the enterprise FERTICA had infringed article 363 of the Labour Code by unilaterally and, without having given prior warning, opening the office set aside for the trade union ATF which has been constantly active on the premises in question and has held meetings there, thus hindering and limiting the ATF's trade union activities and violating its privacy. The transfer of the objects in question caused disruption and obstructed the trade union in its work, as the trade union is not aware of the present location of the furniture, documents and office equipment, according to documents sent by the Government. In light of this ruling, in court the Ministry of Labour accused the enterprise of employing unfair practices.
- 783.** All of this goes to show how diligently and efficiently the Ministry of Labour has dealt with the situation whilst explicitly condemning any anti-trade union practices when evidence of such illegal practices has been produced. At no time has the relevant Regional Directorate of the Ministry of Labour attempted to delay administrative proceedings, nor has it in any way indulged the enterprise FERTICA; indeed, there exists a prior case

whereby the abovementioned enterprise lodged an application for *amparo* (enforcement of constitutional rights) against the administrative authority for alleged state of defencelessness, arguing that its (the enterprise's) basic rights were being violated in the course of the administrative process carried out, a request turned down by the Constitutional Court. The ruling (issued in February 2004) went against the enterprise.

784. Based on the facts listed above, the Government requests that the complaint lodged by the complainant organization be rejected.

785. Finally, the Government adds a report prepared by the enterprise FERTICA with regard to the complaint in question, according to which:

- In 1995, when the entire workforce at the Carrizal de Puntarenas plant was dismissed and paid off in full (including the Secretary-General of the ATF), owing to the financial difficulties affecting FERTICA at the time, the collective agreement no longer remained in force and therefore no longer applied. This lapse in the application of the agreement is the subject of Case No. 96-000263-214-LA pursued by the ATF in the Labour Court of the Second Circuit of San José against FERTICA. On this occasion, the National Labour Inspection Directorate yet again took FERTICA to court for, amongst other things, having failed to apply the collective labour agreement, a legal action dealt with in Case No. 191-1-96.
- From September 1995 onward, support for the ATF amongst the workers fell dramatically and currently none of the more than 123 employees working at the Carrizal de Puntarenas plant belong to the trade union. Rather, those workers currently working for the enterprise have claims pending against the leadership of the ATF, supposedly related to goods that, according to the workers, have disappeared. As a result of this, the enterprise has virtually no knowledge of the current situation regarding this trade union, or of the composition of its executive board.
- Since September 1995, when the collective agreement ceased to be applied and, as a consequence, the storage space was closed, the trade union ATF has made no move to open the storage space and indeed abandoned it completely. The ATF limited itself to launching Case No. 96-000263-214-LA, as mentioned above, requesting that FERTICA compensate it for "all the damages and harm done to my client through the illegal and arbitrary closure of the storage space". This case is currently being examined. Because the trade union had abandoned the storage space, the foodstuffs and other consumables that were being stored there had rotted, providing a breeding ground for rats and other animals that endangered the health of workers. Thus, on 10 June 2003, the enterprise proceeded to make an inventory of the goods stored within and to clean the premises. Proof of this was duly provided to the Regional Office of this Ministry in the city of Puntarenas. Prior to the operation, on 10 April 2003, the Plant Manager contacted the Secretary of the trade union, Don Marcos Guzmán Rodríguez, to attend the clean-up operation and inventory of the contents of the storage space, an invitation that was turned down by the gentleman in question, as can be seen from his note dated 22 April 2003. Indeed, Mr. Guzmán Rodríguez's note stated that the ATF had decided not to be present at the opening of the storage space, a fact which is an important element in the legal proceedings on the violation of the collective agreement. At no time was the trade union ATF evicted from the storage space. Furthermore, since September 1995 the ATF had not been in possession of the abovementioned storage space.
- As to the allegation concerning the trade union office of the ATF, the enterprise FERTICA states that, given the situation regarding the storage space, it was forced to act. Despite the fact that the collective agreement was no longer in force, as pointed out previously, at no time did the enterprise deny its employees access to the office

that was placed at their disposal for conducting trade union business. However, the trade union more or less stopped using the premises although it had a door allowing access from the outside. When the office was abandoned, the build-up of dirt meant that it was necessary to clean it and make an inventory of the goods stored within, according to a legal document prepared by a notary on 27 August 2003. On the same day, the Secretary of the ATF, Don Marcos Guzmán Rodríguez, was sent the note numbered GAF-086-03 in which he was informed that the office had been relocated and that he would have “corresponding access” to the new premises.

- The documents were prepared by the notary at a time when it was vital that the storage space and the office of the trade union be cleaned because the dirt and filth that had built up were posing a threat to the health of the workers carrying out tasks near those premises. The abovementioned documents were made available to the Secretary of the ATF so that he and his friends could collect whatever belonged to them. However, they did not pick up anything whatsoever, neither did they visit the premises again. The Administrative and Financial Director of FERTICA informed the Secretary of the trade union, Marcos Antonio Guzmán Rodríguez that “the trade union office is at your disposal”, according to an official letter dated 27 August 2003. FERTICA states that for the corresponding legal effects both the space taken up by the storage area and that occupied by the office of the trade union are the property of FERTICA and are private property and must be respected as such by the trade union.
- To use a colloquialism, Mr. Guzmán Rodríguez has “milked dry” the case concerning unfair practices; that is to say, he has been going over and over issues dating back to 1997 which have already been resolved.
- As to the excessive delays affecting the procedures, the complaint reiterates issues already dealt with by the Committee employing identical arguments; FERTICA is not obliged in any way to examine or respond to the references to the authorities in the shape of the Ministry of Labour and Social Security and the Judiciary, although those authorities will respond fully. All cases involving the complaint against FERTICA have been examined, resolved and/or dropped, as has been shown. Should the complaint possibly have some grounds with regard to the legislation in force then this would hypothetically lead to a possible reform of that legislation.

C. The Committee's conclusions

786. *The Committee notes that in the present complaint the complainant organization has presented the following allegations: excessive delays affecting cases of anti-trade union dismissal against the enterprise Fertilizantes de Centroamérica (FERTICA); representatives of the enterprise forced their way into the trade union office and storage space assigned to the Association of Workers of the Fertilizer Sector (ATF) as a consequence of the collective bargaining process, requisitioning documents and goods; the complainant organization also refers to a judicial decision which notes various violations of trade union rights by the aforementioned enterprise.*

787. *As to the allegation concerning delays in the legal procedure (over eight years) concerning the case related to the dismissal of trade union officials of the Association of Workers of the Fertilizer Sector, the Committee takes note of the Government's statements, according to which: (1) the Ministry of Labour fulfilled its function as mediator, taking into account each of the Committee's recommendations regarding Cases Nos. 1879 and 1966 concerning the enterprise Fertilizantes de Centroamérica (FERTICA); (2) the courts have exclusive competence in the matter of the reinstatement of the workers who were dismissed and cannot circumvent due process; (3) the parties involved in the dispute were principally responsible for the delays affecting the process owing to the delaying tactics they*

employed; (4) the Government is fully committed to resolving the problem of supposed delays to legal procedures and refers to a draft law currently being examined by the Legislative Assembly aimed at reforming the Labour Code which introduces a less lengthy legal procedure that trade union officials and members may have recourse to in cases of dismissal for reasons linked to membership of a trade union. Furthermore, a process of consultation, study and observations is currently under way concerning a draft reform concerning labour procedure (this has still not been submitted to the Legislative Assembly). The Supreme Court of Justice, the Ministry of Labour and workers' and employers' organizations are all participating in this process, which is aimed at modifying the Labour Code and introducing the principle of oral proceedings with the aim of expediting the procedure and reducing the legal backlog. The ILO is providing technical assistance for the draft. The Committee notes that the enterprise FERTICA highlighted the fact that the issue of delays to proceedings had already been dealt with by the Committee when examining previous cases.

- 788.** *The Committee notes that it has already examined the issue of delays affecting legal procedures related to the dismissal of trade union officials of the ATF. However, the Committee stresses that the complainant organization highlighted the fact that the legal procedure in question is still ongoing more than eight and a half years after the dismissals took place. In this respect the Committee can only note this fact and deplore the excessive delay to the abovementioned case and reiterate that "... proceedings relating to matters of anti-union discrimination, in violation of Convention No. 98, should be examined promptly, so that the necessary corrective measures can be really effective; excessive delay in dealing with anti-union discrimination cases and, in particular, the long delay in deciding proceedings for the reinstatement of dismissed union leaders amounts to a denial of justice and thus a denial of the union rights of those affected" [see Report No. 318, Case No. 1966 (Costa Rica), para. 358]. Whilst taking note of the efforts being made by the authorities to resolve the question of delays to legal proceedings, the Committee once again expresses its concern at the delays affecting proceedings, in particular with regard to the present case. The Committee requests the Government to take the necessary measures to ensure that the draft laws it referred to which are aimed at speeding up the operations of the legal system are adopted promptly. The Committee expects that the judicial authority will issue a ruling on the dismissal of the trade union officials of the ATF without delay, given that over eight-and-a-half years have passed since the dismissals took place and requests the Government to communicate a copy of the ruling as soon as it is issued.*
- 789.** *As to the ruling handed down by the Lower Small Claims Court of Puntarenas on 8 April 2001, communicated by the complainant organization, concerning the accusation of unfair employment practices, the Committee notes that according to the ruling as quoted by the complainant organization, the judicial authority found the enterprise FERTICA to be guilty of unfair employment practices condemned by the Ministry of Labour (promoting the formation of a parallel executive board to the ATF, unjustified refusal to negotiate, withholding of membership fee deductions from the wages of trade union members, etc.). In this respect, the Committee notes with interest that this ruling is in line with the conclusions it (the Committee) formulated concerning Case No. 1966 [see Report No. 316, para. 43 onwards]. Moreover, the Committee notes that according to the complainant organization, in its ruling, the Small Claims Court concluded that the enterprise drew up blacklists and tampered with trade union correspondence. The Committee requests the Government to communicate a copy of the abovementioned ruling handed down by the Lower Small Claims Court of Puntarenas.*

- 790.** As to the allegation that on 10 May 2003 representatives of the enterprise FERTICA forced their way into the storage space allocated to the ATF as a consequence of the collective agreement, forcing the locks and removing all the articles that were stored within, the Committee notes that the Government states that the investigation carried out by the Labour Inspectorate gave rise to the following conclusions: (1) that the enterprise opened up the storage space allocated to the ATF as a consequence of a collective agreement which had not been in force since 1995; (2) it is up to the ATF to take its case to court as the Ministry of Labour cannot launch any kind of legal action against the enterprise; (3) the ATF did not appeal against the administrative ruling handed down in this case. The Committee notes that the enterprise FERTICA states that it invited the Secretary of the ATF to participate in the clean-up operation and the inventory of the contents of the storage space (although he decided not to attend) and that this measure was taken because of the threat posed to the health of the workers by the state of the storage space which had been abandoned since 1995 (filth, dirt, rats). The Committee notes that the enterprise denies that it confiscated trade union property and states that the document prepared by a notary concerning the opening and cleaning of the storage space was sent to the Secretary of the ATF so that trade union members could collect anything they felt belonged to them but they did not collect anything, neither did they return to the premises. Given the state of abandon of the storage space since 1995, the health reasons presented by the enterprise and the invitation which was extended to the trade union to attend the clean-up and inventory operation concerning the premises, the Committee will not proceed with the examination of this allegation.
- 791.** As to the entry effected by representatives of FERTICA into the trade union office of the AFT and the requisitioning of documents and goods, the Committee notes the Government's statements, according to which: (1) based on the evidence gathered, following an investigation, the Labour Inspectorate concluded in a ruling handed down on 18 May 2004 that there was no doubt that the enterprise FERTICA had infringed article 363 of the Labour Code by unilaterally and, without having given prior warning, opening the office set aside for the trade union ATF which has been constantly active and has held meetings at the premises in question, thus hindering and limiting the ATF's trade union activities and violating its privacy. (2) the transfer of the office from one location to another caused disruption and obstructed the trade union in its work, as the trade union is not aware of the present location of the furniture, documents and office equipment, according to documents sent by the Government. In light of this ruling, in court the Ministry of Labour accused the enterprise of employing unfair practices.
- 792.** The Committee notes that contrary to what occurred in the case of the storage space allocated to the ATF trade union as a consequence of the collective agreement, the enterprise did not give prior warning, either of the opening of the trade union office to carry out cleaning and an inventory, or of the relocation of the office to other premises belonging to the enterprise. The Committee stresses that according to the investigation carried out by the Ministry of Labour, the trade union is unaware of the whereabouts of furniture, documents and office equipment taken from the ATF trade union office where the trade union held its meeting and this constitutes a violation of the trade union's privacy and hinders it in its work. The Committee deplores the fact that representatives of the enterprise FERTICA unilaterally and without prior warning or consent entered the office of the ATF trade union and relocated it to other premises belonging to the enterprise. The Committee requests the Government to communicate a copy of the ruling to be handed down as a consequence of the legal proceedings instituted by the Ministry of Labour for unfair employment practices and expects that the ruling will be handed down in the near future, restitution will be made for the damages and the ATF trade union will have its possessions returned to it.

The Committee's recommendations

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

- (a) *As to the allegations concerning delays affecting procedure in the case concerning the dismissal of trade union officials of the Association of Workers of the Fertilizer Sector (more than eight-and-a-half years after the dismissals took place), the Committee notes and deplores the excessive delays affecting the abovementioned case and recalls that proceedings relating to matters of anti-union discrimination, in violation of Convention No. 98, should be examined promptly, so that the necessary corrective measures can be really effective; excessive delay in dealing with anti-union discrimination cases and, in particular, the long delay in deciding proceedings for the reinstatement of dismissed union leaders amounts to a denial of justice and thus a denial of the union rights of those affected. Whilst taking note of the efforts being made by the authorities to resolve the question of delays to legal proceedings, the Committee once again expresses its concern at the delays affecting proceedings, in particular with regard to the present case. The Committee requests the Government to take the necessary measures to ensure that the draft laws it referred to which are aimed at speeding up the operations of the legal system are adopted promptly. The Committee expects that the judicial authority will issue a ruling on the dismissal of the trade union officials of the ATF without delay, given that over eight and a half years have passed since the dismissals took place and requests the Government to communicate a copy of the ruling as soon as it is issued.*
- (b) *As to the entry effected by employees of FERTICA into the trade union office of the AFT and requisitioning of documents and goods, the Committee deplores the fact that representatives of the enterprise FERTICA unilaterally and without prior warning or consent entered into the office of the ATF trade union and relocated it to other premises belonging to the enterprise. The Committee requests the Government to communicate a copy of the ruling to be handed down as a consequence of the legal process undertaken by the Ministry of Labour for unfair employment practices and expects that the ruling will be handed down in the near future, restitution will be made for the damages and the ATF trade union will have its possessions returned to it.*
- (c) *The Committee requests the Government to communicate a copy of the ruling dated 8 April 2001, handed down by the Lower Small Claims Court of Puntarenas.*

CASE NO. 2258

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

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 are obliged to conduct 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 and unlawful house entry; trials and sentencing of trade union officials to long prison terms; confiscation of trade union property and infiltration of the independent trade union movement by state agents; anti-union acts against members of CONIC, the CTDC and CUTC in 2001 and 2002

- 794.** The Committee examined this case at its June 2004 meeting and submitted an interim report to the Governing Body [see 334th Report, paras. 408-467, approved by the Governing Body at its 290th Session (June 2004)].
- 795.** The ICFTU sent new allegations in a communication dated 14 December 2004. The Government subsequently sent new observations in communications dated 28 September 2004 and 2 March 2005.
- 796.** Cuba has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

- 797.** In its examination of the case in June 2004, the Committee made the following recommendations [see 334th Report, para. 467, approved by the Governing Body at its 290th Session (June 2004)]:
- (a) The Committee deeply regrets that the Government categorically rejects the possibility of a direct contacts mission. It further deplores that the Government has not sent the requested judgements with regard to the main issue in this case and therefore draws attention to the lack of will to cooperate fully in the proceedings.

- (b) The Committee urges the Government promptly to adopt new provisions and measures fully to recognize in legislation and in practice the right of workers to establish the organizations they deem appropriate at all levels (in particular, organizations independent from the current trade union structure), and also the right of these organizations freely to organize their activities. The Committee requests the Government to keep the Committee of Experts informed of progress in revising the Labour Code with regard to freedom of association and expects that this review will provide for the removal of any reference by name to the existing Trade Union Central and that it will provide for the establishment of trade unions, outside the existing structure, at all levels, if workers so desire.
- (c) The Committee urges the Government to take measures to amend legislation with regard to collective bargaining in the manner outlined in the conclusions, to ensure that collective bargaining in labour centres can take place without recourse to binding compulsory arbitration prescribed by the legislation and without interference by the authorities, organizations at a higher level or the CTC.
- (d) The Committee strongly expects that the Government will ensure that the right to strike can be exercised in an effective manner in practice and that nobody will be discriminated against or prejudiced in their employment for peacefully exercising this right.
- (e) Taking into account several earlier cases submitted to the Committee regarding harassment and detention of trade union members belonging to trade union organizations that are independent of the established structure, also taking into account the fact that the sentencing of seven trade union members was handed down in summary hearings of very short duration, and given that the Government has for the second time failed to send the requested copies of the criminal convictions handed down, the Committee urges the Government to take steps to release immediately the persons mentioned in the complaints: Pedro Pablo Alvarez Ramos (25 years); Carmelo Díaz Fernández (15 years); Miguel Galván (26 years); Héctor Raúl Valle Hernández (12 years); Oscar Espinosa Chepe (25 years); Nelson Molinet Espino (20 years); and Iván Hernández Carrillo (25 years) and to keep the Committee informed in this respect.
- (f) With regard to the allegations of the ICFTU, stating that Aleida de las Mercedes Godines, Secretary of CONIC, and Alicia Zamora Labrada, Director of the Trade Union Press, were two state security agents infiltrated into the trade union movement (the former for 13 years according to information received from the ICFTU), the Committee deplores the infiltration of security agents in the CONIC trade union organization or in a trade union press agency and urges the Government, in future, to comply with the principle of non-intervention or interference by the public authorities in the trade union activities embodied in Convention No. 87, Article 3.
- (g) The Committee requests the complainant organizations to send a copy of the statutes of CONIC and CDTC.
- (h) The Committee urges the Government to send detailed information on the following allegations, without delay:

2001

- On 26 January, Lázaro Estanislao Ramos, a delegate from the Pinar del Río branch of the Independent National Workers' Confederation of Cuba (CONIC), was threatened in his home by a state security employee, Captain René Godoy. The official warned him that his confederation had no future in Pinar del Río and that penalties against opposition would worsen, culminating, if necessary, in the disappearance of the dissidents.
- On 12 April, Lázaro García Farah, 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.

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- 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.

B. Additional information from the ICFTU

798. In its communication of 14 December 2004, the ICFTU attaches the statutes of the Confederation of Democratic Workers of Cuba (CTDC):

Preamble

Whereas the daily efforts of all our citizens need to be harnessed to maintain a clear path of development and understanding and move our country forward towards economic prosperity and civil rights, while safeguarding the most authentic values of our country's history;

Whereas we seek to achieve definitive recognition for the just demands of the workers which have been flouted and ignored in today's totalitarian political context and to expand those demands and freedoms when they are achieved in a democratic context;

Whereas we draw together the national sentiment of all Cuban workers and the Cuban people as a whole and undertake to represent the various sectors which join forces in this task;

We, with the sincere fervour which is the legacy of all the progressive thinking of the Cuban workers, guided by the longing of the people to exercise its rights, in the footsteps of the most eminent democratic thinkers, above all our mentor José Julián Martí Pérez;

Hereby resolve solemnly to establish the CONFEDERATION OF DEMOCRATIC WORKERS OF CUBA, hereinafter referred to as the CTDC, on the basis of the following statutes governing its formation, objectives and functioning:

Statutes

Chapter 1 – Formation, legal status and address

Article 1 – The CTDC shall have legal personality, notwithstanding the refusal of the current regime in Cuba to recognize it, and is constituted as an instrument for the protection of the highest aspirations of our working class which will coordinate, in conjunction with all national and international democratic and labour organizations, the actions needed to ensure respect for the free exercise of workers' rights that are already recognized or will be recognized in the future.

Article 2 – The CTDC shall have its headquarters in San Fernando #29805 e/ San Luis y Línea, Pueblo Nuevo, Matanzas, Cuba. The location of these headquarters may be changed if circumstances require, subject to the consent of the CTDC executive committee.

Article 3 – (a) All Cuban workers, whether active or inactive, who wish to join the CTDC and comply with its statutes shall, without discrimination based on creed, race, political affiliation, sex or any other distinction that affronts human dignity, be eligible for membership.

(b) The CTDC undertakes to represent free trade unions from the various sectors of the national economy.

Chapter 2 – Objectives

Article 4 – To fight for the full recognition of freedom of association, where freedom of expression can be exercised fully, as an instrument for the protection of workers.

Article 5 – To ennoble work in all its manifestations, promoting the free organization thereof, based on the principle of every worker's right to private ownership of the means of production, to the free exercise of occupation or office, such rights being exercised without governmental, state or any other kind of coercion and irrespective of state or governmental initiatives in the area of economic development.

Article 6 – To establish free contracting between employee and employer without any enterprise, entity or actual or legal person acting as intermediary therein.

Article 7 – To ensure that any employment contract between employee and employer is covered by standards governing wages, working hours, health and safety conditions, without discrimination, and by other internationally recognized standards and laws.

Article 8 – To ensure respect for strikes, in labour and political contexts, as a mechanism for supporting workers' claims.

Article 9 – To gain explicit recognition in the national Constitution for the rights set forth in Articles 5, 6, 7 and 8 of the present statutes.

Article 10 – To fight for access to all forms of the mass media, where the voice of opposition can be heard to the pro-government trade union policy which today stifles the deepest concerns of the country's workers, denying them scope for their activities.

Article 11 – To promote the rise of workers to higher-ranking posts in the various sectors of the economy and in state and government organizations, in accordance with their skills and merits strictly based on their work and not on their political affiliation to any party or on any other activity entailing discriminatory personal privileges.

Article 12 – To represent members in collective bargaining and agreements.

Article 13 – The CTDC is opposed to the rigorous economic centralism in which governmental, state and private entities designated by the State exercise absolute control over the production and marketing of all goods and services, preventing any other private economic organization, even in the hands of Cuban nationals, from showing a more efficient form of management.

Article 14 – The CTDC is opposed to the partisan control of the economy and to the trade union movement belonging to a totalitarian corporate regime.

Article 15 – In accordance with the above, the CTDC seeks the end of the Government's monopoly on foreign trade, with a view to establishing the economic basis necessary for the extensive development of trade between profit-making institutional organizations and private entities and the rest of the world, for the purpose of stimulating the national economy.

Chapter 3 – Membership

Article 16 – The CTDC shall comprise the following categories of members:

Members

The members shall be distinguished between full and honorary members.

A-(1) Full members shall be all persons described in Article 3 of the present statutes, who may be resident in or outside the country, and shall be required to pay previously specified periodic subscriptions.

A-(2) Honorary members shall be non-Cubans who have strongly supported labour, human and civil rights, and peace and human progress, in and outside their countries of origin, and who have shown solidarity with the Cuban workers.

Associates

Chapter 4 – Duties and rights of members

Article 17 – It shall be the duty of all CTDC members to:

- participate actively in one of the CTDC offices;
- comply with and ensure compliance with the statutes of the organization, and also with the agreements originating from higher and primary entities;
- maintain honourable, loyal and impartial conduct with regard to the serious problems facing our people;
- fight tirelessly against any violation of labour rights;
- pay the officially agreed subscription on time;
- show respect towards the authorities notwithstanding differences over government policy in force;
- comply with majority agreements as the highest expression of our sense of democracy.

Article 18 – All CTDC members shall be entitled to:

- participate actively in a peaceful way and vote in all CTDC activities and demonstrations in defence of the workers' conquests and aspirations;
- elect members of, or be elected to, the CTDC executive bodies.

Chapter 5 – Congress

Article 19 – The workers' congress shall be the supreme authority of the CTDC and as such shall decide on matters of general organizational interest, and be the originating body of the other constituent entities. The functioning of the congress, the election of delegates to it, and its authority, shall be covered by the regulations drawn up to this effect which will form part of the present statutes.

Chapter 6 – Governance and administration

Article 20 – The CTDC shall be managed by an executive committee composed of a general secretary, an assistant general secretary, an organizer, a treasurer and nine secretaries, who shall cover the various sectors and branches of the national economy without distinction.

Article 21 – Meetings of the executive committee shall be convened by the general secretary or, should the latter be absent for exceptional reasons, by the assistant general secretary. Meetings shall be convened with at least three days' notice and shall remain open while so agreed by "50 per cent plus one" of the members attending the meeting.

Article 22 – For any meeting of the executive committee to be valid, a quorum of three-quarters of its officers shall be required.

Article 23 – The executive committee shall have the following duties:

- to set up whatever primary organizations are necessary with the participation of an official of the executive committee;
- to represent, govern and manage the CTDC;
- to comply strictly with, and ensure strict compliance with, the CTDC statutes;
- to adopt whatever agreements are necessary to meet the organization's stated objectives and any others set forth in the present statutes;

- to accept or reject membership requests and also handle cancellations or expulsions for members who fail to comply with the standards laid down in the present statutes;
- to maintain close links with the democratic organizations of the country and with personalities and institutions of other democratic countries;
- to ensure observance of the code of conduct applicable to all CTDC members which, once it has been formulated and adopted, shall form part of the present statutes.

Chapter 7 – Amendments to the statutes

Article 24 – Any matter not covered by the present statutes shall be settled solely by the CTDC executive committee subject to approval by a majority of the delegates voting at the corresponding session of congress.

Article 25 – Any amendments to the present statutes may be made only with the agreement of congress, at an extraordinary meeting convened for the purpose, and with a vote in favour by three-quarters of the previously constituted quorum of delegates present.

In the name of God, the nation and freedom.

C. The Government's new observations

- 799.** In its communications of 28 September 2004 and 2 March 2005, the Government states that an in-depth analysis of the various reports of the Committee on Freedom of Association on Case No. 2258 reveals that on the occasions when the Committee has requested the Government's observations, these have been reproduced almost verbatim in the corresponding section of the report. However, in formulating its conclusions and recommendations, the Committee is still reluctant to modify opinions which are based solely on unfounded allegations by the complainants, failing to take account of arguments, evidence and facts set out in the Government's replies.
- 800.** The Government declares that the Committee's recommendations fail to take account of the wealth of information sent by the Government and they reach a biased and unbalanced conclusion by stating that there is a "... lack of will to cooperate fully in the proceedings" (paragraph 467(a)).
- 801.** The Government adds that it is even more unjust and unfounded to describe the case as serious and urgent, a label which was not applied to situations where union officials were murdered and the most fundamental labour and union rights were flouted, not to mention other parts of the world where neither unions nor union rights exist because this is prevented by armies of occupation acting without a clear United Nations mandate.
- 802.** The Government points out, that under treaty law, obligations relating to a ratified international Convention emanate from the text of the instrument itself, not from wilful or arbitrary interpretations of the letter of the law. The Government adds that it is inadmissible and illegal to transgress States' right of sovereignty and seek to add substantive legal pronouncements which are not expressly recognized in the text of a Convention.
- 803.** The Government asserts that it has duly provided information on the revision of the Labour Code, which is currently the subject of comprehensive and participatory discussions in various union bodies, the results of which are to be taken into account in the final version to be submitted to Parliament, respecting the sovereign will of the Cuban workers.
- 804.** The Government points out that it is a key feature of the Cuban socio-political and economic system to consult the workers for their opinion on legislative or economic proposals which concern them directly, and to respect and take full account of their democratically expressed views via trade unions which they have elected freely. The

Government emphasizes that Cuba is an independent and sovereign socialist workers' State, as defined in article 1 of the Constitution of the Republic, and as such the workers' opinion must be reflected in any draft legislation presented to the National Assembly of the People's Power (Parliament).

- 805.** Freedom of association, protected in Convention No. 87, does not translate into the false concept of "trade union pluralism" imposed by the main centres of capitalist and imperialist power. These are chiefly concerned with undermining the workers' unity of strategy and action, which in the case of Cuba acquires strategic importance in the historical project to dominate the Cuban nation, which successive administrations of what is now the sole global superpower have sought to achieve.
 - 806.** The Government adds that the decision by the workers to support the historical choice of maintaining a single trade union central, which has represented and defended them through various historical stages of the socio-economic development of the country and which emerged from the development of class consciousness and the firm resolve to defend unity, can be just as free as choosing, under different circumstances, to develop diverse various trade union organizations, sometimes with contrasting objectives.
 - 807.** Cuba does not consider itself in a position to reach conclusions regarding the superiority of any given approach or model. It is merely convinced that the unity of its trade union movement is a prerequisite for maintaining the independence of the nation and its workers' right to free determination. It merely demands respect for the Cuban workers' sovereign right to establish their own model, without external interference or pressure in favour of the petty interests of those in Washington or Miami who seek to reimpose their structures and mechanisms of exploitation on the Cuban workers.
 - 808.** In accordance with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the decision by an overwhelming majority of Cuban workers to adopt a unified system in the trade union movement merits full respect. As recommended in the 334th Report, paragraph 467(b), the Government will accept and implement the workers' will in relation to the final version of the Labour Code. In the last resort, it will be the National Assembly, the supreme legislative body of the country, which will approve the Code and give it force of law.
 - 809.** The Government points out that article 54 of the Constitution of the Republic of Cuba states as follows:
- The rights to assembly, demonstration and association are exercised by workers, both manual and intellectual, peasants, women, students and other sectors of the working people, and they have the necessary means for this. ... The social and mass organizations have all the facilities they need to carry out those activities in which the members have full freedom of speech and opinion based on the unlimited right of initiative and criticism.
- 810.** The Constitution in force does not impose any kind of restrictions on workers' freedom of association or on the performance of their activities. Calling into question the Cuban Government's will and ability to respect and enforce the provisions of the Basic Law of the country is tantamount to questioning the validity of the rule of law in Cuba and failing to recognize the guarantees of participation in and control of the public service enjoyed by all Cuban citizens and workers.
 - 811.** The Government adds that it would therefore appear that, as regards the analysis of Cuba's compliance with its obligations under Convention No. 87, the Committee on Freedom of Association would have exceeded its mandate and the provisions of the ILO Constitution itself. There is always time for a change of approach and for promoting a real atmosphere of dialogue on the basis of legality and respect.

- 812.** It is worth noting the actual formulation of article 54 of the Constitution, which refers unambiguously to workers' rights. Since Case No. 2258 was filed, neither the complainants – ICFTU, WCL, CLAT – nor the supposed victims – groups of illegally funded mercenaries, masquerading as trade unionists, in the service of the foreign superpower which attacks the Cuban workers – have been able to demonstrate so far that the membership of the so-called CUTC, CONIC and CTDC is constituted by workers.
- 813.** The Government affirms that nobody has been able so far to present credible evidence or sound arguments to support the alleged union official, or even worker, status of the mercenaries Pedro Pablo Alvarez Ramos, Carmelo Díaz Fernández, Miguel Galván, Héctor Raúl Valle Hernández, Oscar Espinosa Chepe, Nelson Molinet Espino and Iván Hernández Carrillo. It is a long time since they have performed any kind of work or had any kind of job which corresponds to the universally accepted parameters defining the status of worker.
- 814.** The Government claims that the only thing which has been demonstrated, by means of evidence and testimonies, in courts constituted according to the guarantees of due process is that the only income received by these persons was channelled via the United States Interests Section in Havana and the terrorist mafia organizations of Cuban origin which act with impunity in Miami. Under the International Convention against the Recruitment, Use, Financing and Training of Mercenaries adopted by the United Nations in 1989, the activity of mercenary does not constitute a legitimate form of employment.
- 815.** The Government requests the complainant organizations, via the Committee on Freedom of Association, to present a single concrete proof of the worker status of the individuals referred to above. Without that status being proven, the affirmation that they are union officials lacks all seriousness or credibility and there is no point in wasting further time and effort on this case which has absolutely no legal or ethical basis.
- 816.** The Government adds that Cuba formed part of the Commission on International Labour Legislation, which was instituted by the 1919 Peace Conference which drew up the ILO Constitution, and this gives the country the status of ILO founder member. Cuba has ratified 87 of the 184 ILO Conventions in force. On a number of occasions it has been a member of the ILO Governing Body. It is a country which has maintained close historical ties with the ILO and professes profound respect for, and a firm commitment towards, the Organization's objectives.
- 817.** The Government regrets the fact that the Committee, which plays a key role in the actual implementation of fundamental principles and rights at work, is being misled in its handling of the case and is reiterating conclusions and recommendations based on unproven allegations which have been manipulated for improper political motives.
- 818.** The Government adds that the Committee's previous request, aimed at obtaining copies of official documents relating to legal judgements against the mercenaries mentioned in the case, could not be met for the following reasons.
- Under article 121 of the Constitution, the courts constitute a system of state bodies which function independently of all other systems and are subordinated only to the National Assembly of the People's Power and the Council of State.
 - Moreover, under article 122 of the Constitution, the judges, in their role of administering justice, are independent and owe allegiance only to the law. Any interference or revision with regard to decisions issued by a judicial body, except those laid down by national law, is therefore unacceptable.

- Taking account of the above, it is not possible to supply official documentation relating to judicial proceedings to persons unconnected with those proceedings, or in particular to submit the contents of such documentation to evaluation or scrutiny by a foreign international entity or person that has not been given authority to do so, pursuant to obligations incurred voluntarily and explicitly by the Cuban State on the basis of a legally binding international instrument.
- The parties to all the proceedings referred to above were notified of these rulings at the time, as required by the law.
- In addition, Cuba also has the obligation to protect the personal safety and integrity of persons who participated in the proceedings as judges, prosecutors, lawyers or witnesses, given that the United States Government has issued public threats against those who participated in any form in the legal proceedings against the mercenaries involved in its blockade and policy of hostility and aggression against the Cuban people.
- If the Committee wishes to obtain further information on the cases in question, it may refer to the various official statements issued by the Cuban Government on the matter, to the Republic of Cuba's replies to various issues raised in proceedings of the Committee on Human Rights, and also to the official document published at the 60th session of the Committee on Human Rights entitled "Cuba and its defence of all human rights" (E/CN.4/2004/G/46).

819. Nevertheless, the Government reminds the Committee of the wealth of information it sent previously in relation to the criminal proceedings undertaken in compliance with the guarantees laid down in our laws, which are no different from those adopted in any other country of the world for criminal acts of the same type and gravity.

820. The Government also makes the following comments on item (h) of the Committee's recommendations reached at the 290th Session of the Governing Body [334th Report, paragraph 467(h)] regarding allegations made by the International Confederation of Free Trade Unions (ICFTU):

- *Lázaro Estanislao Ramos* is known at his place of residence not as a worker or trade union official but for his illegal activities as a mercenary in the service of the government of a foreign country which are against the legally established constitutional order. The conversation between the Cuban state security official and this individual was held with the latter's prior consent, without any coercion or force. The purpose of the meeting was to advise the abovementioned citizen of the violations of Cuban law which he had committed as a result of his activities in the service of the Interests Section of a foreign country in Havana. No threats of any kind were made at any time, nor was any "disappearance of the dissidents" mentioned: this is nothing but a malicious distortion by Mr. Ramos of the tone of the conversation. In Cuba, unlike certain other countries, there has not been a single case of a forced disappearance since 1959.
- *Lázaro García Farah* is a terrorist who has convictions for piracy and murder. He was convicted in Case No. 37-94 of the People's Provincial Court of the City of Havana for his involvement in the hold-up and hijacking of a ship, the "Baraguá", on 4 August 1994 using pistols and knives. In this dramatic episode, the young police officer Gabriel Lamothe was murdered, trying to prevent the hijack. For almost 48 hours the vessel remained at anchor under the hijackers' control, only three miles off the Cuban coast. The perpetrators finally gave themselves up to the Cuban authorities, after the large number of children caught by surprise aboard the vessel on a scheduled evening trip between Havana and Regla had suffered a terrible ordeal of hunger and

thirst. Since Mr. Farah went to prison, his conduct has been appalling, with repeated indiscipline and insults to the prison authorities. For this reason, he has been subject to the corresponding disciplinary measures, with absolute respect for his physical and psychological welfare. The Cuban prison system is structured in accordance with the principles, regulations and institutions established in the "Standard Minimum Rules for the Treatment of Prisoners", approved at the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva, Switzerland in 1955. The system lays down rules and disciplinary measures for those who break them. Nevertheless, none of the latter entails corporal punishment or cruel, inhuman or degrading treatment. Prisoners are not subjected to the use of chains, shackles or straitjackets. Violence and abuse, both physical and psychological, are totally prohibited and are criminal offences.

- After a thorough search in the records of the Penal Control Department of the National Directorate of Prisons, no prisoner by the name of Georgis Pileta was identified, and it is therefore impossible to cast light on the allegations concerning this person.
- The same applies to the cases of Cecilia Chávez and Jordanis Rivas, concerning whom no information was found in the records of the law enforcement agencies.
- *José Orlando González Bridón*, currently resident in the United States and self-styled ringleader of a supposed trade union organization, has never been a worker in Cuba, nor has he performed any activity other than conspiring against the established constitutional order in his country, in support of a foreign country's policy of hostility, acting as their paid employee. A peculiar feature of the non-existent "Confederation of Democratic Workers" is that it fails to include one single person with a known labour connection in its membership, which automatically disqualifies its case from being examined by a body such as the Committee on Freedom of Association. Mr. González Bridón was sentenced to one year's imprisonment for contempt in Case No. 1/01, having publicly insulted law-enforcement and civil security officers who had accosted him when he was committing a serious breach of the peace. His main motives were to gain credibility as a victim of political persecution, with a view to being accepted by the United States Interests Office refugee programme and being able to emigrate to the United States. González Bridón went to prison on 29 December 2000 and was released on parole on 22 November 2001. He emigrated to the United States more than two years ago, on 17 July 2002. It is not known whether he is engaged in defending the "trade union rights" of workers there – something he never did in Cuba.
- On completion of all the usual investigations, the accusation made by Manuel Lantigua was shown to be false. All that is certain from his allegation is that he forms part of a tiny group of individuals whose aim is to deceive others, convincing them that a trade union called the "Single Council of Cuban Workers" is operating in Cuba, when in reality, like all the other so-called "independent trade unions", it does not perform any trade union activity, it does not have workers with recognized labour connections in its ranks, and it is not independent, since the persons who claim to be its members act as mercenaries in the service and pay of the government of a foreign country. His physical and psychological welfare has never been threatened and, following the example of Mr. González Bridón, he is currently in the process of emigrating to a foreign country whose authorities have used him as a paid employee in support of their anti-Cuban policy.
- *Luis Torres Cardosa* obstructed officials from the Guantánamo Municipal Housing Department, physically blocking their access to an illegally occupied dwelling, from which they were about to undertake an eviction in accordance with the law. He was

arrested for obstructing the officials in the performance of their duties, but the case opened in relation to this offence was dismissed and the abovementioned person was released.

- The supposed national assembly of the misnamed “Independent National Workers’ Confederation of Cuba” was a complete sham orchestrated by the Interests Section of a foreign country in Havana at the house of one of its mercenaries and attended by a few people in the pay of this supposedly diplomatic office. The so-called “Federation-in-Exile of Cuban Electricity, Gas and Water Utility Trade Unions” is one of the counter-revolutionary organizations established by the terrorist mafia of Cuban origin in a foreign country, using the millions funded by the authorities of a foreign country to overthrow the Revolution of labourers, peasants, intellectuals and Cuban workers in general. The said organization has been associated since the 1960s with the activities of terrorist paramilitary groups which have been operating from a foreign country, inflicting huge losses of property and human life on the real Cuban workers.

821. The Government also sends comments on the additional information in the case sent by the ICFTU to the Committee on Freedom of Association on 14 December 2004. The Government makes the following specific comments.

- The document presented on 14 December 2004 by the ICFTU General Secretary, Mr. Guy Ryder, is in response to a request made by the Committee on Freedom of Association in its 334th Report, paragraph 467(g), approved by the 290th Session (June 2004) of the Governing Body. As a result of this request, the supposed complainant organization drew up a document entitled “Statutes” – hastily, judging by the errors in it – in order to comply with the request.
- The “Statutes” do not originate from a congress or meeting of members, nor are they linked to representatives elected by the membership, as is the usual practice of genuine trade unions when adopting regulations to give substance and legitimacy to the organization. The document in question is merely the work of paid clerks who have no connection with any trade union activity.
- Paragraphs 13, 14 and 15 of the said document again show that the complainants’ real goals are not union-related, nor could they be, since they lack any representativeness. It is quite clear that their fundamental objective is the destruction of the economic, social and political system elected freely and democratically, with absolute independence and sovereignty, by the Cuban people and embodied in the Constitution of the Republic, approved by popular referendum.
- Any legitimate and independent trade union must be established on the basis of respect for, not violation of, the country’s legal and constitutional order, as recognized in Article 8 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which states: “... In exercising the rights provided for in this Convention, workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land ...”.
- A document such as the one under examination, drawn up without the support of a grouping of workers, has no legitimacy or force. It would seem improper for the Committee to make a priori references to this bogus entity as a trade union. This flawed document does not even contain the fundamental elements needed to constitute a genuine trade union, whatever its name, much less a “confederation”, which does not comprise even one primary union.

- In Cuba, trade unions are formed by the workers, as required by Article 2 of Convention No. 87, without the need for any kind of prior authorization from either the State or the employer. As has been stated repeatedly, there are more than 120,000 primary unions, with structural levels agreed upon by the workers themselves, from the company, sector or branch of activity to structures at national level.
 - None of the abovementioned unions has needed prior authorization from any state or judicial body to be recognized or to carry out its union activities in the workplace. The strength of these organizations lies in the will of the workers themselves who form their membership and in the collective backing for their activities.
 - The Labour Code and labour law as a whole establish rights which are exercised to the full by the workers and their organizations. The document under examination makes no mention of any labour rights which have not already been recognized and exercised for years by the Cuban workers.
- 822.** The Committee has already been informed in previous observations on the case of the circumstances of the anti-Cuban campaign in the context of the ILO, its motives and its links with the Helms-Burton Act and with a foreign country's policy of hostility against the Cuban Revolution.
- 823.** The United States authorities allocate substantial resources to the funding of groups of mercenaries acting on behalf of the foreign power which has openly stated its intention to overthrow the constitutional order approved in a sovereign and democratic manner by the Cuban people.
- 824.** The Government would like to suggest that the Committee examine the first chapter of the report of the so-called Commission for Assistance to a Free Cuba, presented by the President of a foreign country on 6 May 2004. This is a vast 450-page plan for depriving Cuba of its independence and sovereignty, and the Cuban people of its legitimate right to free determination, and also to convert the island into a mere North American possession.
- 825.** In the abovementioned chapter, the Committee will find that the ILO is explicitly defined on various occasions as an appropriate body for promoting the abovementioned country's public diplomacy against the Revolution of the Cuban labourers, peasants and intellectuals. The ILO is described as a natural forum for condemning the regime, as a part of the diplomatic efforts of the North American Government to impose a "regime change" in Cuba.
- 826.** A recommendation is made to work with "NGOs and other interested parties to assure that a Cuban independent labour representative or labour representative in exile is able to speak at ILO conferences".
- 827.** It is suggested that greater use be made of the ILO and efforts with international trade unions be coordinated, as part of the "diplomatic efforts" to attack the Cuban Government and promote the development of the mercenary groups in "civil society". Is any similarity with Case No. 2258 pure coincidence?
- 828.** In the abovementioned report, it is recommended that US\$3 million be assigned to "promote membership and organizational development" of "independent trade unions" in Cuba, and raise the international profile of the mercenary groups.
- 829.** The measures proposed in the report have been implemented since June 2004. These are specific facts, collated in official documents of the government of a foreign country and announced by the President himself.

- 830.** Cuba finds it hard to believe that the Committee gives credence to the myths and false allegations fabricated with the money allocated by a foreign country seeking to overthrow the Government of the labourers, peasants, intellectuals and workers of Cuba.
- 831.** There is not one single aspect of the fabrications presented by the ICFTU which the Cuban Government has not refuted in its observations to the Committee.
- 832.** The Committee has sufficient information not to defer a response to the proposal to terminate examination of Case No. 2258. It should not continue to encourage the fabrication of fraudulent documents or false allegations which only exist in the unhealthy minds of those who are being paid to support the anti-Cuban policy of a foreign country.
- 833.** Prolonging the existence of Case No. 2258 is tantamount to undermining the credibility of the entities responsible for promoting and protecting freedom of association anywhere in the world.
- 834.** Cuba hopes that the objectivity and impartiality which should be the defining features of this ILO body prevail and lead it to the inevitable conclusion that the time has come to end this unjust political manoeuvring and consequently close the case.

D. The Committee's conclusions

The Government's comments on the Committee's previous conclusions

- 835.** *The Committee notes the Government's statements in its communication of 28 September 2004 to the effect that: (1) it expresses and explains its disagreement with the Committee's conclusions, recommendations and opinions in the latter's previous examination of the case; (2) it claims that the Committee has engaged in wilful or arbitrary interpretations of the letter of the ILO Conventions, seeking to add substantive legal pronouncements which are not expressly recognized in the text of the Convention; (3) the Labour Code is undergoing revision and is the subject of comprehensive and participatory discussions in various trade union bodies, the results of which are to be taken into account in the final version to be submitted to the National Assembly; (4) although it is not in a position to decide on the relative merits of the model of trade union unity by decision of the workers, on the one hand, and the model of diverse trade unions developed on a voluntary basis, on the other, the unity of the Cuban trade union movement is a prerequisite for maintaining the independence of the nation and it respects the decision, in accordance with Convention No. 87, of an overwhelming majority of the Cuban workers; (5) the Constitution of the Republic establishes the rights of workers to assemble, demonstrate and associate and the social and mass organizations have all the facilities they need to carry out those activities; (6) the Constitution in force does not impose any kind of restrictions on workers' freedom of association or on the performance of their activities, and; (7) with regard to the analysis of Cuba's compliance with its obligations under Convention No. 87, the Committee on Freedom of Association has exceeded its mandate and the provisions of the ILO Constitution itself.*
- 836.** *The Committee observes that these government statements mainly refer to matters on which it had already formulated definitive conclusions in its previous examination of the case (the need to amend legislation in order to recognize fully in law and practice the right of workers to establish the organizations they consider appropriate at all levels – in particular, organizations independent of the existing trade union structure – and also the right to organize their activities freely, as well as the need to amend legislation in the area of collective bargaining). The Committee reminds the Government that it had previously*

examined and submitted to the Committee of Experts these legislative aspects of the case and consequently it will not examine these issues any further. Nevertheless, the Committee wishes to emphasize that in examining this case it limited itself strictly to its mandate from the Governing Body, namely to determine whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 6], and also that the principles of Conventions Nos. 87 and 98 and the principles of freedom of association in general must apply, whatever the system or the political, economic or social conditions of a country. In this respect, the Committee must remind the Government that Article 2 of Convention No. 87 provides that workers and employers shall have the right to establish and to join organizations of their own choosing. This provision of the Convention is in no way intended as an expression of support either for the idea of trade union unity or for that of trade union diversity. It is intended to convey, on the one hand, that in many countries there are several organizations among which the workers or the employers may wish to choose freely and, on the other hand, that workers and employers may wish to establish new organizations in a country where no such diversity has hitherto been found. In other words, although the Convention is evidently not intended to make trade union diversity an obligation, it does at least require this diversity to remain possible in all cases. Accordingly, any governmental attitude involving the imposition of a single trade union organization would be contrary to Article 2 of Convention No. 87 [see **Digest**, op. cit., para. 291].

Long prison sentences for trade union officials

837. With regard to the first of the pending questions, namely the Committee's recommendation concerning the sentencing of seven trade unionists to between 15 and 26 years' imprisonment and its request that the Government should take steps to ensure their immediate release and keep it informed in this respect, the Committee regrets that most of the Government's reply repeats its previous arguments which had already been examined, to the effect that: (1) the persons in question are neither trade union officials nor workers; (2) they were funded by the United States Interests Section in Havana and terrorist mafia organizations of Cuban origin; (3) the complainants' allegations were not proven and the conclusions and recommendations have been manipulated for improper political motives. The Committee notes the reasons cited by the Government for not meeting its request to provide the rulings that sentence the seven persons in question to terms of imprisonment. The Committee notes in particular the Government's statement that:

- according to article 121 of the Constitution, the Cuban courts constitute a system of state bodies which function independently of all other systems and are subordinated only to the National Assembly of the People's Power and the Council of State;
- according to article 122 of the Constitution, judges are independent in their role of administering justice and owe allegiance solely to the law; hence any interference or revision with respect to decisions issued by a judicial body, except those laid down by national law, is unacceptable;
- taking account of the above, it is not possible to supply official documentation relating to judicial proceedings to persons unconnected with those proceedings, or in particular to submit that documentation to evaluation or scrutiny by a foreign international entity or person that has not been given authority to do so, pursuant to obligations incurred voluntarily and explicitly by the Cuban State on the basis of a legally binding international instrument;

- *the parties to all the proceedings referred to above were notified of these rulings at the time, as required by the law;*
- *Cuba also has the obligation to protect the personal safety and integrity of persons who participated as judges, prosecutors, lawyers or witnesses in the proceedings, inasmuch as the government of a foreign country has issued public threats against those who participated in any form in the legal proceedings against the mercenaries involved in its blockade and policy of hostility and aggression against the Cuban people.*

838. *In this respect, the Committee reminds the Government that when it requests a government to furnish records of judicial proceedings, such a request does not reflect in any way on the integrity or independence of the judiciary. The essence of judicial procedure is that its results are known, and confidence in its impartiality rests on their being known [see Digest, op. cit., para. 23]. If the Committee had had these rulings at its disposal, it would have been in a position to examine the basis on which the persons in question had been convicted and the precise facts which led to the handing down of these long prison sentences. Nevertheless, there is nothing in the Government's general statements concerning these judgements which indicates specific facts that could justify such severe sentences; nor has the Committee been in a position, given the Government's failure to send copies of the judgements, to determine whether such rulings were related to the exercise of trade union activities. The Committee once again regrets the Government's refusal to send these judgements, which prevents the Committee from undertaking its examination. Under these circumstances, the Committee repeats its previous conclusions and recommendations and, consequently, taking into account the previous cases presented to the Committee relating to harassment and detention of members of trade unions which are independent of the established structure, and also taking into account the fact that the convictions of these seven trade unionists were issued in the context of very brief summary proceedings and that for the third time the Government has failed to send the requested judgements containing the sentences, the Committee urges the Government to take steps to ensure the immediate release of the trade unionists referred to in the complaints (Pedro Pablo Alvarez Ramos (sentenced to 25 years' imprisonment), Carmelo Díaz Fernández (15 years), Miguel Galván (26 years), Héctor Raúl Valle Hernández (12 years), Oscar Espinosa Chepe (25 years), Nelson Molinet Espino (20 years), and Iván Hernández Carrillo (25 years)), and to keep it informed in this respect.*

Statutes of the CTDC and CONIC

- 839.** *The Committee notes the statutes of the Confederation of Democratic Workers of Cuba (CTDC) sent by the ICFTU and the Government's comments in this respect. The Committee notes that, according to the CTDC statutes, the membership of this organization includes workers resident or non-resident in the country who pay union dues, the organization represents those workers, in particular by means of collective bargaining, it defends the private ownership of the means of production and upholds the members' right to participate peacefully in CTDC activities and demonstrations.*
- 840.** *The Committee notes that the Government suggests that the statutes were mainly drawn up by the ICFTU and asserts that they do not originate from any congress or meeting of members and are the work of paid clerks who have no connection with any trade union activity; the Government considers that articles 13, 14 and 15 of the statutes highlight the fundamental objective of destroying the economic, social and political system of the country which is enshrined in the Constitution of the Republic.*
- 841.** *With regard to the Government's statement that the ICFTU drafted the statutes of the CTDC, the Committee, while observing that it does not have any information proving the*

veracity of this statement, points out that it does not see any incompatibility with the principles of freedom of association in the possibility of a trade union having recourse to the assistance that a global trade union confederation can provide in the drafting of its statutes. As regards the non-existence of a congress or meeting of members cited by the Government, the Committee wonders on what basis the Government can make this claim. With regard to articles 13, 14 and 15 of the statutes, the Committee observes that they read as follows:

Article 13 – The CTDC is opposed to the rigorous economic centralism in which governmental, state and private entities designated by the State exercise absolute control over the production and marketing of all goods and services, preventing any other private economic organization, even in the hands of Cuban nationals, from showing a more efficient form of management.

Article 14 – The CTDC is opposed to the partisan control of the economy and to the trade union movement belonging to a totalitarian corporate regime.

Article 15 – In accordance with the above, the CTDC seeks the end of the Government's monopoly on foreign trade, with a view to establishing the economic basis necessary for the extensive development of trade between profit-making institutional organizations and private entities and the rest of the world, for the purpose of stimulating the national economy.

- 842.** In the Committee's opinion, the above articles express positions vis-à-vis economic systems and structures of trade union diversity which come within the mandate of trade unions. As a cornerstone of democracy, trade unions and labour movements must be free to determine for themselves the best means to defend and promote the economic and social objectives of their members and society at large.
- 843.** Finally, there is nothing in the Government's statements which clearly inclines the Committee to conclude that the intention of the organization in question – even if there were links with foreign groups – is to overthrow the national order by violent means. In fact, the statutes clearly state that "it shall be the duty of all CTDC members to ... show respect towards the authorities notwithstanding differences over government policy in force". For all these reasons, the Committee considers that the statutes of the CTDC should not be an obstacle to registration of the organization and requests the Government to guarantee recognition thereof.
- 844.** The Committee once again requests the complainant organizations to send the statutes of CONIC.

Allegations relating to 2001 and 2002

- 845.** As regards the allegation that on 26 January 2001, 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 (according to the complainant, the official warned him that his confederation had no future in Pinar del Río and that penalties against the opposition would worsen, culminating, if necessary, in the disappearance of the dissidents), the Committee notes the Government's claim that: (1) this person is known at his place of residence not as a worker or union official but for his illegal activities as a mercenary in the service of the United States Government which are against the legally established constitutional order; (2) the conversation between the Cuban state security official and this individual was held with the latter's prior consent, without any coercion or force, and its purpose was to advise the abovementioned citizen of the violations of Cuban law which he had committed as a result of his activities in the service of the United States Interests Section in Havana; (3) no threats of any kind were made at any time, nor was any "disappearance of the dissidents" mentioned, this being nothing but a malicious distortion by Mr. Ramos of the

tone of the conversation; (4) in Cuba, unlike certain other countries, there has not been a single case of a forced disappearance since 1959. The Committee observes that the Government has not indicated the unlawful activities committed by Mr. Lázaro Estanislao Ramos but notes that the Government denies that any threats were made. Recalling its previous conclusions concerning the imposition of a trade union monopoly by law, the Committee requests the Government to take all necessary steps to ensure that no person is intimidated or harassed merely for being a union member, even if the union in question is not recognized by the State.

- 846.** *As regards the allegation that on 12 April 2001 Mr. Lázaro García Farah, a trade union member of the Independent National Workers' Confederation of Cuba (CONIC) who was in prison, was brutally assaulted by prison guards, the Committee notes the Government's statement that he is a terrorist with judicial convictions for piracy and murder and that on account of his appalling conduct he had been subject to the corresponding disciplinary measures, with absolute respect for his physical and psychological welfare. Given the contradiction between the allegations and the Government's reply, the Committee can only trust that the Government will guarantee that any allegation of abuse or aggression during detention in prison will be the subject of an in-depth independent investigation, so that the necessary steps can be taken to ensure that no detainee is the victim of treatment such as that which has been alleged.*
- 847.** *As regards the allegation that on 27 April 2001, Mr. Georgis Pileta, an independent trade union member in prison, was beaten by guards after being sent to the punishment cells, the Committee notes the Government's statement that, after a thorough search in the records of the Penal Control Department of the National Directorate of Prisons, no prisoner by the name of Georgis Pileta was identified, and it is therefore impossible to cast light on the allegations concerning this person. In addition, with regard to the allegation that on 14 December 2001 the homes of independent labour activists Ms. Cecilia Chávez and Ms. Jordanis Rivas were raided and both were detained on a number of occasions by the security forces and threatened with imprisonment if they continued their trade union activities, the Committee notes the Government's statement that no information on them was found in the records of the law enforcement agencies. The Committee will not proceed with an examination of these allegations unless the complainant organizations provide additional information.*
- 848.** *With regard to the allegation that on 24 May 2001 Mr. José Orlando González Bridón, general secretary of the independent trade union Confederation of Democratic Workers of Cuba (CTDC), was sentenced to two years in prison for "spreading false information", the Committee notes that according to the Government: (1) this person is currently resident in a foreign country and is the self-styled ringleader of a supposed trade union organization, has never been a worker in Cuba, nor has he performed any activity other than conspiring against the established constitutional order in his country, in support of a foreign country's policy of hostility, acting as their paid employee; (2) he was sentenced to one year's imprisonment for contempt in Case No. 1/01, having publicly insulted law enforcement and civil security officers who had accosted him when he was committing a serious breach of the peace; (3) his main motives were to gain credibility as a victim of political persecution, with a view to being accepted by the refugee programme of the Interests Section of a foreign country and emigrating to that country; (4) he went to prison on 29 December 2000 and was released on parole on 22 November 2001, and (5) he emigrated to a foreign country more than two years ago, on 17 July 2002. The Committee regrets that the Government has not sent a copy of the judgement for contempt and refers to its previous conclusions on the reasons cited by the Government for not sending copies of judgements convicting trade unionists.*

- 849.** As regards the allegation that on 9 July 2001 another independent trade unionist, Mr. Manuel Lantigua, of the Single Council of Cuban Workers (CUTC), was beaten and stoned in the doorway of his home by members of the “Rapid Response Brigades” paramilitary group, the Committee notes the Government’s statement that the allegations are false and that the physical and psychological welfare of this person was never threatened and, following the example of Mr. González Bridón, he is currently in the process of emigrating to a foreign country whose authorities have used him as a paid employee in support of their anti-Cuban policy. In view of the contradiction between the allegations and the Government’s reply, the Committee cannot reach any conclusions.
- 850.** With regard to the allegation that on 12 February 2002 Mr. Luis Torres Cardosa, a 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 by the police (according to the complainant, he was detained as a result of his opposition, along with others, to the official eviction of a dwelling), the Committee notes the Government’s claim that this person obstructed officials from the Guantánamo Municipal Housing Department in the performance of their duties, physically preventing them from entering an illegally occupied dwelling from which they were about to undertake an eviction in accordance with the law, and he was arrested for obstructing enforcement of the law. The Committee also notes the Government’s claim that the case opened in relation to this offence was dismissed and the abovementioned person was released.
- 851.** The Committee also notes the allegations that: (1) on 6 September 2002 CONIC held its second national assembly, amidst retaliation by the State; (2) a heavy-handed operation was conducted by the political police to prevent the annual trade union assembly being held; (3) the political police threatened the CONIC officials with possible charges of rebellion if any demonstration was held in the vicinity of the premises where the assembly was taking place; (4) they stopped all people trying to enter the building, checking their identity and the reason for their presence, and they also denied access to a number of trade unionists, violently expelling them from the vicinity. The Committee notes the Government’s statement that: (1) the would-be trade union known as CONIC, like all the other would-be “independent trade unions”, does not perform any trade union activity, it does not have workers with recognized labour connections in its ranks, and it is not independent, since the persons who claim to be its members act as mercenaries in the service and pay of the United States Government, and (2) the supposed national assembly of the misnamed “Independent National Workers’ Confederation of Cuba” was a complete sham orchestrated by the United States Interests Section in Havana at the house of one of its mercenaries and attended by a few persons in the pay of this supposedly diplomatic office. The Committee regrets that the Government has not replied in detail to the allegations concerning threats and a heavy-handed police operation entailing identity checks on those attending the national assembly, denying trade unionists access and ejecting them violently. The Committee requests the Government to carry out a detailed investigation into these allegations and keep it informed in this respect.
- 852.** The Committee would like to recall that this serious case concerns very long prison sentences and the exile of persons who, according to the complainants, are the founders of a trade union and union officials. Having examined the statutes placed at its disposal, the Committee considers that there is no justification for obstructing the registration of such organizations. The Committee is unable to endorse the Government’s argument that these organizations cannot be considered as trade unions because of not having a membership; indeed, in the light of all the information available in this case, it is very clear that ever since the formation of these organizations, their founders, officials and members have been forced to carry out their activities in such a climate of insecurity that it has resulted in a number of them being sentenced to long prison terms while others have been obliged to go

into exile. The Committee emphasizes in this respect that for the contribution of trade unions to be properly useful and credible, they must be able to carry out their activities in a climate of freedom and security. This implies that, in so far as they may consider that they do not have the basic freedom to fulfil their mission directly, trade unions would be justified in demanding that these freedoms and the right to exercise them be recognized and that these demands be considered as coming within the scope of legitimate trade union activities [see *Digest*, op. cit., para. 37]. The Committee can only express the firm hope that the Government will take steps to ensure a climate free of violence, pressures or threats of any kind so that trade union activities can be carried out freely, even by organizations which do not share the same economic and social objectives.

853. Finally, the Committee requests the Government to accept a direct contacts mission.

The Committee's recommendations

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

- (a) Taking into account the previous cases presented to the Committee relating to harassment and detention of members of trade unions which are independent of the established structure, and also taking into account the fact that the convictions of seven trade unionists were issued in the context of very brief summary proceedings and that for the third time the Government has failed to send the requested judgements containing these sentences, the Committee urges the Government to take steps to ensure the immediate release of the trade unionists referred to in the complaint (Pedro Pablo Alvarez Ramos (sentenced to 25 years' imprisonment), Carmelo Díaz Fernández (15 years), Miguel Galván (26 years), Héctor Raúl Valle Hernández (12 years), Oscar Espinosa Chepe (25 years), Nelson Molinet Espino (20 years), and Iván Hernández Carrillo (25 years)), and to keep it informed in this respect.
- (b) The Committee considers that the statutes of the CTDC should not be an obstacle to registration of the organization and requests the Government to guarantee recognition thereof.
- (c) The Committee once again requests the complainant organizations to send the statutes of CONIC.
- (d) With regard to the allegations that: (1) on 6 September 2002 CONIC held its second national assembly, amidst retaliation by the State; (2) a heavy-handed operation was conducted by the political police to prevent the annual trade union assembly being held; (3) the political police threatened the CONIC officials with possible charges of rebellion if any demonstration was held in the vicinity of the premises where the assembly was taking place; (4) they stopped all people trying to enter the building, checking their identity and the reason for their presence, and they also denied access to a number of trade unionists, violently ejecting them from the vicinity, the Committee requests the Government to carry out a detailed investigation into these allegations and keep it informed in this respect.

- (e) Recalling its previous conclusions concerning the imposition of a trade union monopoly by law, and other legislative issues (need for the adoption without delay of new provisions and measures fully to recognize in legislation and in practice the right of workers to establish the organizations they deem appropriate at all levels (in particular, organizations independent from the current trade union structure), and also the right of these organizations freely to organize their activities; removal of any reference by name to the existing Trade Union Central and permit the free establishment of trade unions, outside the existing structure, at all levels, if workers so desire; the amendment of legislation with regard to collective bargaining, to ensure that collective bargaining in labour centres can take place without recourse to binding compulsory arbitration prescribed by the legislation and without interference by the authorities, organizations at a higher level or the CTC; and assurances that the right to strike can be exercised in an effective manner in practice and that nobody will be discriminated against or prejudiced in their employment for peacefully exercising this right), the Committee requests the Government: (1) to take all necessary steps to ensure that no person is intimidated or harassed merely for being a union member, even if the union in question is not recognized by the State; and (2) to make the necessary amendments in respect of the pending legislative issues raised by the Committee.
- (f) The Committee can only express the firm hope that the Government will take steps to ensure a climate free of violence, pressures or threats of any kind so that trade union activities can be carried out freely, even by organizations which do not share the same economic and social objectives.
- (g) The Committee requests the Government to accept a direct contacts mission.

CASE NO. 2360

DEFINITIVE REPORT

**Complaint against the Government of El Salvador
presented by
the Trade Union of Workers in Tourism, the Hotel Industry
and Allied Industries (STITHS)**

Allegations: The complainant organization alleges unjustified delays on the part of the Ministry of Finance in the approval process for the collective agreement concluded between the complainant and the Salvadorian Institute of Tourism

- 855.** The complaint is contained in a communication from the Trade Union of Workers in Tourism, the Hotel Industry and Allied Industries (STITHS) dated 29 May 2004.

- 856.** The Government sent its observations in a communication dated 24 February 2005.
- 857.** El Salvador has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Labour Relations (Public Service) Convention, 1978 (No. 151), or the Collective Bargaining Convention, 1981 (No. 154).
- A. The complainant's allegations**
- 858.** In its communication dated 29 May 2004, the Trade Union of Workers in Tourism, the Hotel Industry and Allied Industries (STITHS) states that on 21 August 2000 it submitted a request to the General Labour Directorate asking that the process of negotiating a collective agreement with the Salvadorian Institute of Tourism (henceforth ISTU) be considered under way, in accordance with the provisions of sections 270 and following of the Labour Code. On 24 August 2000, the trade union was notified of the resolution issued by the General Labour Directorate on 21 August 2000, according to which STITHS was deemed to be a party to the collective bargaining process and the request to begin negotiating the first collective labour agreement between STITHS and ISTU was granted. In this same resolution, the then legal representative of ISTU was summoned for the first time to appear before the Ministry of Labour and Social Security on 30 August to respond to the trade union's request.
- 859.** On 11 September 2000, STITHS was notified of the resolution issued by the General Director of Labour granting the request for STITHS and ISTU to conclude the collective labour agreement and ordering that the direct negotiation stage be initiated, in accordance with the provisions of sections 481-489 of the Labour Code. A copy of the relevant list of demands was sent to ISTU. On 12 September 2000, the negotiating committees of STITHS and ISTU met to schedule a series of discussion meetings, thus complying with the provisions of section 484 of the Labour Code. Despite this agreement, 21 days passed and the ISTU still had not complied with the agreed programme, prompting the General Secretary of the union's General Executive Committee, on 3 October 2000, to address a written complaint to the General Director of Labour bringing this breach of the law to his attention, an action supported by the provisions of section 488 of the Labour Code.
- 860.** The complainant adds that, on 9 October 2000, the General Director of Labour notified STITHS of the resolution in which it resolved to summon the parties to agree, in the presence of the General Director of Labour, on a new programme of collective talks. On 11 October, at the hearing presided over by a representative of the General Director of Labour, the General Secretary of STITHS General Executive Committee and the ISTU representative rescheduled the series of meetings between the parties. The direct negotiation stage of the collective bargaining process began on 17 October 2000 and ended on 31 May 2001 with the adoption of the collective agreement between STITHS and ISTU. In accordance with the law, the agreement was registered at the Ministry of Labour and Social Security.
- 861.** The complainant points out that, when one of the parties to a collective labour agreement is an autonomous official institution, approval is required from the associated ministry – in this case the Ministry of the Economy – and the Ministry of Finance must also be consulted. This is stipulated in section 287 of the Labour Code. Given that ISTU has a close relationship with the Ministry of the Economy, it sent the collective agreement to the Minister of the Economy on 17 July 2001. On 30 July, a copy was sent to the Minister of Finance. On 14 November 2001, STITHS was informed that, at the end of November 2001, the collective agreement, duly revised, would be sent to the Office of the Minister of Finance.

- 862.** In the face of the lack of any response from the Minister of Finance, STITHS lodged a petition on the grounds of unconstitutionality (*amparo*) with the Constitutional Division of the Supreme Court of Justice, drawing attention to the violation of the constitutional right to collective bargaining (the petition was given reference number 260/2003). By the time this petition was lodged, STITHS had been waiting for a total of 630 days for the Minister of Finance to state his opinion on the new collective agreement, so that it could be duly registered and enter into force. The fact that the Minister of Finance did not give an opinion on the collective agreement prevented it from being registered and entering into force. The indifference of the Minister thwarts the hitherto successful efforts at dialogue and consensus made by the trade union and ISTU and violates the constitutional principle enshrined in article 35, which recognizes the right to conclude collective agreements within the framework of labour law.
- 863.** On 1 December 2003, STITHS received notification of the resolution issued by the Constitutional Division of the Supreme Court of Justice indicating that the Minister of Finance had presented a written statement to this Court, which is the highest judicial body according to this statement “on 16 May this year [...] informed the Minister of the Economy of the outcome of the relevant evaluations, indicating that it was not viable to authorize the collective labour agreement concluded between the Salvadorian Institute of Tourism (ISTU) and the trade union, given that the ISTU does not possess the necessary financial capacity to honour its new contractual and economic obligations”. In response to this statement, the Constitutional Division surprisingly dismissed the case and ordered the dossier filed.
- 864.** The complainant points out that the actions of the Minister of Finance and the ruling handed down by the Constitutional Division of the Supreme Court of Justice constitute a violation of its trade union rights. The legal registration of the collective agreement with the Ministry of Labour and Social Security would safeguard trade union rights and provide legal underpinning for the economic provisions set out in the agreement, from which workers are already benefiting in practice.

B. The Government's reply

- 865.** In its communication of 24 February 2005, the Government stated that, in accordance with the provisions of section 287 of the Labour Code, the Minister of Finance, in his communication of 8 February 2005, had given a favourable opinion on the collective agreement in question maintaining that the Salvadorian Institute of Tourism (ISTU) *does* have the necessary financial capacity to honour the obligations arising from the collective agreement negotiated with the trade union representing its workers. This opinion followed a further financial study of the current and projected economic situation of ISTU, and was a response to the request for a review of the unfavourable opinion given in December 2001.
- 866.** The Government adds that, through the agreement of 11 February 2005, the General Executive Committee of the Trade Union of Workers in Tourism, the Hotel Industry and Allied Industries (STITHS) approved the minutes of the meetings of 6 and 19 June 2001 in which the draft collective agreement was formalized and submitted to the union's Extraordinary General Assembly for consideration. The Government adds that, through a resolution dated 10 February 2005, the Minister of Tourism had, in accordance with section 287 of the Labour Code, approved the collective agreement in its entirety.

- 867.** Lastly, the Government indicates that the collective agreement concluded between ISTU and STITHS was presented on 15 February 2005 and registered under number 11, from page 370 to page 421 of the 99th Book of the Collective Agreements Register of the Department of Social Organizations, on 17 February this year.

C. The Committee's conclusions

- 868.** *The Committee observes that the complainant objects to the delay on the part of the Ministry of Finance (630 days) in giving its opinion on the collective labour agreement which the complainant had concluded with ISTU on 31 August 2001. According to the complainant, STITHS was notified only on 31 December 2003, after lodging a petition with the Constitutional Division of the Supreme Court of Justice, of the fact that the Ministry of Finance had indicated that it was not possible to authorize the collective agreement in question.*
- 869.** *In this respect, the Committee notes the Government's information to the effect that: (1) on 8 February 2005 the Ministry of Finance gave a favourable opinion on the collective agreement in question; (2) said opinion was issued after further investigation of ISTU's current economic situation and came as a response to the request for a review of the earlier unfavourable opinion; and (3) on 17 February 2005, the collective agreement concluded between ISTU and STITHS was entered in the Collective Agreements Register of the Department of Social Organizations at the Ministry of Labour and Social Security.*
- 870.** *The Committee notes that the collective agreement concluded between STITHS and ISTU in 2001 was eventually approved and registered and has entered into force.*
- 871.** *However, the Committee considers that the extremely long period of time that elapsed from the beginning of negotiations to the approval and definitive registration of the collective agreement was excessive, and that it has undoubtedly harmed the complainant and its affiliated workers. The Committee considers that a situation such as the one described does not encourage collective bargaining. Given these conditions, the Committee requests the Government to take steps to avoid future instances of unjustified delays by budgetary authorities in the approval process for collective labour agreements.*

The Committee's recommendation

- 872.** *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 steps to avoid in future unjustified delays by budgetary authorities in the approval process for collective labour agreements.

CASE NO. 2368

INTERIM REPORT

**Complaint against the Government of El Salvador
presented by
the Trade Union of Electricity Workers (STSEL)**

Allegations: The complainant organization alleges anti-union practices against its two branches at the Río Lempa Hydroelectricity Board (CEL) and the El Salvador Electricity Transmission Company (ETESAL). These practices comprise the following: dismissal of a large number of trade union officials and members, threats of dismissal against members who refused to resign from the union, violation of the collective agreement and support from the employer for a parallel union to the detriment of the abovementioned branches at CEL and ETESAL. The complainant organization adds that as a result of these anti-union practices its CEL branch no longer exists. It also claims that the Ministry of Labour maintained a complicit silence towards the complaints made on the situation at both enterprises

- 873.** The complaint is contained in a communication dated 22 June 2004 from the Trade Union of Electricity Workers (STSEL). The Government sent its observations by a communication dated 28 February 2005.
- 874.** El Salvador has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 875.** In its communication of 22 June 2004, the Trade Union of Electricity Workers (STSEL) explains that it was set up in a number of electricity generating companies in El Salvador and alleges that its union branches at the Río Lempa Hydroelectricity Board (CEL) and the El Salvador Electricity Transmission Company (ETESAL) have been the subject of actions aimed at dissolving or damaging them, with the Ministry of Labour maintaining a complicit silence with regard to the complaints made.
- 876.** The complainant organization states that since September 2001 the Río Lempa Hydroelectricity Board (CEL) has made subtle threats against union members aimed at making them resign from the union if they wish to keep their jobs. According to the complainant, some 33 workers of the union branch were dismissed, 28 of whom (including minutes secretary Mr. Ercilio Rubio Alberto and 11 union leaders or shop stewards who enjoyed trade union immunity) were obliged to accept severance pay; for example, at the time of the dismissals of Mr. Alirio Salvador Romero Ayala, general secretary of the

union, and Ms. Isabel Quintanilla, general secretary of the union branch executive committee at CEL, both ended up accepting severance pay after they were informed of their dismissals by phone in October 2002 and were denied access to the CEL offices for a long period. All this occurred notwithstanding the fact that article 47 of the Constitution of the Republic states that trade union officials cannot be dismissed without good grounds previously established by the competent authority. The five dismissed workers who did not accept severance pay are the union leaders Mario Ernesto Martell Rivas, René Torres Aguirre, Germán Granados Figueroa, Roger Bill Aguilar and Roberto Efraín Acosta. The complainant organization emphasizes that, in addition to the dismissal of general executive committee and branch executive committee members and shop stewards, the orchestrated campaign to dissolve its CEL branch includes threats of dismissal against members who were unwilling to resign from the union and offers of better wages and higher-ranking jobs to workers who resigned; violation of the collective agreement; and CEL support for a parallel union with the aim of breaking up the complainant union. On account of the above, the CEL branch of the complainant union no longer exists.

- 877.** The complainant organization also alleges that its branch at the El Salvador Electricity Transmission Company (ETESAL) has been the victim of the same anti-union actions as those committed at CEL: a campaign since 3 September 2003 using threats of dismissal to encourage resignations from the union; dismissal of union officials and members who resisted those measures (according to the complainant, nine union leaders – seven of them having union immunity – and seven members were dismissed); violation of the collective agreement; and backing from the employer for the creation of a parallel union supportive of the management. The complainant organization concludes by stating that the ETESAL branch has been decimated and that the few members of the branch executive committee who have not been dismissed are being subjected to intimidation.

B. The Government's reply

- 878.** In its communication of 28 February 2005, the Government refers to the Río Lempa Hydroelectricity Board (CEL) and to a number of trade union officials and shop stewards whose contracts were deemed to be terminated (Alirio Salvador Romero Ayala, Santos Alirio Pacas Molina and Mario Ernesto Martell Rivas). On the basis of information received from CEL, despite the fact that they resigned, the workers were paid not only a length of service grant but also the full wages corresponding to their trade union immunity, all of them having communicated their resignations to CEL in due legal form, declaring the enterprise to be free of any liability that might arise from the employment relationship to which they had been bound. A copy of the relevant documents is attached.
- 879.** Regarding the list of workers allegedly dismissed by CEL, it is important to mention that after Germán Granados Figueroa took CEL to the Constitutional Chamber of the Supreme Court of Justice, that Chamber dismissed the case against the CEL president, in a ruling issued on 23 February 2004, stating that the defendant authorities were not responsible for the act appealed against by the plaintiff. In addition, Roberto Efraín Acosta also opened *amparo* proceedings [concerning protection of constitutional rights] in the Constitutional Chamber of the Supreme Court of Justice against the CEL president, and the outcome of these proceedings is pending. The Government adds that the appeal lodged by Alirio Salvador Romero Ayala, general secretary of the Trade Union of Electricity Workers (STSEL), against the Ministry of Labour decision of 7 January 2002 granting legal personality to the Trade Union of Hydroelectricity Board Workers (STECEL), was declared inadmissible by the Administrative Disputes Chamber of the Supreme Court of Justice in a decision issued on 21 December 2004.

- 880.** With regard to the El Salvador Electricity Transmission Company (ETESAL), the complainant claims that there was a campaign of intimidation to make workers leave the union but this has not been proven since, in principle, resignation from a union is a voluntary act, in line with the legislation in force, and the employer is not involved. Indeed, in the cases involving resignation from the union (a matter which is unconnected with the actual work being done), the enterprise points out that it had no knowledge thereof until the workers presented the copies of their letters of resignation from the union to stop the check-off of their union dues.
- 881.** As regards the employees compensated by ETESAL, it should be noted that in December 2002, when the XIXth Central American and Caribbean Games were being held in El Salvador, some workers at the enterprise chose to withhold their services in order to carry out a smear campaign, which led to other, more expensive means of electricity generation being used to prevent the service to the public being interrupted. ETESAL requested the competent labour tribunals to designate the situation officially as a strike, the strike was declared illegal and a 24-hour deadline was set for returning to work. When this deadline passed, 18 workers refused to provide their services as required, which meant in law that individual work contracts could be terminated without compensation. Nevertheless, an agreement was reached with the workers to pay them the appropriate employment benefits.
- 882.** In the particular case of the union leaders, the latter refused to enter the enterprise since that date and their claims have been of a purely pecuniary nature. On 4 January 2005, union leaders Misael Alfredo López and Felipe René Hernández Araujo (STSEL national and international relations secretary and women's affairs secretary, respectively) appeared at the offices of the Labour Department at the Ministry of Labour requesting the department to take conciliatory action with the aim of resolving the said labour dispute, the request having been admitted on the basis of section 24 of the Act on the structure and functions of the labour and social welfare sector.
- 883.** On 5 January 2005, a hearing was held in which the enterprise offered the following payments as a conciliatory settlement to the following workers: Misael Alfredo López – US\$28,243.10; Enrique Montano Hidalgo – US\$2,381.62; José Roberto Flores Sánchez – US\$33,897.97; and Felipe René Hernández Araujo – US\$33,897.97 – despite the fact that he failed to attend. All these amounts constituted severance pay and other employment benefits. The settlements were accepted by the workers who attended. On 12 January, the abovementioned settlements were paid to the first three workers referred to above, and on 15 February Felipe René Hernández Araujo received his payment. All the workers concerned signed their respective contract termination forms issued by the Labour Inspectorate (attached by the Government) thereby closing the case.

C. The Committee's conclusions

- 884.** *The Committee observes that in the present case the Trade Union of Electricity Workers (STSEL) alleges anti-union practices against two of its branches, namely at the Río Lempa Hydroelectricity Board (CEL) and at the El Salvador Electricity Transmission Company (ETESAL). These practices have consisted of: the dismissal of a large number of union leaders and members; threats of dismissal against members who refuse to resign from the union; violation of the collective agreement; and support from the employer for a parallel union to the detriment of the abovementioned branches, with all of the above occurring at both CEL and ETESAL. The STSEL adds that as a result of these practices its CEL branch no longer exists, while the ETESAL branch has been decimated, with the few members of the branch executive committee who have not been dismissed being subjected to intimidation. The complainant organization also alleges that the Ministry of Labour*

maintained a complicit silence with regard to the complaints made on the situation at both enterprises.

- 885.** *With regard to the alleged dismissal of 33 trade unionists at CEL, the Committee observes that the complainant organization indicates that 28 of them were obliged to accept severance pay, 11 of them enjoyed trade union immunity (under article 47 of the Constitution of the Republic, they could not be dismissed without good grounds previously established by the competent authority) and another five leaders (Mario Ernesto Martel Rivas, Germán Granados Figueroa, Roberto Efraín Acosta, René Torres Aguirre and Roger Bill Aguilar) did not accept the severance pay offered by the enterprise. The Committee notes that the Government refers to five of the 33 trade unionists dismissed and points out in this respect that: (1) three trade union leaders and shop stewards (Mario Ernesto Martel Rivas, Alirio Salvador Romero Ayala and Santos Alirio Pacas Molina) resigned from their jobs but CEL paid them not only a length of service grant but also the full wages corresponding to their trade union immunity and the workers concerned declared the enterprise at which they had been employed free of all liability; (2) the Supreme Court considered that the CEL authorities were not responsible for dismissing Germán Granados Figueroa; and (3) the outcome of the judicial proceedings relating to Roberto Efraín Acosta is pending.*
- 886.** *The Committee requests the Government to send a copy of the ruling concerning the dismissal of union official Germán Granados Figueroa and of any ruling issued in relation to the dismissal of Roberto Efraín Acosta, and to provide information on the situation of the other two dismissed officials who allegedly did not accept the statutory severance pay (René Torres Aguirre and Roger Bill Aguilar), indicating whether they have taken legal action.*
- 887.** *In more general terms, the Committee observes that the Government only refers to five of the 33 dismissed trade unionists, it does not indicate whether good grounds for the dismissal of the 11 union officials who enjoyed trade union immunity were previously established by the competent authority, as stipulated by article 47 of the Constitution of the Republic, and it does not indicate the reason for the dismissals. The Committee also observes that the Government does not deny the complainant organization's allegation that the dismissals at CEL formed part of a campaign to break up the branch of the union and that consequently the branch ceased to exist. Moreover, in view of the fact that the dismissals date from 2001 and 2002 and that the vast majority of the dismissed workers accepted the statutory severance pay, it does not appear feasible to reinstate that majority. Under these circumstances, the Committee deplores the fact that, as a result of numerous dismissals of officials and members, the CEL branch of the complainant union has ceased to exist and asks the Government to examine the issue of reinstatement of the dismissed trade unionists who did not accept severance pay, and to ensure that in future the dismissal of union leaders can only occur in accordance with the procedure laid down in article 47 of the Constitution.*
- 888.** *With regard to the alleged anti-union dismissals of trade unionists at ETESAL (nine union officials – including seven having trade union immunity – and seven members) who had accepted severance pay, with the exception, according to the complainant, of union leaders José Roberto Flores, Felipe René Hernández Araujo and Misael Alfredo López and union member Enrique Montano, the Committee notes that the Government attaches documents which show that these four workers requested conciliatory action on the part of the Labour Department and also finally accepted severance pay. As regards the reasons for all the dismissals, the Committee notes the Government's statement that the judicial authority declared the strike of a group of workers in December 2002 illegal and gave the strikers 24 hours to return to work; when 18 workers refused to do so, the enterprise was entitled*

to terminate their contracts without compensation; however, the enterprise reached an agreement with the workers to pay them the appropriate employment benefits.

- 889.** *Although it is aware that the electricity transmission service provided by ETESAL could be considered an essential service, the Committee requests the Government to send the text of the ruling which declared the strike at ETESAL illegal so that it can examine the allegations of dismissals at ETESAL in full knowledge of the facts.*
- 890.** *As regards the allegation concerning the promotion of parallel unions at CEL and ETESAL with intent to dissolve or damage the branches of the complainant organization at both institutions, the Committee notes the Government's observations which refer to ETESAL but not to CEL. The Committee requests the Government to send the text of the ruling of 21 December 2004 issued by the Administrative Disputes Chamber of the Supreme Court of Justice concerning the appeal lodged by the general secretary of the complainant organization in relation to the granting of legal personality to a new enterprise union at ETESAL, as well as its observations on the alleged actions of the enterprise concerning the creation of a parallel union at CEL.*
- 891.** *With regard to the alleged campaign to intimidate workers into resigning from the branches of the complainant union at CEL and ETESAL, the Committee notes that the Government declares that the allegation concerning ETESAL could not be proven and that the enterprise states that it had no knowledge of the resignations from the union until the workers presented copies of their respective resignation letters to stop the check-off of their union dues. The Committee also observes that the Government has not sent observations on the allegations concerning the campaign of intimidation to make workers resign from the CEL branch or on the allegations concerning violation of the collective agreement. The Committee requests the Government to carry out an in-depth investigation into the abovementioned matters and keep it informed in this respect.*
- 892.** *Finally, the Committee requests the Government to send its observations on the allegation that the Ministry of Labour maintained a complicit silence with regard to the complaints submitted by the complainant union in relation to the matters raised in the present case.*

The Committee's recommendations

- 893.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to the alleged dismissal of union leaders and members at the Río Lempa Hydroelectricity Board (CEL), the Committee requests the Government to send a copy of the ruling concerning the dismissal of union official Mr. Germán Granados Figueroa and of any ruling issued in relation to the dismissal of Mr. Roberto Efraín Acosta, and to provide information on the situation of the other two dismissed officials who allegedly did not accept the statutory severance pay (Mr. René Torres Aguirre and Roger Bill Aguilar), indicating whether they have taken legal action.*

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- (b) *The Committee asks the Government to examine the issue of reinstatement of the dismissed trade unionists who did not accept severance pay, and to ensure that in future the dismissal of union leaders can only occur in accordance with the procedure laid down in article 47 of the Constitution.*
 - (c) *With regard to the alleged anti-union dismissals of trade unionists at the El Salvador Electricity Transmission Company (ETESAL) (nine union officials – including seven having trade union immunity – and seven members), the Committee requests the Government to send the text of the ruling which declared the strike at ETESAL illegal so that it can examine these allegations in full knowledge of the facts.*
 - (d) *As regards the allegation concerning the promotion of parallel unions at CEL and ETESAL with intent to dissolve or damage the branches of the complainant organization at both institutions, the Committee requests the Government to send the text of the ruling of 21 December 2004 issued by the Administrative Disputes Chamber of the Supreme Court of Justice concerning the appeal lodged by the general secretary of the complainant organization in relation to the new union established at ETESAL, as well as its observations on the alleged actions of the enterprise concerning the creation of a parallel union at CEL.*
 - (e) *With regard to the alleged campaign to intimidate workers into resigning from the branches of the complainant union at CEL and ETESAL, the Committee notes that the Government declares that the allegation concerning ETE SAL could not be proven and that the enterprise states that it had no knowledge of the resignations from the union until the workers presented copies of their respective resignation letters to stop the check-off of their union dues. The Committee also observes that the Government has not sent observations on the allegations concerning the campaign of intimidation to make workers resign from the CEL branch or on the allegations concerning violation of the collective agreement. The Committee requests the Government to carry out an in-depth investigation into the abovementioned matters and keep it informed in this respect.*
 - (f) *Finally, the Committee requests the Government to send its observations on the allegation that the Ministry of Labour maintained a complicit silence with regard to the complaints submitted by the complainant union in relation to the matters raised in the present case.*

CASE NO. 2241

INTERIM REPORT

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

- the Trade Union of Workers of Guatemala (UNSITRAGUA)
- the Guatemalan Union of Workers (UGT)
- the World Confederation of Labour (WCL) and
- the Latin American Central of Workers (CLAT)

Allegations: The complainant organizations allege a number of anti-union acts in the municipality of San Juan Chamelco, in enterprises, estates and the Higher Electoral Tribunal (dismissals, refusal to enter into collective bargaining with a union affiliated to UNSITRAGUA), as well as physical and verbal aggression of union officials and members and arrest and prosecution of a union official

- 894.** The Committee examined this case at its June 2004 meeting and presented an interim report to the Governing Body [see 334th Report, paragraphs 508-526, approved by the Governing Body at its 290th Session (June 2004)]. The WCL sent additional information in a communication dated 17 September 2004. UNSITRAGUA sent additional information in communications dated 27 May, 26 July and 11 August 2004.
- 895.** The Government sent further observations in communications dated 29 April, 4 November and 2 December 2004 and 19 January, 16 March and 25 April 2005.
- 896.** 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

- 897.** At its June 2004 meeting, the Committee made the following recommendations [see 334th Report, paragraph 526]:
- (a) Regarding the alleged anti-union dismissal of the secretary-general of the Union of Workers of the Municipality of San Juan Chamelco, Alta Verapaz, Mr. Edwin Roderico Botzoc Molina, on 19 August 2002, the Committee calls on the Government to take all the steps within its power to ensure that the union official is reinstated in his post, with payment of the wages due to him. The Committee further calls on the Government to keep it informed of the outcome of the judicial proceedings that have been initiated in this connection.
 - (b) Regarding the anti-union dismissal of Mr. Macedonio Pérez Julián by La Comercial S.A. and the initiation of criminal proceedings against him by the enterprise, the Committee requests the Government to send its observations without delay on the criminal proceedings under way, indicating whether the worker concerned is still under arrest or has been released, and on the judicial proceedings initiated by the worker with respect to his dismissal.

- (c) Regarding the alleged anti-union harassment of Ms. Rocío Lily Fuentes Velásquez by La Comercial S.A. and her transfer to a lower level post, the Committee, while taking note of the information provided by the Government, calls on the Government to take steps for a full and independent inquiry to be made into these allegations and, if they are confirmed, to take steps to ensure that the anti-union acts cease immediately and that those responsible are duly punished.
- (d) Regarding the alleged arrest – since June 2003 – and trial in violation of due process and restricting the regime concerning visits (on charges of fraud and possession of stolen goods) of Mr. Rigoberto Dueñas Morales, the deputy secretary-general of the General Central of Workers of Guatemala (CGTG) and deputy representative of the Guatemalan Union of Workers (UGT) on the Board of Directors of the Guatemala Social Security Institute (IGSS), after this worker denounced abuse of privilege, influence peddling, corruption and absence of accountability within the Institute, the Committee, observing that the complainant organizations state that a person charged with the offences of which Mr. Rigoberto Dueñas Morales is accused can be released from prison on oath or on bail and above all that, as the Government confirms, the Office of the Attorney-General requested that the charges against the union official concerned be provisionally dropped, considers that steps should be taken to have him released and calls on the Government to take such action immediately. The Committee further expresses the firm expectation that due process will be observed in the continuing trial of Mr. Dueñas and calls on the Government to keep it informed of the final outcome.
- (e) The Committee regrets that the Government has not sent its observations on the following allegations: (a) the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Union of Workers of the Higher Electoral Tribunal on 17 October of the same year; (b) the refusal of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit to recognize and enter into collective bargaining with the works' union unless it gives up its affiliation to UNSITRAGUA; (c) the harassment by La Comercial S.A. of members of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit because of the union's opposition to the illegal deductions from the workers' wages made by the enterprise. Specifically, it is alleged that the enterprise exerts pressure on workers belonging to the union (threatening them with dismissal, refusing to supply them with goods for sale or to allow them to engage in the sale of goods, etc.), that Mr. Manuel Rodolfo Mendizábal has been harassed by people in unmarked vehicles to discourage him from playing an active part in the union and that other union members have been the victims of a series of thefts and aggressions. Finally, the enterprise is alleged to have refused to deduct union dues from workers' wages; (d) the anti-union harassment of the members of the Union of Workers of Rafael Landivar University by the university authorities after the union submitted a draft collective agreement on working conditions (according to the complainants, the members of the union were aggressed verbally and physically and its secretary-general, Mr. Timoteo Hernández Chávez, was attacked by armed men on his way home); and (e) the dismissal of 50 members of the Union of Workers of the Asociación Movimiento Fe y Alegría in the work centres located in the department of Guatemala on 31 October 2001 in reprisal against the trade union for the activities carried out in order to obtain equality of remuneration between the permanent and contract workers. The Committee calls on the Government to send its observations on these allegations without delay.

B. Further allegations and additional information from the complainant organizations

- 898.** In a communication dated 17 September 2004, the WCL states that Mr. Rigoberto Dueñas, deputy secretary-general of the CGTG was freed and all the charges against him dismissed.
- 899.** In a communication dated 27 May 2004, UNSITRAGUA alleges that the Asociación Movimiento Fe y Alegría initiated a legal procedure requesting authorization for the termination of the employment contract of Mr. Juan Miguel Angel González, a member of

the Union of Workers of the Asociación Movimiento Fe y Alegría, with the aim of suppressing his trade union activities and weakening the trade union. The complainant organization states that the judicial authority authorized the dismissal and that that ruling may be appealed against through an *amparo* (enforcement of constitutional rights) appeal.

- 900.** In its communication dated 27 May 2004, UNSITRAGUA refers to events that were examined by the Committee in its 334th Report.
- 901.** In its communication dated 11 August 2004, UNSITRAGUA alleges that on 14 June 2004 the worker Marco Antonio Estrada López, a member of the Union of Workers of La Comercial S.A., was dismissed despite the fact that the enterprise was subject to the rules of prior notification within a collective dispute of an economic and social nature. UNSITRAGUA adds that the judicial authority ordered the worker to be reinstated in August 2004, but that the enterprise refused to comply.

C. The Government's reply

- 902.** In its communications dated 29 April, 4 November, 2 December 2004 and 19 January, 16 March and 25 April 2005, the Government states the following:
- The case of Edwin Roderico Botzoc Molina. Through Decision No. 32-2003-Of. 2º-November 2º, of 9 January 2004 issued by the First Chamber of the Court of Appeals for Labour and Social Security, the individual in question was reinstated in his post, as recorded in Ruling No. 003-2004 of 16 January 2004 of the Book of General Rulings (Libro de Actas Generales) currently kept by the Ministry of Labour and Social Security.
 - The case of Macedonio Pérez Julián. The Lower Criminal Court for Drug-related and Environmental Offences issued an indictment for the offences of embezzlement, possession of stolen goods and concealment against the worker in question on 1 August 2002. Likewise, bail was set at 25,000 quetzales. On 12 August 2002, the enterprise known as La Comercial S.A. put itself forward as an adhering complainant. On 6 November 2002, the Office of the Attorney General requested that the case be provisionally dropped in favour of Macedonio Pérez Julián and, on 19 November 2002, the case was provisionally dropped in his favour. Likewise the enterprise La Comercial S.A. abandoned its stance as an adhering complainant.
 - The case of Rocío Lily Fuentes Velásquez. The Government requested that this case be closed in light of the fact that the enterprise La Comercial S.A. has stated that the complainant is no longer a member of the trade union and no longer has an employment relationship with the enterprise. The Government states that the enterprise and the trade union stated that Mrs. Fuentes Velásquez left both the trade union and the enterprise, having been paid all of her benefits and is currently in the United States.
 - The case of the Asociación Movimiento Fe y Alegría. The Government requests that the case of Mr. Miguel Angel González Rodríguez be closed because the request to terminate his contract was granted by the judicial authority and no *amparo* (enforcement of constitutional rights) appeal was lodged against the ruling. As to the 50 workers who were dismissed, only eight requested to be reinstated before the law courts. With regard to six of those eight workers, the Fourth Court of Labour and Social Security ordered that they be reinstated. Only three have taken up their posts again. On 9 December 2003, the defendant lodged an appeal against the ruling issued by the abovementioned Fourth Court. On 17 December 2003 the appeal was accepted,

the parties were notified and the case was sent before the First Chamber of the Court of Appeal to be ruled on.

- The case of the enterprise La Comercial S.A. The Government states that the enterprise states the following: (1) as to the alleged illegal deductions from the workers' wages made by the enterprise, in certain cases wherein workers do not hand over the money they have made from the sale of the enterprise's goods but instead keep it, the enterprise makes monthly deductions from those wages with the authorization of the worker by way of reimbursement and with the intention that the worker should continue with his/her labour activities; (2) as to the allegations that unionized workers are not supplied with sufficient goods to sell, or allowed out of the enterprise to engage in the sale of goods, the question arises as to how an enterprise dedicated to selling goods could survive if it prevented its sales staff from making sales; (3) with regard to the case of Mr. Rodolfo Mendizábal Guevara, the said worker worked for about a year at the enterprise and he did not meet his sales targets. A few months ago he resigned from the enterprise and was paid the benefits to which he was legally entitled, as well as compensation for length of service. Furthermore, the enterprise denies that the worker in question was harassed by people in unmarked vehicles; (4) as to the accusation regarding an increase in the number of assaults, the enterprise finds it strange that sales staff, when the time comes to pay in the money made through sales, do not do so, arguing that they have been assaulted. The enterprise adds that when an offence has been committed, it must be reported immediately to the National Police, or the Office of the Attorney General.
- The case of Rigoberto Dueñas. Following a trial which took place before the Eleventh Court on 19 August 2004, Mr. Rigoberto Dueñas, former worker representative on the Board of Directors of the Guatemala Social Security Institute (IGSS), was absolved of the offences of fraud and possession of stolen goods and was freed immediately after the ruling was read out. Since 26 August 2004, Mr. Rigoberto Dueñas, who is a member of the workers' section of the Tripartite Committee on International Labour Affairs, has participated in the meetings that take place every week on Thursday.
- The case of the Higher Electoral Tribunal. Dismissal of the workers Edgar Alfredo Arriola Pérez and Manuel de Jesús Dionicio Salazar. The two abovementioned individuals were dismissed by the Tribunal, for duly justified causes, in light of the disciplinary faults they committed whilst carrying out their respective functions as drivers working for the judicial system, in accordance with article 21 of the collective agreement on working conditions concluded between the Higher Electoral Tribunal and its workers. The dismissals in question are in line with the exercise of the right to impose sanctions contained in article 125, item (ñ), of the Electoral and Political Parties Law and article 48, item (d), of the abovementioned collective agreement and consequently neither do they constitute, nor can they be held to be retaliatory acts, or acts against freedom of association and collective bargaining, rights which this Tribunal recognizes and respects unconditionally.
- The Rafael Landivar University case. The Government refers to the ongoing legal case concerning the presentation of a list of grievances and does not send information regarding the allegations that were pending. With regard to the anti-union harassment of the members of the Union of Workers of Rafael Landivar University by the university authorities after the union submitted a draft collective agreement on working conditions, the Government indicates that the university categorically denies the denunciations, that the union is a minority one, without any representativeness to allow it to bargain collectively, reason for which the university refused to negotiate with it. Despite this, the trade union continued to raise collective disputes and had recourse to justice on various occasions. In all cases their claims were rejected. As for the violent acts in particular, the university indicates that it denounced the contract

with the Wackenhut de Guatemala S.A. company in 2004 and that the university is not responsible for the acts committed by employees of the service providing companies outside the university campus and that the harassed workers can have recourse to the judicial authority to denounce these acts. The university also indicates that it did not request in any way the employees of the Litza S.A. company (which had a contract for the provision of services in the university), to insult the workers who were members of the trade union.

D. The Committee's conclusions

- 903.** *The Committee recalls that in this case there were allegations of acts of anti-union discrimination (mainly dismissals), as well as physical and verbal aggression and the arrest of trade union leaders. The Committee notes that the further allegations that have been presented also refer to anti-union dismissals.*
- 904.** *At its June 2004 meeting, the Committee requested the Government to take all the steps in its power to ensure that the secretary-general of the Union of Workers of the Municipality of San Juan Chamelco, Alta Verapaz, Mr. Edwin Roderico Botzoc Molina, dismissed in August 2002, be reinstated in his post, with payment of the wages due to him. In this regard, the Committee notes with satisfaction that the Government states that the trade union leader in question was reinstated in his post in January 2004.*
- 905.** *As to the allegation concerning the arrest and prosecution in June 2003 (in violation of due process and restricting his visiting rights, on charges of fraud and possession of stolen goods) of Mr. Rigoberto Dueñas Morales, the deputy secretary-general of the General Central of Workers of Guatemala (CGTG) and deputy representative of the Guatemalan Union of Workers (UGT) on the Board of Directors of the Guatemala Social Security Institute (IGSS), after the abovementioned trade union leader denounced abuse of privilege, influence peddling, corruption and absence of accountability within the Institute, the Committee notes with satisfaction that the WCL and the Government state that, following a trial which took place on 19 August 2004, the trade union leader in question was absolved and freed after the ruling was read out.*
- 906.** *As to the anti-union dismissal of the worker Macedonio Pérez Julián by the enterprise La Comercial S.A. and the initiation of criminal proceedings against the abovementioned individual by the enterprise, the Committee had requested the Government to send without delay its observations concerning the ongoing criminal proceedings, indicating whether the worker in question was under arrest or whether he was free, as well as observations concerning the legal procedure initiated by the worker regarding his dismissal. The Committee notes that the Government states that: (1) the worker in question was tried for supposedly committing the offences of embezzlement, possession of stolen goods and concealment; (2) on 19 November 2002 the case was provisionally dropped at the request of the Office of the Attorney General; and (3) the enterprise La Comercial S.A. abandoned its stance as a complainant. This being the case, the Committee requests the Government to keep it informed as to the outcome of the legal procedure initiated by the worker concerning his dismissal.*
- 907.** *As to the alleged anti-union harassment of the worker Rocío Lily Fuentes Velásquez by the enterprise La Comercial S.A., and her demotion, the Committee notes that the Government states that the worker in question resigned from the trade union and the enterprise, having been paid all her benefits and is currently in the United States. Taking this information into account, the Committee will not make any further examination of these allegations.*
- 908.** *As to the alleged harassment by the enterprise La Comercial S.A. of members of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and*

other enterprises belonging to the same economic unit because of the union's opposition to the illegal deductions from the workers' wages made by the enterprise, the Committee notes the Government's indication states that the enterprise has stated that some workers do not hand over the money they have made from the sale of the enterprise's goods but instead keep it and, in order not to have to dismiss these workers, the enterprise makes deductions from their monthly wages by way of reimbursement of the money owed to the enterprise with their consent. Taking this information into account, the Committee will not make any further examination of these allegations, unless the complainant organization provides more information in this respect.

- 909.** *As to the alleged refusal by the enterprise La Comercial S.A. to provide workers belonging to the trade union with goods to sell, the Committee notes that, according to the Government, the enterprise states that it could not survive if it were to prevent its sales staff from making sales. Taking this information into account, the Committee will not make any further examination of these allegations.*
- 910.** *With regard to the alleged harassment of Mr. Manuel Rodolfo Mendizábal Guevara by people in unmarked vehicles attempting to dissuade him from participating in the activities of the Union of Workers of La Comercial S.A., and the thefts and assaults affecting members of that trade union, the Committee notes that, according to the Government, the enterprise states that: (1) Mr. Rodolfo Mendizábal Guevara has resigned from the enterprise and has been paid all the benefits he is legally entitled to and compensation for length of service; the enterprise denies that he was subject to harassment by people in unmarked vehicles; and (2) as to the accusation concerning the rising number of assaults, the enterprise states that when called on to hand over the money they have made through sales, some sales staff do not do so but instead claim that they have been assaulted. Taking this information into account and, noting that there seems to be no link between these allegations and the exercise of trade union rights, the Committee will not make any further examination of these allegations.*
- 911.** *As to the other allegations which were pending, also related to the enterprise La Comercial S.A., concerning: (a) the refusal by the enterprise to recognize and enter into collective bargaining with the enterprise's trade union unless it gives up its affiliation to UNSITRAGUA; and (b) the refusal by the enterprise to deduct union dues from workers' wages, the Committee again requests the Government to send its observations in this respect.*
- 912.** *As to the further allegations concerning the dismissal from the enterprise La Comercial S.A. of the worker Marco Antonio Estrada López, a member of the Union of Workers of La Comercial S.A., despite the fact that the enterprise was subject to the rules of prior notification within a collective dispute of an economic and social nature (which according to legislation excludes any dismissal), the Committee notes that the Government has not sent observations in this respect. This being the case, given that the complainant organization states that the judicial authority ordered his reinstatement in August 2004, the Committee requests the Government to ensure that the worker in question is reinstated in his post.*
- 913.** *As to the allegations of the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002, after they applied to join the Union of Workers of the Higher Electoral Tribunal on 17 October of the same year, the Committee notes that the Government states that they were dismissed for duly justifiable causes, in light of the disciplinary faults they committed whilst carrying out their respective functions, in accordance with the terms of article 21 of the collective agreement on working conditions. Taking this information into account, the Committee requests the*

Government to state the nature of the disciplinary faults committed by the workers which gave rise to their dismissal.

- 914.** *As to the allegations which remained pending concerning the anti-union harassment of the members of the Union of Workers of Rafael Landivar University by the university authorities after the union submitted a draft collective agreement on working conditions (according to the complainants, the members of the union were aggressed verbally and physically and its secretary-general, Mr. Timoteo Hernández Chávez, was attacked by armed men on his way home), the Committee takes note of the information provided by the Government according to which the alleged violent acts were in reality the work of two companies which provide or used to provide services within the university. The Committee recalls that no person should be prejudiced in his or her employment by reason of membership of a trade union, even if that trade union is not recognized by the employer as representing the majority of workers concerned [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 701]. In these conditions, the Committee requests the Government to conduct an investigation in order to determine those truly responsible for the acts of anti-union harassment and ensure that they are appropriately punished so that this kind of discrimination is avoided in the future within the university. The Committee requests the Government to keep it informed in this respect.*
- 915.** *As to the dismissal of 50 workers belonging to the Union of Workers of the Asociación Movimiento Fe y Alegría in the work centres located in the department of Guatemala on 31 October 2001 in reprisal against the trade union for the activities carried out in order to obtain equality of remuneration between the permanent and contract workers, the Committee notes that the Government states that: (1) only eight of the 50 workers requested to be reinstated before the law courts; (2) the judicial authority ordered that six of those eight workers be reinstated; (3) three have been reinstated; and (4) the defendant lodged an appeal against the ruling ordering the reinstatement, with a decision on this appeal currently pending. This being the case, the Committee requests the Government to keep it informed as to the final outcome of the appeal lodged against the legal ruling ordering that the six workers be reinstated.*
- 916.** *As to the allegation that the Asociación Movimiento Fe y Alegría initiated a procedure requesting authorization to terminate the contract of Mr. Juan Miguel Angel González, a member of the Union of Workers of the Asociación Movimiento Fe y Alegría, with the aim of suppressing his trade union activities and weakening the trade union, the Committee notes that the Government states that the judicial authority authorized the dismissal and that no appeal was lodged against the legal ruling. Taking this information into account, the Committee will not make any further examination of these allegations.*

The Committee's recommendations

- 917.** *In light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *As to the anti-union dismissal of the worker Macedonio Pérez Julián by the enterprise La Comercial S.A., the Committee requests the Government to keep it informed as to the outcome of the legal procedure under way.*
 - (b)** *Concerning the allegations concerning the enterprise La Comercial S.A. regarding: (1) the refusal by the enterprise to recognize and enter into collective bargaining with the enterprise's trade union unless it gives up its affiliation to UNSITRAGUA; and (2) the refusal by the enterprise to deduct*

union dues from workers' wages, the Committee requests the Government to send its observations in this respect.

- (c) *As to the allegation regarding the dismissal of the worker Marco Antonio Estrada López, a member of the Union of Workers of La Comercial S.A., the Committee, noting that the complainant organization states that the judicial authority ordered that he be reinstated in August 2004, requests the Government to ensure that the worker in question is reinstated in his post.*
- (d) *As to the alleged harassment by the enterprise La Comercial S.A. of members of the Union of Workers of La Comercial S.A., Distribuidora de Productos Alimenticios Diana S.A. and other enterprises belonging to the same economic unit because of the union's opposition to the illegal deductions from the workers' wages made by the enterprise, the Committee, taking into account the fact that, according to the Government, the enterprise states that some workers do not hand over the money they have made from the sale of the enterprise's goods but instead keep it and, in order not to have to dismiss these workers, the enterprise makes deductions from their monthly wages by way of reimbursement of the money owed to the enterprise with their consent, will not make any further examination of these allegations, unless the complainant organizations provide more information in this respect.*
- (e) *As to the allegations that were pending concerning the anti-union harassment of the members of the Union of Workers of Rafael Landivar University by the university authorities after the union submitted a draft collective agreement on working conditions (according to the complainants, the members of the union were aggressed verbally and physically and its secretary-general, Mr. Timoteo Hernández Chávez, was attacked by armed men on his way home), the Committee requests the Government to conduct an investigation in order to determine those truly responsible for the acts of anti-union harassment and ensure that they are appropriately punished so that this kind of discrimination is avoided in the future within the university. The Committee requests the Government to keep it informed in this respect.*
- (f) *As to the dismissal of 50 workers belonging to the Union of Workers of the Asociación Movimiento Fe y Alegría in the work centres located in the department of Guatemala on 31 October 2001 in reprisal against the trade union, the Committee requests the Government to keep it informed as to the final outcome of the appeal lodged against the legal ruling ordering that six workers be reinstated (according to the Government, only eight workers requested to be reinstated before the law courts).*
- (g) *As to the allegations of the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Union of Workers of the Higher Electoral Tribunal on 17 October of the same year, the Committee requests the Government to state the nature of the disciplinary faults committed by the workers which gave rise to their dismissal.*

CASE NO. 2323

INTERIM REPORT

**Complaint against the Government of Islamic Republic of Iran
presented by
the International Confederation of Free Trade Unions (ICFTU)**

Allegations: The complainant organization alleges that workers have been killed and injured by riot police in the context of a strike and related protests, and that many other workers were arrested and detained. In another incident during a May Day rally, several workers were arrested and detained

- 918.** The complaint is contained in communications from the International Confederation of Free Trade Unions (ICFTU) dated 12 February, 2 and 4 May and 7 July 2004.
- 919.** The Government sent its observations in communications dated 2 May and 11 August 2004.
- 920.** The Islamic Republic of Iran has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 921.** In its communication dated 12 February 2004, the International Confederation of Free Trade Unions (ICFTU) informed of the killing of at least four workers and of injuries inflicted on 40 or more workers by riot police during a strike on 24 January 2004 in the village of Khatoonabad and the city of Shahr-e-Babak (Kerman Province, in the south-east of the Islamic Republic of Iran). The names of four of the dead workers are reportedly as follows: Mahdavi, Javadi, Momeni and Riyahl. Unofficial figures report between seven to 15 dead and up to 300 wounded.
- 922.** According to the information available to it, the ICFTU stated that the workers concerned by these events were a mixed group of unskilled workers, construction workers and other skilled workers employed in the construction of the Nazkhaton's copper smelting plant in the village of Khatoonabad. Their employer, a subcontractor that had built the smelting plant for the National Iranian Copper Industries Company had reportedly promised permanent contracts to the 1,500 workers who had participated in the construction and preparation of the smelting plant. However, once the construction had finished, the employer only kept 250 workers. The workers therefore went on strike and organized a sit in at the plant in the days up to 24 January 2004.
- 923.** The sit in lasted eight days before violence broke out. Many workers and their families had attended the protest and had been blocking the main road leading to the plant and the main entrance of the plant. They were demanding permanent employment and were protesting against the use of temporary contracts, layoffs and deferred payment of salaries and benefits.

- 924.** The ICFTU continued that, due to the persistence of the sit in and the protest, it appeared that the Provincial Security Council, on which the Governor of Kerman Province and the Governor of Shahr-e-Babak City both had seats, decided to dispatch more security forces to the area. Special police forces were thus brought in from Kerman City by helicopter.
- 925.** There are conflicting reports as to how the confrontation began. According to the Government's press agency, the confrontation began when 300 motorbike riders started attacking government property, banks and other buildings. A similar explanation was given by Governor Selfollah Shahad-Nejad. However, he contended that the confrontation began when a group of 100-150 motorbike riders took advantage of the tension to start attacking the Governor's residence, banks and private property and that these attacks led the police to open fire. The Governor stated that some of the wounded sustained their injuries in clashes with baton-wielding riot police; he also claimed that some were hurt by flying objects thrown by the workers themselves.
- 926.** Another version given by Mansour Soleymani Meymandi, a reformist Member of Parliament for the city of Shahr-e-Babak, suggested that the local authorities had brought in special police forces in helicopters in order to break the strike, and that these special police forces had attacked the workers in the village of Khatoonabad. The confrontation had then spread to the city of Shahr-e-Babak, where the four workers were killed and dozens more severely injured. Mr. Meymandi gave this information during a session in Parliament on 25 January 2004.
- 927.** Reports from Iranian workers' organizations in exile supported Mr. Meymandi's understanding of the events. However, the organizations contend that the workers were shot dead in front of the plant, and that the outbreak of violence in the city of Shahr-e-Babak was caused by special police forces dispatched there.
- 928.** The General Secretary of the Teheran-based organization, 'Workers' House', Mr. Ali Reza Mahjoub, also confirmed that the police had attacked the workers during the sit in.
- 929.** In an interview on 25 January 2004, the Governor of Kerman Province confirmed that special guards from Kerman City had been brought in to break the strike and ensure free access to the plant. In view of the abovementioned reports, this statement gives the ICFTU reason to believe that the confrontation began when the police used force in an attempt to break the strike. In addition, the Islamic Republic of Iran's head of security forces, General Mohammad Bagher Ghallbaf, later confirmed that the police had fired the shots that killed the striking workers.
- 930.** The ICFTU indicated that it was informed that some of the wounded were hospitalized in Surcheshmeh and in the city of Shahr-e-Babak; some of them were reported as being in a critical condition.
- 931.** After the confrontation, local people gathered in front of the residences of the dead workers, demanding that those responsible for their deaths be held to account. Protests and clashes with police reportedly continued over the following days, leading to the arrest of workers and their relatives. According to one of the abovementioned exiled workers' organizations, security forces had conducted extensive house-to-house searches. The other exiled workers' organization reported that a number of those arrested had been tortured.
- 932.** Official sources confirmed the arrests. The commanding officer of the security forces of Kerman Province, General Isa Darayee, disclosed that 80 people had been arrested during the incident, and 15 had been kept for interrogation. The present status of any such detained workers was unknown to the ICFTU at the time of writing.

- 933.** Different public authorities have reportedly ordered separate investigations into the matter. The President of the Islamic Republic of Iran, Mohammad Khatami, has ordered an investigation by a delegation from the Presidential Office. The Interior Ministry has reportedly also ordered an investigation into the matter by a delegation of its own and a delegation from the Kerman Governor's General Office is also reported as investigating the matter.
- 934.** The ICFTU provided new allegations in its communication dated 2 May 2004 about police interventions in a Labour Day march. On 1 May 2004, hundreds of workers and their families staged a peaceful rally and march in the city of Saqez (Kurdistan Province), in order to celebrate Labour Day. The event was organized by "the First of May Council", an organization of workers in Saqez, consisting of labour activists acting independently from the Government and the workers' organizations it controls.
- 935.** At about 5 p.m., the marchers were attacked by the Government's security forces, including plain-clothes agents of the security service. Over 40 participants were reportedly detained and taken into custody. Among those arrested were Mahmoud Salehi, a well-known labour leader who had previously been arrested and imprisoned for ten months in 2001, Jalal Hosseini, a local labour leader, and Mohsen Hakimi, a well-known activist and a member of the Iranian Writers' Association.
- 936.** The security forces subsequently raided Mahmoud Salehi's home and his computer and documents were confiscated. Families of the arrested workers and other citizens are said to have gathered outside the Security Ministry's offices to demand the release of all those arrested.
- 937.** The ICFTU expressed its concern over the fact that Mr. Salehi and Mr. Hakimi had been met two days before their arrest by an ICFTU mission which visited the Islamic Republic of Iran earlier in the week. The mission had been closely monitored by the security service. The ICFTU further believes that the search of Mr. Salehi's house and confiscation of his computer are directly related to his contacts with the ICFTU.
- 938.** The ICFTU provided further details of these arrests in its communication dated 4 May 2004. Mr. Mahmoud Salehi, who was arrested on 1 May 2004, was a well-known labour leader from the "Trade Association of Saqez Bakers". Two local labour leaders, Mr. Jalal Hosseini and Mohammad Abdipoor were also arrested, as well as Mohsen Hakimi and two or three workers.
- 939.** The workers had gathered for a peaceful celebration of 1 May and – whilst no formal meeting was held, nor any speeches made – the police arrested around 50 people. Some sources indicate that, out of the 50, the six or seven people mentioned above had been transferred to a prison in Sanandaj (capital of Kurdistan Province). The families have been asked the sum of 200,000,000 tomans (around US\$250,000) for their bail. The families of the arrested (in particular Ms. Manizheh Kazerani, wife of Mr. Mohsen Hakimi) have tried unsuccessfully to contact the judicial and intelligence authorities in Saqez and Sanandaj and have no information about the whereabouts of their relatives.
- 940.** The ICFTU also gathered further information from several workplaces where workers were not free to organize, such as the Iran Khodro auto company (the largest of its kind in the Middle East, with more than 34,000 workers). Since July 2001, workers have tried unsuccessfully to affirm their trade union rights, but management and officials of the Ministry of Labour prevented even the formation of the Islamic Labour Council. Workers of the company as well as of its subcontractors (such as Ehya-Gostar Sabz) have been regularly fired after their protests, as recently happened for the non-payment of wages. Other cases involve, for example, the Saman company in Mashad, where employees are

forced to work overtime (with shifts of 14 hours per day) or the well-known cases of oil workers who are not allowed to organize.

- 941.** Finally, in its communication dated 7 July 2004, the ICFTU informed that summons were served on or around 30 June 2004 to four labour leaders, Mahmoud Salehi, Jalal Hosseini, Borhan Divangar and Mohammad Abdlooor, on charges of collaboration with the banned leftist political organization “Komala” based in the Islamic Republic of Iran’s Kurdistan. They were to appear in court on 24 August.
- 942.** These four leaders were among the around 50 workers arrested while celebrating Labour Day in the city of Saqez. Most were quickly released, but the four of them and three more labour leaders and activists (Mohsen Hakimi, Esmail Khodgam and Hadi Tanom) were only released on bail on 12 May after heavy international pressure, including that of the ILO.
- 943.** At the time of their arrest, they were mainly accused of illegal assembly, but at the time of their release, no known charges had been brought against them. The fact that they were only released on bail would seem to suggest that some kind of charges had been brought against them and had been upheld after their release. The current charges of illegal political activity are different from the initial reasons for their arrest and it would therefore seem that they are merely an indirect way of victimizing the leaders for their labour rights activism and in particular their attempt to celebrate Labour Day.
- 944.** The ICFTU asserted that the four labour leaders were independent labour activists and did not, to the best of its knowledge, have any links with political parties. The ICFTU remained deeply worried that their prosecution was directly related to their contacts with the ICFTU mission on 29 April 2004, only two days before their arrest, as this mission had been closely monitored by the Iranian security service.
- 945.** In a communication dated 7 February 2005, the complainant provided additional information concerning the arrests following Labour Day celebrations in Saqez. In addition to the four arrested labour leaders referred to in its earlier communication, the complainant stated that it had since learned that Mohsen Hakimi, Esmail Khodkam and Hadi Tanoumand, who were also arrested while celebrating Labour Day, were subsequently also served summons on charges of collaboration with the “infidel” and the banned political organization “Komala”. The complainant emphasized that, at the time of their arrest, these labour leaders and activists had been told that they were arrested for having organized a gathering without legal permission and that they had not been involved in any political activity between the time of their arrest on 1 May 2004 and the time they were charged with these other offences on or around 30 June 2004. The complainant thus strongly considered that the charges brought merely represented an indirect way of victimizing these leaders for their labour rights activism, in particular their attempt to celebrate Labour Day. It affirmed that these seven labour leaders were independent labour activists and did not, to its knowledge, have any links with political parties.
- 946.** The complainant organization provided detailed information on the professional and trade union background of each of the seven arrested labour leaders, as well as on their current roles within the trade union movement. The complainant organization added that Borhan Divangar and Mahmoud Salehi had informed it that they were being continuously harassed for the exercise of their trade union activities. Mr. Salehi had further stated that the prosecution has based its accusations of his sympathizing with the “Komala” on documentation retrieved from his computer, which had been seized during the search of his home. Mr. Salehi denied having any such documents and informed the judge that no such documents were found in the presence of his legal representative. He did not want to

assume responsibility for documents that may have been placed on his computer after the authorities had seized it.

- 947.** While initially the seven arrested labour leaders were to appear in court on 24 August 2004, the first hearing did not take place until 25 December 2004. This first case concerned Borhan Divangar. Although the trial was held behind closed doors, the complainant understood that Mr. Divangar was represented by his lawyer, Ms. Mahshid Hadad, who pleaded that the charges be withdrawn. During the trial, his lawyer referred to mistreatment and torture endured by Mr. Divangar during his 12-day detention in May 2004. She also requested that a representative of the Intelligence Ministry be called to testify in order to shed light on the charges brought against her client, but the judge rejected the request, indicating that the intelligence authorities would provide their evidence in writing. The complainant has not yet been informed of any verdict in this case.
- 948.** Mohsen Kahimi was put on trial on 16 January 2005, behind closed doors. A revolutionary guard was however present until the defence counsel, Mr. Sharif, objected. According to information provided to the complainant, Mr. Hakimi was not even given the opportunity to provide a final defence statement. The complainant asserted that this was a serious breach of due process, which raised serious concerns about the fairness of these trials.
- 949.** Mahmoud Salehi was put on trial on 1 February 2005, also behind closed doors. Again, his lawyer rejected the charges brought against him. A so-called “additional evidence” was brought against Mr. Salehi, including two texts which he had written in 2004, namely an article entitled “Preparing a cost of living index for a family of 5 in Iran” and a statement condemning the killing of several striking workers by security forces in Khatoonabad in January 2004. Mr. Salehi stated that these two texts were not only public documents and not illegal in any sense, but that he had actually also sent them to the authorities concerned at the time they were published. Moreover, the prosecution held Mr. Salehi’s contacts and meeting with an ICFTU mission on 29 April 2004 against him as further evidence of his alleged crimes. While the prosecution brought up Mr. Salehi’s past arrests and periods of detention, the complainant insisted that all of these arrests were directly related to his independent trade union activities, such as his involvement with the Saqez Bakery Workers’ Association and organizing independent Labour Day demonstrations. Nevertheless, he was charged in each case with sympathizing with “Komala”, an accusation routinely used by the Iranian judiciary against progressive labour, social and human rights activists.
- 950.** Mohammad Abdipoor’s hearing was held on 6 February 2005. The judge announced that the trial was open to the public, but only his lawyers, Ms. Mahshid Hadad and Ms. Mohammadi were allowed to enter the courtroom along with their client. In addition to the two charges brought against the seven labour leaders, Mr. Abdipoor faced the charge of contacting members of the central committee of “Komala” and participating in “Komala’s” Anniversary Day and the gathering of information for “Komala”. He denied these allegations, stating that they were fabrications to justify the authorities’ arrests of people before the start of Labour Day celebrations in May 2004. His lawyers pleaded that all charges be withdrawn.
- 951.** The complainant was informed that a second hearing for the seven labour activists was scheduled to take place after the Iranian New Year in April. While the complainant was making arrangements to apply for a visa to observe the trials still scheduled, it recalled that it had not received a reply to its previous formal requests made in August, September and December 2004 and January 2005.
- 952.** The complainant stated that the trials have become a symbol of the repression of workers in the Islamic Republic of Iran and have prompted workers from 17 factories and a group

of workers from Sanandaj to declare their support for the seven labour leaders in an open statement issued by the Labour Committee of Tehran's Production Factories on 10 September 2004, denouncing the court cases and calling for a five-minute work stoppage in solidarity with the Saqez seven. The statement also denounced the lack of freedom to organize Labour Day events, the widespread use of temporary contracts and the poor living conditions of workers in the country. The statement was supported by workers from: Iran Khodro, Shahab Khodro (Auto Manufacturing), Gorohe Sanati Minoo (Minoo Industrial Group), Pars Metal, SaiPa, Kashi-Irana, Pump Industries of Tehran, Sazeh Gostare Saipa, Petoshimi Mahshahr (Mahshahr's Petrochemical Plant), Khavar Press, Vitana, Follade Khuzestan (Khuzestan's Steal), a Group of workers from Sanandaj, Tabriz Tractor-Manufacturing Plant, Bolberingsazi Tabriz, Sugar Cube Plant of Miandoab, Iran Khodro Diesel Company and Vazneh.

The arrest of teachers

- 953.** The complainant organization also submitted new allegations concerning the arrests of teachers. It indicated that, according to reports from the official Iranian news agency – the Islamic Republic News Agency (IRNA) – the General Secretary of the Teachers' Guild Association Mahmoud Beheshti Langarudi and the spokesperson Ali-Ashgar Zati were arrested on 12 July 2004. According to official sources, their arrests were not connected to their trade union activities, notably organizing strikes on non-payment of wages in March 2004. Trade unionists believed, however, that they were arrested for their trade union activities and strikes that they organized in June 2004. The complainant added that it had been informed that the Teachers' Guild Association was linked to one of the fractions of the Government from which it was now allegedly distancing itself.
- 954.** The complainant stated that, in May 2004, Mr. Langarudi was summoned to court on charges linked to the strikes in March 2004. He was accused of entering a school illegally, leaving his job during working house and mobilizing “agitating” teachers to strike. The March strike was attended by 200,000 people, a third of all teachers.
- 955.** The complainant understood from the IRNA that the arrest in July could result in charges of violation of national security and organization of two protests in June. The protesters were demanding higher wages and wage arrears of 5.2 billion rials (US\$620 million). The arrest of Mr. Langarudi and Mr. Ali-Ashgar Zati prompted teachers in Tehran and other cities to gather for a demonstration on 19 July in front of the main entrance of Majles (the Iranian Parliament) in Tehran, to protest against their arrests and the intimidation by security forces and the Ministry of Education they had been subjected to. According to the ICFTU sources, the teachers' union has been intimidated into silence and has thus not issued any statements on these arrests.
- 956.** Messrs. Mahmoud Beheshti Langarudi and Ali-Ashgar Zati were only released on bail in mid-August. Mr. Zati had to pay a bail of 70 million tomans and Mr. Beheshti 50 million tomans. However, reportedly, other members of the same association had been arrested in the northern province of Mazandaran.

Restrictions to the application of the labour legislation

- 957.** The ICFTU has been informed that the Parliament of the Islamic Republic of Iran has passed and is also about to pass legislation that would deprive different groups of workers of the protection of the labour legislation, thus depriving most workers of the right to organize workers' organizations including trade unions. In 2004, the Parliament passed legislation exempting workers at workshops of less than ten employees from the scope of the labour legislation. This legislation would exempt workers at most carpet weaving

workshops from the protection of existing labour legislation, thus depriving them of the right to organize. Furthermore, draft legislation exempting temporary workers from the scope of the labour legislation was to be considered by Parliament in November 2004. Such legislation would deprive about 90 per cent of the workforce in the Islamic Republic of Iran of the protection of the labour legislation including the right to organize, annual leave, pay rises, the right to benefit from public holidays, unemployment benefit and medical and social benefits.

The Kurdistan Textile Factory in Sanandaj (Kurdistan Province)

- 958.** According to information received by the ICFTU, the Kurdistan Textile Factory was surrounded by armed security forces that cut off access to the factory during a sit-in strike that started on Sunday, 31 October 2004. The 75 workers started the sit-in strike to protest against the mass redundancy plans announced by management. On 1 November the strike was joined by workers from all sections of the factory until it finally covered the entire factory, with hundreds of workers participating in the sit-in. Workers from two other textile factories in the city (Shaho and Shinbaf), the bakery union and a number of others had reportedly declared that they supported the strike. Reportedly, workers from the textiles industry, aluminium, dairy, bakery and plastic industry and university students came out in support of the workers. Throughout the city of Sanandaj, a large number of people signed a petition in support of the striking workers and a fund to raise funds had been set up. Workers in Saqez also supported the strike.
- 959.** On 2 November, the Labour Ministry had reportedly called on Kurdistan's Governor, the army and the management to put an end to the "rebellion". The strike ended on 3 November when the employer and the government authorities agreed to improve severance pay. The agreement was negotiated when the factory was still besieged by armed forces. The agreement included four-and-a-half month severance pay for each year of employment as well as two years of unemployment insurance benefits for 75 workers who had been made redundant. Furthermore, management agreed to reinstate six workers who had been expelled and to pay full salary also on strike days to all workers. However, they did not want to commit to refrain from further redundancies. The negotiations were observed by one Sergeant Doosty, reportedly the localhead of the security service. According to some sources, Mr. Doosty, at one moment waived a leaflet, shouted and made threats against the workers' representatives.
- 960.** According to the Iranian Labour News Agency (ILNA), the management later refused to improve severance pay. This led to further protest by the workers, who were also dissatisfied with the prospect of privatization. Allegedly, there were plans to privatize most, if not all, of the textile industry. This plan would also involve a reduction of the workforce. Workers' representatives of the factory later informed the complainant that the promises made during the settlement have not been fulfilled.
- 961.** The complainant was informed that renewed strike action was taken on 22 December 2004 and that the workers at the factory had earlier been on strike on two occasions during the months of November and December. The strike on 22 December started after the employer decided to fire five workers named Yadullah Jafari, Ali Kheirabadi, Zahed Nasiri, Shahram Chenareh and Mohammad Kali. 350 workers participated in the strike. They wanted the employer to reconsider this decision, but the employer refused. This led to a strike, where workers protested against management's plans to dismiss more active and senior workers and replace them with workers on short-term temporary contracts not covered by the labour legislation.
- 962.** The workers were demanding:

- recognition of their right to strike;
- payment of their full salary, without pay for strike days being deducted;
- reinstatement of the dismissed workers;
- an end to the policy of using temporary contracts;
- an end to the threatening of workers by the agents of management and government;
- cancellation of the regulations set up by the “Disciplinary Committee”;
- full implementation of an existing job classification plan;
- respect for the dignity and rights of workers in the workplace;
- a self-service canteen, serving one warm meal a day;
- a healthy and hygienic work environment, especially a replacement of the poor ventilation equipment that made many workers ill; and
- medical treatments for close to 100 workers who were ill due to the highly polluted and unhygienic work environment.

963. The ICFTU was informed that workers feared that security forces would be deployed at the factory as they had been in November. According to information received by the ICFTU, the workers elected a committee of workers to defend their rights. However, security forces and the employer were pressuring the members of the committee, and in particular Mr. Shis Amani, the chair of the committee, to end the strike. He was interrogated and threatened several times and only workers' support had prevented his detention. Other workers' representatives such as Messrs. Hadi Zarei, Iqbal Moradi, Hassan Hariati, Farshid Beheshti Zad and Ahmad Fatehi were also threatened with dismissal and arrest. Many workers had reportedly been expelled and worker activists were put under “immense pressure”. However, the committee managed to organize a strike fund and a crisis committee in case measures would be taken against the Committee of Workers.

964. On 2 January, while the strike was still ongoing, the Committee in Support of the Striking Workers informed the ICFTU that a commission created by the Department of Labour with representatives from security forces, the Department of Labour, the management and the Ministry of Information (public security) had been formed. On 1 January, the Commission had threatened the striking workers that it would expel them all. However, on 6 January, the Commission negotiated for more than five hours with the workers' representatives and reached an agreement. The negotiations took place in the presence of an agent from the Ministry of Information who refused to identify himself.

965. According to information provided to the complainant, the striking workers agreed to go back to work on the condition that the employer and government authorities honour and start implementing the agreement within one month. A statement issued by the Committee in Support of the Striking Workers indicated that the agreement included the following terms:

- (1) All lay-offs by the employer be stopped. Lay-offs would have to be approved by a commission comprised of the representatives of the management, the Provincial Governor, the Labour Ministry and the Committee for the Settlement of Disputes, and workers' representatives.

- (2) Temporary contracts would be signed on a six-month basis instead of the current three months.
- (3) Health and safety conditions of the workplace would be examined.
- (4) Wage arrears would be paid to workers immediately, including their wages for the 16 days of strike. This promise was reportedly made by the Ministry of Labour.
- (5) Instead of self-service canteen providing one hot meal, workers would be paid 30,000 rials instead of the former 15,000 rials daily for meals and they would also be served milk and cake on a daily basis.
- (6) The demand for reinstatement of six sacked workers was rejected but it was agreed that they would receive redundancy pay equivalent to three months' wages for each year of service at the factory, plus allowances.
- (7) A committee for implementation of a plan of job classification would be established and the workers on temporary contracts would be included in the plan. Underpayment from previous years would also be compensated.

Aftermath of the strike

966. The ICFTU indicated that it has since been informed that representatives of the workers at the Kurdistan Textile Factory have been harassed and brought in for interrogation on 19 January by the Intelligence Ministry, following the agreement reached on 6 January. Mr. Shis Amani, the chair of the Workers Committee in Support of the Striking Workers and Mr. Hadi Zarei, have both been threatened. Mr. Fashid Beheshti Zad was threatened and accused of having ties with opposition political parties. Around the same time, Mr. Amani was also accused of having ties with political parties. The complainant was also informed that the authorities and the employer were trying to find excuses not to honour the agreement.

B. The Government's replies

- 967.** In its communication dated 2 May 2004, the Government indicates that there were a certain number of ambiguities in the complaint concerning the incident in the village of Khatoonabad and the city of Shahr-e-Babak, which needed clarification. Given the sensitivity of the case, an independent inquiry team was set up under the mandate of President Khatami to investigate the case and report its findings directly to the President.
- 968.** With its communication dated 11 August 2004, the Government transmitted additional information on the situation surrounding the incidents in Shahr-e-Babak and Saqez, as well as on the efforts made by the Government to improve freedom of association and collective bargaining.
- 969.** The Ministry of Labour and Social Affairs made inquiries about the incident through concerned governmental bodies so as to have access to details in order to communicate to the ILO a comprehensive report. These concerned bodies prepared and submitted reports, the summary of which is as follows.

Incident of Shahr-e-Babak

- 970.** In the course of constructing Khatoon Abad industrial copper complex (located some kilometres far from Shahr-e-Babak, in Khatoonabad village), some local inhabitants of the

village were working for the above construction project as temporary construction workers. Over the past few years, these workers gradually began to expect to be permanently recruited once the complex was operative.

- 971.** As the construction project terminated and the subcontractors began to leave the site, temporary labour contracts also came to an end. Workers were informed of the termination of their temporary contracts. Their endeavours to become permanently recruited in the complex remained intact. Parallel to the settlement of the construction project by subcontractors, employment of skilled and specialized manpower was pursued and therefore the above local inhabitants who had worked as construction workers, were prevented from entering the complex.
- 972.** In reaction to this measure taken by the complex authorities to decrease the previous workforce, serious violence broke out in the area. Thus, preliminary nuclei of objection and opposition, mainly consisting of local inhabitants of Khatoonabad, were formed. The local inhabitants frequently gathered in front of the complex in protest of new employment policies and blocked the roads leading to the site preventing the entrance and exit of the employees. Complex authorities met with protestors and asked them to bring the case to the dispute settlement boards.
- 973.** Some protestors, who had not been patient enough to refer the matter to the dispute settlement boards, began to threaten to set the complex on fire. The police had no other choice but to use tear gas and water cannons to scatter them. With much regret, some protestors were gas-poisoned and some others injured; they were immediately taken to hospitals.
- 974.** In the course of this event and parallel to the violence inside the industrial complex, some opportunists, pursuing political considerations, concurrently tried to misuse the situation and shift the move toward political purposes and attacked the Governor's Office in Shahr-e-Babak, broke the windows and destroyed some part of the office.
- 975.** This chaos later continued on main avenues of the city where rioters broke the windows of 12 banks and seriously damaged some residential buildings, the police station and cars. The invaders then moved toward the gas station and threatened to set it on fire. It was at this point that the police force had to come to the scene to defend public and private properties and safeguard the lives of citizens. The chaos was so great that the police had to use tear gas. At this point, some of the citizens were injured and later taken to the hospital. Some of the rioters were also arrested. Some of the detainees were released after investigations.
- 976.** A close look at the events in retrospect signifies the necessity to separate the workers' protest in front of Khatoonabad industrial copper complex (located some kilometres from Shahr-e-Babak) from the chaos and riots happening inside Shahr-e-Babak. The latter, which was political in nature, followed non-democratic and non-work-related purposes.
- 977.** The Government observed in general that, like many other developed and developing countries, it was now facing the challenge of unemployment. To tackle this problem, the Government made its best efforts to effectively plan for job creation. Encouragement of foreign direct investment coupled with modification of relevant legislation, encouragement of domestic investment, facilitation of privatization, execution of policies encouraging employers to recruit more and various other plans were amongst policies and plans of the Government to increase job opportunities and expand supportive measures for the workforce. Although the Government considers the problems faced by workers as important and makes its best effort to settle them, it is fully aware of any political-based movements which are raised in support of workers' rights.

- 978.** The Government has continuously facilitated the legitimate protests of the workers' community and has seriously requested the police not to interfere in the above gatherings. Unfortunately, there have been some riotous elements in the past few years who stick to wrath and destruction of public properties. By misusing the workers' demands, they try to deviate from their legitimate objection to their own political-based purposes. In the course of such events, the police had to intervene in order to prevent the destruction of public property.
- 979.** The Government has strengthened tripartism enormously over the past few years, reinforcing the role of social dialogue in its tripartite mandate. In this connection, technical cooperation on social dialogue with the ILO has taken place in the form of several seminars and training programmes.
- 980.** The Government has not and will not consider any work stoppage or strike on behalf of workers demanding labour-related rights as crisis, turbulence or disorder. In fact, in similar instances of dispute between workers and their employers, the Government has intervened itself to peacefully remove obstacles and has solved the problems. To this end, the fundamental principle of constructive dialogue has always been viewed by the national authorities as the starting point of dispute settlement.
- 981.** Recalling that during the strike a conflict began with a number of anti-regime insurgents who had misused the protest and destroyed public property, the Government states that the security forces decided to disperse the crowd with tear gas to ease the tension and prevent further disorder. However, the security forces were resisted by illegally armed insurgents and hence faced with no other choice but to resort to the use of force and gunshots in the situation where national security and order were indeed seriously threatened.
- 982.** The Government indicated that it fully considers the right to organize public meetings and processions as an important aspect of trade union rights, and wishes to assure that it has paid attention to the social and economic demands of workers and will certainly continue making endeavours to meet their requirements on a fair basis.
- 983.** In addition, during the incident of Shahr-e-Babak, a number of hooligans who caused disorder and clashed with security forces were arrested. It should be noted that none of the detainees were among the workers rallying in protest against the termination of their labour contracts. The arrested individuals were indeed the key instigators of violence with absolutely political purposes, not social or economic ones.
- 984.** The Government indicated that it would be grateful for any information that would demonstrate to the contrary that these had been arrests of ordinary workers, demanding labour-related rights, and it will investigate any such cases and report back to the Committee. Nevertheless, the Government considered that there should be a consensus on the distinction between political purposes and worker-related rallies. Economic and social grounds should not be misused for political purposes, as had been done by the instigators in the Shahr-e-Babak incident.

City of Saqez event

- 985.** Regarding the Saqez event, the Government considered that the Committee has not been well informed on specific aspects of the incident. The truth of the matter is that, on 1 May 2004, hundreds of workers and their families staged a peaceful rally and marched in the city of Saqez in order to celebrate the International Labour Day.
- 986.** However, according to the Government, a long time before the approach of 1 May, a number of members and advocates of the two non-elected and non-democratically banned

political groups (the “Komala” Party and the Communist Party, both located in the Islamic Republic of Iran’s Kurdistan and having a long history in opposing the Islamic Republic), had misused the International Labour Day and provoked workers’ sentiments in order to fan the flame and create tension.

- 987.** On 1 May, the members affiliated to these two groups mentioned above, joined the marchers in public gathering and disrupted the ceremony. In so doing, the public rally turned into a political movement rather than a labour one.
- 988.** The Government reiterated that it valued the right to organize public gatherings, particularly on the occasion of May Day, as an important aspect of human rights at work. However, during the May Day rally, the main advocates and also key figures of these politically banned organizations considered the labour gathering as a safe haven for inflaming tension and hence materializing their anti-regime objectives. They marched through the city of Saqez, clashed with police forces and created tension and disorder.
- 989.** In view of the gravity of the situation, and in order to ease tension, security forces intervened and arrested the individuals identified as the key figures of causing violence and crisis. All detainees were, however, released several days after the May Day rally.
- 990.** The Government asserted that it has always respected the principle of freedom of association and freedom of organizing labour-related gatherings and has taken great strides to improve workers’ social and economic lifestyle. As assured in respect of the Shahr-e-Babak event, no use of force towards work-related gatherings was made by the security forces in the May Day march and if even one single case of arrest of a labourer rallying on the occasion or for his or her fundamental rights at work is reported to the Committee, the case will be investigated and the results communicated to the Committee.
- 991.** The Government strongly considered that the basis for good governance in all labour-related issues was a well-functioning democratic system that ensures respect for human rights in general, and notably for basic civil liberties such as the right to enjoy security, integrity and collective freedoms, including freedom of expression and of association. The Government stated that it continued to make every effort to remove obstacles impeding the growth of representative organizations of workers and also employers and to promote fruitful social dialogue between its social partners. These are, in fact, fundamental conditions for the development of a vibrant civil society that reflects full diversity of views and interests.
- 992.** To this end however, the Government considered that top priority should be given to ensuring the appropriate framework within which labour-related concerns may promptly be settled through a legal merit system. To mitigate labour-related concerns, the Government is assisting workers’ and employers’ organizations to strengthen their capacities to play a greater and stronger role in prompting labour relations and the rights involved. In this line, a number of tripartite workshops and seminars in collaboration with the ILO have been held in Teheran and some other industrial cities particularly during the past three years. Furthermore, the Government has placed the question of crystallization of existing trade unions as a top priority of its agenda and is continuing to try to bring the legislation concerned into full conformity with international labour standards.
- 993.** Despite the efforts made and progress achieved, the Government shared the view that it needed to carry out much further work in this respect, including through joint projects with the ILO. In this respect, the Government recalled that over the past few years it has demonstrated a growing readiness and willingness for good cooperative relations with the ILO based on mutual respect, rapport and understanding. It further referred to visits it has and will receive from officials of the Standards and Fundamental Principles and Rights at

Work Sector and assured the Committee that specifically during recent years the Government has spared no efforts, and will continue to do so, to materialize all fundamental rights at work. This is the natural result of its sincere commitment to uphold the rule of law and to empower civil society with civil liberties, including the rights of freedom of association and expression.

- 994.** In closing, while welcoming the ongoing cooperation trend, the Government reiterated that any further collaboration from the ILO on how best to upgrade fundamental principles and rights at work, including freedom of association, was highly welcomed and appreciated.
- 995.** In a communication dated 24 October 2004, the Government reiterated much of the information provided in its earlier communication and provided some more details. In this communication, the Government emphasized that the incidents occurring at each of these villages are of a very different nature and therefore set them out separately.
- 996.** As regards Khatoonabad, the Government recalled the background to this dispute and the difficulties arising from the temporary nature of the work of the first contractor, Consersium Contracting Company, and its engagement of unskilled construction workers on fixed-term temporary labour contracts, which had been mutually agreed between the employer and the workers concerned.
- 997.** The Government stated that as early as the year 2000, these casual workers engaged in industrial action demanding the conversion of their contracts into permanent ones. Conciliatory measures had been proposed to the casual workers, including unemployment benefits and re-recruitment for other phases of the project. Despite these envisaged measures, the employer legally terminated their contracts in 2003 at the completion of the plant's construction. The Government argued that such action on the part of the employer in no way breached Iranian labour law or international labour standards and it would have been totally unacceptable to compel the employer to re-hire these workers.
- 998.** Regardless of the full settlement of entitlements, the unskilled casual workers organized further sit-ins and work stoppages at the plant for several days, blocking the main entry routes and preventing access to the plant's staff. While the protesting workers were summoned to discuss the issue peacefully, they showed no interest and continued to block the main entry doors and routes leading to the plant and threatened to set the complex on fire. This created an unusually severe situation associated with an entire lack of security.
- 999.** The Government stated that the seriousness and the urgency of the matter led the police forces to intervene in the crisis, which stretched beyond the village of Khatoonabad to the city of Shahr-e-Babak. The Government asserted that the atmosphere of labour-related protest switched into a politically motivated one, which was both unprovoked and unpeaceful. The incitement of destruction and disruption of private and public facilities causing damage or trouble to ordinary people, whether it is for social, economic or political activity, has no justification whatsoever. The strike became violent when the tension exceeded the scope of the labour-related grievance and was driven by political motivations by some non-labour individuals who, with a pre-orchestrated objective, misused the unrest and stirred unpleasant feelings among workers, provoking them to resort to immoral tactics and violence.
- 1000.** In the case of Shahr-e-Babak, the city Governor's office was attacked and windows broken. This chaos stretched to the main avenues of the city where rioters broke the windows of 12 banks and caused serious damage to some residential buildings, the police station and cars. They then moved toward the petrol station, which they threatened to set on fire. At this point, the police came to the scene to defend public and private property and to safeguard the lives of citizens. Due to the strong resistance of the mixed group of

workers and ‘invaders’, the security forces were compelled to intervene and use force to defuse the growing tension and unrest, but only in cases where law and order and public interest were seriously threatened.

- 1001.** The Government specified that, while it is true that this unfortunate incident in the violence-wrecked city of Shahr-e-Babak left four dead, none of these were among the workers employed in the plant’s construction project. According to the Government, this was further proof that the incident erupted on the basis of pre-orchestrated political objectives, lacking social or economic grounds.
- 1002.** In addition, the Government referred to the outcome of the investigations, which demonstrated that one of the main reasons for the flare-up of the riot was also the existence of local and ethnic challenges among the people of Khatoonabad and Shahr-e-Babak. While stating that it was an incontrovertible fact that the workers engaged in the construction work of the plant had first social and economic grievances, the Government added that the labour protest shifted into an ethnic conflict, with many culprits behind the violence having political motives. Furthermore, the Government stated that the protests and their subsequent unrest was coincident with the election campaign for the Iranian Parliament, which was touched, influenced and inspired by the local ethnic challenges and the general political atmosphere in the country.
- 1003.** As regards the detention of seven individuals involved in the rally in Saqez on May Day, the Government reiterated that neither the disruption of the rally, nor the subsequent related arrests occurred for anti-trade union reasons, but rather for the creation of great and serious social discomfort and destabilization of the city. The Government pointed out in this respect that thousands of Iranian workers and their families in many large cities carried out peaceful rallies on May Day without interference.
- 1004.** There are, however, particular circumstances in respect of the city of Saqez due to the various tribes and religious minorities with different languages, religions and ethnic origins in the Kurdistan province. These huge ethnic and tribal challenges carry enormous potential for social unrest. In addition, the organization of the May Day rally was pre-orchestrated well ahead of time by a non-elected group, which calls itself the ‘Workers Council for May Day’. This action was associated with some unusual moves and atrocities aimed at challenging the Government and signalling their preferred political approach. Thus, the Iranian intelligence was observing the indicators to determine whether this was a normal activity and discovered that this event was a pretext for holding a protest meeting with political purposes.
- 1005.** Intelligence also revealed the involvement of many of the Workers Council members in the banned “Komala” Party and the Communist Party, which have a long history of opposition with the Islamic Republic and have been trying to fan the flame of discord throughout post-revolutionary times. By tapping into public concern over social difficulties, the key figures of the Workers Council were busy convincing people, including the working strata, to attend its politically motivated demonstrations.
- 1006.** On 1 May 2004, the events in Saqez were peaceful until a number of political opposition figures staged a political public meeting and started to chant anti-regime slogans, without any social or economic background. This sparked widespread tension and violence. The Government emphasizes that politically motivated issues have to be marginalized from social or economic grounds. Nevertheless, the Workers Council still makes no clear demarcation between labour-related activities and politically motivated moves, which is also the case for the two banned political parties.

- 1007.** In addition, while national law requires that political action obtain prior approval from the competent authorities, the Workers Council dropped all attempts to obtain permission for the meeting. The security forces were obliged to intervene and due to the strong confrontation on behalf of the political opposition groups, 40 individuals were arrested, although many of them were released that same day. None of the ordinary workers or their relatives were among the remaining detainees, while seven individuals referred to by the complainant have been held in custody, as they were truly responsible for contributing to create insecurity and tension. The detentions were made on political grounds and not for anti-union or even social reasons. This was further corroborated by the fact that Iranian intelligence has uncovered evidence showing that four of the detainees are active clandestine agents of the banned political parties. Their files were pending before the Iranian public court, the required investigations were under way, and their natural and legal rights will be upheld during the trial, the outcome of which will be communicated in due course.
- 1008.** In conclusion, the Government gave its assurances that it will uphold the principle of democracy, freedom of expression and freedom of association, but added that irrational and unreasonable tactics used to express political views did not comply with Iranian laws or with international labour standards and should be condemned. While the Government held International Labour Day in high regard as an important aspect of human rights at work, no one should be allowed to exploit labour-related occasions for political purposes.
- 1009.** While the Government has not ratified Conventions Nos. 87 and 98, it affirmed its commitment to respect and promote fundamental principles and rights at work. To this effect, the question of bringing related legislation into full conformity with international labour standards was a top priority of the Labour Ministry's mandate and the Government has been in regular contact with the Office as to the measures necessary in this regard.
- 1010.** In a communication dated 16 February 2005, the Government indicated that it had contacted the Public Prosecutor's Office and National Police in December 2004 in order to obtain additional and follow-up information on the Saeqez incident and on the state of investigation. The Government also requested the Public Prosecutor's Office to ensure that an independent and thorough investigation was carried out into the allegations concerning alleged suppression of the rally and the detention of demonstrators in May 2004.
- 1011.** The Public Prosecutor's Office and National Police supplied the following additional information on the incident. According to the judicial authority, on 1 May 2004, 50 persons were arrested for instigating illegal and violent anti-regime demonstrations. The law concerned provided that in order to hold demonstrations and rallies prior permission from the Interior Ministry needed to be obtained. Forty-three of those arrested were released by the investigating authority, after being questioned. Seven individuals suspected of being engaged in a variety of banned activities, remained in custody. The Public Prosecutor's Office indicated that the engagement of the seven persons concerned was, based on political motivations, organized and cunning.
- 1012.** According to the judiciary, the pre-trial investigation indicated that these individuals were suspected to be part of the politically banned group of "Komala", a proscribed sect of ultra-leftists violent groups in the Islamic Republic of Iran who had instigated a number of social unrests and incidents in the past. The "Komala" is at present affiliated to a banned Communist Party.
- 1013.** The investigating body was convinced, by investigating past cases concerning "Komala", that the seven suspects of this case were at the rally as a pretext for their continued political agenda. They held an assembly in Saeqez on 1 May 2004 under the pretext of the Labour Day merely to protest against the regime in an effort to discredit the ruling establishment.

The body responsible for investigation reiterated that the politically motivated demonstration had been carried out in violation of the law, as prior permission should have been obtained.

- 1014.** The judicial authority further referred to Convention No. 87, which states that “in exercising the rights provided for in this Convention, workers, employers and also their respective organizations, like other persons or organized collectivities, shall respect the law of the land”. The judiciary rejected the complainant’s assertion that the arrest of the defendants was illegal or unjust, as such arrest was conducted in conformity with the provisions of the law and was on the basis of objective evidence which proved that there was a reasonable cause to suspect that the acts of the defendants constituted a breach of law and order. The judiciary particularly drew attention to the fact that the suspects were arrested not for carrying out trade union activities but for committing violent assemblies. They are charged with acting against and insulting the Islamic system. They also have a history of repeatedly acting against the Government and its policies. According to the judicial authority, the seven defendants were released on bail and are now free. Their trial has been ongoing at a local court in Saqez.
- 1015.** According to the National Police, the application for detention was due to the unreasonable and violent behaviour of the seven individuals who intended to unleash public demonstrations at national level, involving roadblocks and closure of streets aiming at causing social chaos and disorder. The police report on these events stated that the individuals in question, associated to the “Komala”, indulged in violent acts leading to disruption of law and order. Its report provided details that the police had intervened in a timely manner and had taken appropriate action to maintain law and order.
- 1016.** Both the Judiciary and the police have ascertained that allegations of misconduct by them were false and baseless. The investigating authorities wish to draw the attention of the Government as well as the ILO to the political aspects of this case. Additional information had also been received from the High Central for Islamic Labour Councils about the detention of the seven individuals, which confirmed the reports of the Judiciary and National Police.
- 1017.** As regards the search of the residence of one of the defendants (Mr. Mahmoud Salehi) and the confiscation of items and documents to which reference was made by the complainant, the investigating authority acknowledged that it searched some places, including the residence of the suspect, in the process of investigating this case and that each place searched was believed to be where the material evidence concerning the case existed. All places that were searched were specified in the search warrant. The investigating authority acknowledged that it seized a computer and documents during the course of the abovementioned searches and added that each item seized was specified as an item in the search warrant, as these items were believed to have something to do with the case.
- 1018.** Furthermore, the investigating authority stated that giving consideration to the fact that the seizure inevitably entailed restrictions on property, it paid the required attention to the rights of the person involved in this case. Thus, the investigating authority reiterated that it never seized any goods or documents for which there was no need for seizure. According to judiciary, all searches and seizures were completely lawful and proper. Therefore, the investigating authority rejected the assertion of the complaint that the defendants were being prosecuted simply for their participation in the 1 May rally.
- 1019.** There was reasonable and firm suspicion, based on their past activities, that the individuals in question were and still are engaged in unlawful anti-government activities and are associated to the politically banned “Komala” group. The investigating authority noted that

the judicial system was currently considering the cases of the seven defendants and assured that the process would be conducted in a fair and impartial manner.

- 1020.** Mr. Mohsen Hakimi is charged with being associated to the illegal “Komala” party. He also has links with the leaders of a banned Communist Party and has taken part in an illegal gathering, with political motivations. His case was posted for hearing in October 2004, by the local court and postponed in order to further consider all aspects of the allegations. Mr. Mohsen Hakimi’s hearing was held on 17 January 2005 in the First Circuit of Saqez Court in Kurdistan Province. At this point, no definitive decision has been reached by the court.
- 1021.** The body responsible for the investigation reassured that no one would be subjected to sanctions for the mere fact of organizing or participating in May Day celebrations and activities. In fact, on the same day, a number of different official and non-official gatherings and events took place in various parts of the country to mark Labour Day, none of which was subjected to restrictions and sanctions.
- 1022.** The Islamic Republic of Iran has ratified neither Convention No. 87 nor Convention No. 98; however, it should be noted that the Government was undertaking appropriate consultations with workers’ and employers’ organizations with regard to further elaboration and adaptation of the relevant labour legislation (for example, the amending of Chapter 6 of the Labour Law). The Government reiterated that during recent years, efforts had been made to enhance the trade union environment, with increased respect for trade union pluralism. The Government concluded that it would follow up this matter and transmit any further developments in the case that are received from the investigating authorities.

C. The Committee’s conclusions

- 1023.** *The Committee recalls that the allegations in this case concern two separate clashes with government security forces. The first incident occurred on 24 January 2004 with respect to a strike in Khatoonabad, extending out to Shahr-e-Babak. Several workers were arrested and at least four were killed during the clashes, with a number of others seriously injured. The second incident refers to a peaceful May Day rally in Saqez, which ended in the arrest and detention of some 50 people. New allegations were received from the complainant concerning the arrest of trade union leaders of the Teachers’ Guild Association and interventions in a strike at the Kurdistan Textile Factory in Sanandaj. Finally, the complainant alleges the proposal and adoption of legislation that would restrict the trade union rights of a large number of workers.*

Khatoonabad and Shahr-e-Babak

- 1024.** *The Committee notes that the complainant’s allegations and the Government’s reply basically concord in respect of the circumstances surrounding the strike undertaken by the workers at the copper smelting plant in Khatoonabad prior to the police intervention and the social nature of the demands that were made by the workers. The complainant further alleges that, due to the persistence of the sit in, the Provincial Security Council decided to bring in special police forces. The complainant adds that, according to certain sources, these forces had been brought in to break up the strike and they had attacked the workers in Khatoonabad. Later the confrontation spread to Shahr-e-Babak where four workers were killed and others injured. The complainant also refers to contrary indications coming from Iranian workers’ organizations in exile, which stated that the workers were shot dead in front of the plant at Khatoonabad.*

- 1025.** *The Committee notes that the complainant considers there is sufficient reason to believe that the confrontation began when the police used force to break the strike. In addition, the complainant raises the concern that subsequent demonstrations protesting these clashes led to further arrests. Eighty people were said to have been arrested and 15 kept for interrogation.*
- 1026.** *As regards the incidents at Khatoonabad, the Government first recalls that the demands of the casual workers in Khatoonabad revolved around their desire to convert their temporary contracts into permanent ones and argues that the employer had legally terminated their contracts at the completion of the plant's construction and had not breached any national or international law. It further asserts that the situation became serious when some protesters who had been blocking the roads leading to the complex prevented the employees from entering and exiting the site and began to threaten to set the complex on fire. Thus, according to the Government, the police had no choice but to use tear gas and water cannons. The Government regrets that some of the protesters were injured and states that they were immediately taken to hospitals.*
- 1027.** *The Government adds, however, that the incidents in Shahr-e-Babak, distinct from the labour protests at Khatoonabad, were caused by certain opportunists who were pursuing political considerations and who damaged property in the city. In light of the damage caused and following threats to set the gas station on fire, the police force was obliged to protect the lives of citizens and had no choice but to use tear gas. According to the Government, given that the security forces were resisted by illegally armed insurgents, they had no choice but to use force and gun shots to defuse the growing tension and unrest, but only in cases where law and order and public interest were seriously threatened. Some citizens were injured. Rioters were arrested and some detainees were released after investigation.*
- 1028.** *The Government insists that the incident at the copper complex and the incident in Shahr-e-Babak must be looked at separately, as the latter was political in nature. It further emphasizes that none of the detainees had been among the workers rallying over the termination of their labour contracts and those who were arrested were the key instigators of the violence with purely political purposes. While the Government admits that the unfortunate incident in Shahr-e-Babak left four dead, it asserts that none of these were among the workers employed in the plant's construction project. The Government adduces with this further proof that the incident erupted on the basis of pre-orchestrated political objectives, lacking social or economic grounds.*
- 1029.** *While taking due note of the reply made by the Government and the distinction it makes between the incident at the copper complex and that which occurred in Shahr-e-Babak, the Committee regrets that the information provided is not sufficiently detailed to permit it to glean a full picture of what actually occurred. As regards, in particular, the clashes at the Khatoonabad copper complex that the Government confirms stemmed from a labour dispute, the Committee notes that the police resorted to the use of tear gas to disperse the protesters. The Committee recalls that, in cases in which the dispersal of public meetings or demonstrations by the police for reasons of public order or other similar reasons has involved loss of life or serious injury, it attaches special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 148]. While noting with interest that the Government did institute an investigation into this matter, the Committee regrets that the information provided in the Government's reply refers only to an unspecified threat of arson, without any details as to who may have made these threats, alternative measures initially used to control the situation, any subsequent charges for criminal acts or court*

judgements relating to such charges. Regrettably, in these circumstances, the Committee has insufficient information to determine whether the recourse to force in respect of the protesting workers at the copper complex was justified or not and requests the Government to provide further information on any criminal charges brought and court judgements rendered in respect of the threats of violence and arson at Khatoonabad.

- 1030.** *As regards the four persons killed during these clashes, the Committee notes that the information provided by the complainant and that of the Government do not concur as to whether these persons were actually workers involved in the protest over social demands, or whether they were involved in a political protest, as stated by the Government. In the absence of any clarity as to the circumstances surrounding these regrettable deaths, the Committee recalls that, in cases in which the dispersal of public meetings by the police has involved loss of life or serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities [see *Digest*, op. cit., para. 52]. Noting that the Government has investigated this matter, the Committee requests it to provide further details concerning the circumstances in which these four persons were killed, as well as the believed reasons for their involvement in these events.*
- 1031.** *It wishes further to draw the Government's attention to the general 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*, op. cit., para. 137]. The Committee trusts that all necessary measures will be taken in the future to ensure that excessive force is not used when controlling demonstrations.*
- 1032.** *As regards the events at Shahr-e-Babak, the Committee notes the Government's statement that these protests were parallel to those which took place at the copper complex and, contrary to the latter, were undertaken for purely political purposes and resulted in important damage to public property. Indeed, while confirming that it is an incontrovertible fact that the workers engaged in the construction work of the plant first had social and economic grievances, the Government adds that the labour protest shifted into an ethnic conflict, with many culprits behind the violence having political motives.*
- 1033.** *In light of the complainant's references to public information that some 80 persons had been arrested overall and 15 kept for interrogation following further protests against the police intervention, the Committee requests the Government to establish an independent investigation into the matter and to provide further information on whether any persons arrested in connection with the incidents in Khatoonabad and Shahr-e-Babak are still being detained or charged in relation to these two incidents and, if so, to provide details in this respect. The Committee further requests the complainant to provide any additional information available to it which might link the spread of the protest action to Shahr-e-Babak with the workers' demands on social and economic matters.*

Saqez

- 1034.** *The Committee notes that the complainant's allegations concern the arrest and detention of some 50 participants in a peaceful May Day rally in Saqez. In particular, the complainant refers to Mahmoud Salehi, labour leader of the Trade Association of Saqez Bakers, and Mr. Hakimi, a well-known member of the Iranian Writers' Association, who*

had met with representatives from the complainant organization just two days before their arrest.

- 1035.** *Following their arrests on 1 May 2004, Messrs. Salehi, Jalal Hosseini, Borhan Divangar and Mohammad Abdipoor and three other labour leaders were only released on 12 May after heavy international pressure. The complainant states that, at that time, they had been mainly accused of illegal assembly. Although their release was contingent on bail being paid, no known charges had been brought. Subsequently, on 30 June 2004, summonses were served on Messrs. Salehi, Hosseini, Divangar and Abdipoor, charging them with collaboration with the banned leftist political organization “Komala” based in the Islamic Republic of Iran’s Kurdistan. Summonses concerning the same charges were served upon Mohsen Hakimi, Esmail Khodam and Hadi Tanoumand, also arrested while celebrating Labour Day. The complainant asserts that, to the best of its knowledge, these seven labour leaders and independent labour activists do not have any links with political parties. The complainant adds that it is deeply concerned that their prosecution may be directly related to the contacts they had with representatives from its organization.*
- 1036.** *According to the complainant, the charges brought against these seven labour leaders merely represented an indirect way of victimizing them for their labour rights activism. The charges of sympathizing with “Komala” are routinely used by the judiciary against progressive labour, social and human rights activists. The Committee notes the detailed information furnished by the complainant on the professional and trade union background of these arrested labour leaders, as well as on their current roles within the trade union movement. It further notes the complainant’s allegation that these leaders have been continuously harassed for the exercise of their trade union activities.*
- 1037.** *For its part, the Government confirms that hundreds of workers and their families had initially staged a peaceful rally and march in Saeqez on May Day. The Government adds, however, that the organization of the May Day rally was pre-orchestrated well ahead of time by a non-elected group, which calls itself the “Workers Council for May Day”. Iranian intelligence discovered that this event was a pretext for holding a protest meeting with political purposes. The Government emphasizes that such action must also be considered within the framework of the huge ethnic and tribal challenges in the region that carry enormous potential for social unrest. In addition, the Government states that Iranian intelligence has also revealed the involvement of many of the Workers Council members in the banned “Komala” Party and the Communist Party, which, it adds, have a long history of opposition with the Islamic Republic. Thus, members and advocates of two non-elected and non-democratic banned political groups (the “Komala” Party and the Communist Party) joined the marchers and disrupted the ceremony, turning the rally into a political movement rather than a labour one. According to the Government, in order to ease tension, the security forces intervened and arrested individuals identified as the key figures of causing violence and crisis. The Government adds that all detainees were released several days later.*
- 1038.** *The Committee further notes that the Government contacted the Public Prosecutor’s Office and National Police in December 2004 in order to obtain additional and follow-up information on the Saeqez incident and on the state of investigation. According to the judicial authority, on 1 May 2004, 50 persons were arrested for instigating illegal and violent anti-regime demonstrations; 43 were released, whereas the seven persons referred to above were suspected of being involved in banned political activities, using the rally as a pretext for their political agenda.*
- 1039.** *The Committee notes that the Government has provided only very general indications that the rally and march that started out as a celebration of International Labour Day, ultimately turned into a political movement. The Government has not provided any specific*

information as to the manner in which this peaceful rally became violent, nor as to the actual necessity of intervention by the security forces. No specifics were given as to the violent nature of these demonstrations. As to the illegality, the Committee notes that the Government refers to the law providing that the prior approval of the Interior Ministry is necessary in order to hold demonstrations and rallies and the judiciary states generally that the demonstration was a pretext to protest against the regime. As to the general assertions by the Government that these actions were political in nature and not social and economic, the Committee recalls that the organizations responsible for defending workers' socio-economic interests and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living [see Digest, op. cit., para. 480]. While the information available to the Committee is insufficient for it to determine whether the May Day rally in Saeqez actually evolved into a purely political rally beyond the Committee's mandate, asserted by the Government, the Committee wishes to recall the importance it attaches to the principle that the right to organize public meetings and processions, particularly on the occasion of May Day, constitutes an important aspect of trade union rights [see Digest, op. cit., para. 134] and trusts that the Government will ensure full respect for this principle in the future.

- 1040.** *As regards the charges brought against Messrs. Salehi, Hosseini, Divangar, Abdipoor, Hakimi, Khodkam and Tamoumand – all of whom had participated in the May Day rally and been arrested at the time – for collaborating with a banned political organization, the Committee notes the Government's indication that the seven individuals referred to by the complainant have been held in custody, as they were truly responsible for contributing to create insecurity and tension. According to the Government, these detentions were made on political grounds and not for anti-union or social reasons, a fact which the Government states, is further corroborated by evidence uncovered by Iranian intelligence showing that the detainees are active clandestine agents of the banned political parties. The Government adds that their cases are before the courts, the required investigations are under way, and their natural and legal rights will be upheld during the trial, the outcome of which will be communicated in due course.*
- 1041.** *The Committee notes, however, the complainant's allegations concerning the closed nature of the trials and the serious breaches of due process. The Committee recalls that the absence of guarantees of due process of law may lead to abuses and result in trade union officials being penalized by decisions that are groundless. It may also create a climate of insecurity and fear which may affect the exercise of trade union rights. [See Digest, op. cit., para. 106.] The Committee requests the Government to reply to the complainant's allegations in this respect and to ensure that due process is fully guaranteed during these trials.*
- 1042.** *As regards more specifically the allegations of search and seizure of documents in the home of Mr. Salehi, the Committee notes the concerns raised by the complainant that this search may have been related to its visit just a few days before to Mr. Salehi's home. The Committee notes on the other hand from the Government that the search of Mr. Salehi's home and the seizure of documents found there were carried out in full conformity with the search warrant. The Committee notes with concern, however, that, according to the complainant, two of the documents used as evidence against Mr. Salehi included an article he had written on preparing a cost of living index and a statement he had made condemning the killing of several striking workers in Khatoonabad in January 2005, both of which constitute the exercise of legitimate trade union activities. The Committee further notes with deep concern the allegations that the prosecution had held Mr. Salehi's contacts and meeting with an ICFTU mission against him as further evidence of his alleged crimes, as well as the complainant's more general fears that the arrest of these*

individuals might be linked to their contacts with representatives of the complainant organization when they were in the country.

- 1043.** *While noting the Government's indication that Messrs. Salehi, Hosseini, Divangar, Abdipoor, Hakimi, Khodkam and Tanoumand were charged in relation to their activities in a banned political organization, the Committee further observes that the Government also refers to matters directly related to the Labour Day demonstration and, in particular, to the lack of required approval for this march from the Interior Ministry. In these circumstances, and given from the paragraph above that some of the proof used in some of these trials was clearly related to the exercise of legitimate trade union activities, the Committee cannot conclude that the arrests of Messrs. Salehi, Hosseini, Divangar, Abdipoor, Hakimi, Khodkam and Tanoumand and the trials currently under way are wholly unrelated to their trade union activities. In this respect, and recalling that workers should enjoy the right to peaceful demonstrations to defend their occupational interests [see Digest, op. cit., para. 132], the Committee requests the Government to ensure that all charges related to the organization of the Labour Day march and the peaceful participation therein, even if it took place without prior approval, are immediately dropped.*
- 1044.** *Finally, as regards the Government's indication that these persons are being charged with association with a banned political organization and the complainant's contention that such charges are merely a pretext for victimizing labour rights' activists, the Committee wishes to emphasize that in cases where the complainants alleged that trade union leaders or workers had been arrested for trade union activities, and the Government's replies amounted to general denials of the allegation or were simply to the effect that the arrests were made for subversive activities, for reasons of internal security or for common law crimes, the Committee has followed the rule that the Government concerned should be requested to submit further and as precise information as possible concerning the arrests, particularly in connection with the legal or judicial proceedings instituted as a result thereof and the result of such proceedings, in order to be able to make a proper examination of the allegations. [see Digest, op. cit., para. 98.] While noting that the Government has made an effort to obtain information from the judicial authorities and the police in respect of the incidents involved in this case, the Committee can only observe that the indications provided remain quite general. In light of the contradiction between the Government and the complainant as to the true reasons behind these arrests and their eventual link to trade union activities, the Committee requests the Government to provide it with precise and detailed information on the specific charges brought against Messrs. Salehi, Hosseini, Divangar, Abdipoor, Hakimi, Khodkam and Tanoumand and, in particular, to transmit copies of the judicial sentences in their cases as soon as they are handed down.*
- 1045.** *The Committee further requests the Government to provide information in reply to the additional allegations made by the complainant in its communication dated 7 February 2005 concerning the arrest of trade union leaders of the Teachers' Guild Association, interventions in a strike at the Kurdistan Textile Factory and subsequent harassment of the workers' representatives and the proposal and adoption of legislation that would restrict the trade union rights of a large number of workers.*

The Committee's recommendations

- 1046.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Regretting that it has insufficient information to determine whether the use of force in respect of the protesting workers at the copper complex in*

Khatoonabad was justified or not, the Committee requests the Government to provide further information on any criminal charges brought or court judgements rendered in respect of the threats of violence and arson at Khatoonabad. It further trusts that all necessary measures will be taken in the future to ensure that excessive force is not used when controlling demonstrations.

- (b) *Noting that the complainant has referred to some 80 persons who were arrested and 15 kept for interrogation following further protests against the police intervention in Khatoonabad and Shahr-e-Babak, the Committee requests the Government to establish an independent investigation into the matter and to provide further information on whether any of these persons are still being detained or charged in relation to these two incidents and, if so, to provide details in this respect. The Committee further requests the complainant to provide any additional information available to it which might link the spread of the protest action to Shahr-e-Babak with the workers' demands on social and economic measures.*
- (c) *The Committee requests the Government to provide details concerning the circumstances in which four persons were killed during the incidents at Shahr-e-Babak.*
- (d) *The Committee requests the Government to reply to the complainant's allegations concerning serious breaches of due process and requests it to ensure that due process is fully guaranteed during these trials.*
- (e) *The Committee requests the Government to ensure that all charges against Messrs. Salehi, Hosseini, Divangar, Abdipoor, Hakimi, Khodkam and Tanoumand related to the organization of the Labour Day march and the peaceful participation therein, even if it took place without prior approval, are immediately dropped.*
- (f) *The Committee requests the Government to provide it with precise and detailed information on the specific charges brought against Messrs. Salehi, Hosseini, Divangar, Abdipoor, Hakimi, Khodkam and Tanoumand and, in particular, to transmit copies of the judgements in their cases as soon as they are handed down.*
- (g) *The Committee further requests the Government to provide information in reply to the additional allegations made by the complainant in its communication dated 7 February 2005 concerning the arrest of trade union leaders of the Teachers' Guild Association, interventions in a strike at the Kurdistan Textile Factory and subsequent harassment of the workers' representatives and the proposal and adoption of legislation that would restrict the trade union rights of a large number of workers.*

CASE NO. 2346

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

**Complaint against the Government of Mexico
presented by
the International Confederation of Free Trade Unions (ICFTU)**

***Allegations: Refusal to recognize the Single
Independent Trade Union of Workers at
TARRANT Mexico (SUITTAR) by the
Conciliation and Arbitration Board of the State
of Puebla***

- 1047.** The complaint is contained in a communication from the International Confederation of Free Trade Unions (ICFTU) dated 13 May 2004.
- 1048.** The Government sent its observations in a communication dated 25 January 2005.
- 1049.** Mexico 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

- 1050.** In its communication of 13 May 2004, the International Confederation of Free Trade Unions (ICFTU) alleges that the Conciliation and Arbitration Board of the State of Puebla rejected a request for recognition of the Single Independent Trade Union of Workers at TARRANT Mexico (SUITTAR). This request was refused on 3 October 2003; a subsequent appeal was also rejected. The request for recognition was rejected for officious and trivial reasons and without giving the union the opportunity to correct any erroneous administrative procedures which may have occurred with the documents. The reasons given by the Conciliation and Arbitration Board are as follows:
- The authorities state that the union did not comply with the requirement to submit copies of the request in duplicate, in accordance with section 366 of the Federal Labour Act (the union states, however, that the documents were submitted with a copy attached as an annex, which, according to union officials, was a duplicate of the original).
 - Section 365 of the Federal Labour Act states that the union must submit the minutes of the assembly at which it was founded, a list of union members, a copy of its statutes and the minutes of the assembly at which union officials were elected. The Conciliation and Arbitration Board maintains that the union violated this section by forming a union and electing officials at the same assembly and by submitting a single document describing both procedures, rather than two separate documents. However, section 365 makes no reference to anything which prevents a union being founded and its executive body elected at one and the same assembly.
 - The authorities maintain that the union's statutes violate section 371.XI of the Federal Labour Act, claiming that, although SUITTAR's statutes contain provisions concerning the acquisition of assets, they include nothing about the administration

and final disposal of these assets. The complainant states that the sections in question stipulate only that statutes must contain regulations for the administration, acquisition and final use of such assets, without explicitly stating what provisions they must contain. The provisions of this section are covered in the union's statutes, which deal in a full and coordinated manner with matters relating to maintaining an inventory of the union's assets, collecting union dues, procedures for preparing and submitting reports, the use of union assets and liquidating a union's assets.

- It is also stated that the union does not indicate in the text that it is a “workers’ association” created with the aim of improving and defending workers’ rights. However, the complainant states that section 4 of the statutes describes the aims of the union in detail; furthermore, in the founding minutes, the workers who founded the union are clearly shown; and in one section it is also stated who is eligible to become a member of the union.
- Under section 371 of the Federal Labour Act, a union must be made up of workers at a company. However, the documentation indicates that Ms. María Guadalupe Martínez González, who was nominated as Chairman of the Committee for Honour and Justice, does not appear on either the payroll or the list of union members and, since she is not an employee of the company, is therefore disqualified from being a member of the union. The complainant states that this name is a small error in the list of 728 names and that, even supposing that the authorities are in the right, this would simply mean that this person did not fulfil the conditions for union membership or to be assigned a position within the union, and is not sufficient cause for obstructing the will of the 727 founder members.
- The resolution passed by the Conciliation and Arbitration Board states that the request violates section 371.VII of the Federal Labour Act, since it does not include disciplinary measures to be applied against union members. In particular, the authorities allege that the statutes do not make reference to the length of periods of suspension. However, the statutes do specifically deal with sanctions and their duration and include each of the points covered in section 371.VII of the Federal Labour Act.
- Lastly, the authorities state that the documents were not duly certified. The complainant states that this observation has never been made to the union in order for any possible error to be rectified.

B. The Government's reply

1051. In its communication of 25 January 2005, the Government refers to the allegation made by the International Confederation of Free Trade Unions (ICFTU) which states that the Conciliation and Arbitration Board of the State of Puebla rejected a request for recognition from the Single Independent Trade Union of Workers at TARRANT Mexico (SUITTAR) on 3 October 2003, for allegedly officious and trivial reasons and without giving the union the opportunity to correct any erroneous administrative procedure which may have occurred with the documents. The Government states that, in spite of the fact that the ICFTU has not mentioned this in its communication, SUITTAR brought an action for constitutional protection (*amparo*) before the Third District Court in the State of Puebla in respect of the resolution of the Local Conciliation and Arbitration Board of the State of Puebla which rejected its registration. However, on 28 November 2003, SUITTAR dropped its *amparo* request, to suit its interests, so this action was superseded and the *amparo* ruling given on 8 December became final.

1052. The Government adds that the bodies responsible for granting registration of trade union organizations operating at local level (as in the present case) are the Conciliation and Arbitration Boards, which are tribunals with full jurisdiction formed from an equal number of worker and employer representatives. In this regard, article 17 of the Constitution of the United States of Mexico states that tribunals must make resolutions in an impartial manner, and that federal and local laws shall establish the measures necessary to guarantee the independence of tribunals. If a union considers that registration has been refused for reasons which are not properly founded or motivated, the Mexican legal system provides for actions, procedures and remedies before the competent authorities. In this specific case, the remedy is *amparo*. The Government states that the nation's Supreme Court of Justice has maintained the criterion that trade union representatives may legitimately bring actions against refusal to grant registration, in accordance with the following legal verdict:

Trade unions: *Amparo* actions in respect of refusal of registration shall be brought by representatives of a union, not by individual members. Section 374.III of the Federal Labour Act, in stating that legally constituted trade unions are moral persons with the capacity to defend their rights before any authority and take corresponding actions, accords legal personality to those unions which comply with the constitutional requirements set out in section 364 of the Labour Act. By means of the register referred to in section 365 of the same Act, the relevant authority certifies that the act of constituting a union complies with the fundamental legal requirements, but does not grant existence or new legal personality to the union; it follows that it is the unions themselves, through the actions of their legal representatives, that are permitted to bring *amparo* actions in respect of a refusal to register a union, rather than their individual members, since the persons directly affected by such an action are not the individual members but the moral person which they make up, which enjoys its own legal personality independent of its members.

1053. The Government notes that the Federal Labour Act does not establish mechanisms for the Conciliation and Arbitration Boards to grant trade union organizations the opportunity to correct any mistakes in their register entries, but that it does set out the timescales and requirements for registration, along with the reasons why it may be refused. However, if a workers' organization does not agree with the decision of the registering authority, it can have recourse to the measures established by the Mexican legal system. The Government further states that the company TARRANT S. de R.L. de C.V. has been closed, and the complaint thus lacks a subject.

1054. To sum up, in the Government's view, the facts as stated by the ICFTU in its communication do not demonstrate any failure on the part of the Government to comply with the principle of freedom of association and the right to organize enshrined in ILO Convention No. 87. Rather, this is a matter which was brought before the competent legal authorities, which then, with regard for the law, decided not to grant registration to SUITTAR, on the basis that it did not fulfil the requirements set out in labour legislation. The Government adds that workers were able to defend their rights before the competent legal authorities, taking the appropriate legal action and, where appropriate, the measures for challenging legal decisions established by the Mexican legal system. The *amparo* action is the remedy which was open to SUITTAR under the Constitution and the *amparo* act to challenge the resolution passed by the labour authority on 3 October 2003, and which it took, within the time and in the manner established in law, by bringing the matter before the competent legal authorities, even though it subsequently dropped its action to suit its interests, and therefore there has been no violation of the principles of Convention No. 87 in this case.

C. The Committee's conclusions

1055. *The Committee observes that, in the present case, the complainant alleges that the Conciliation and Arbitration Board of the State of Puebla (which is a tribunal) rejected a*

request to recognize the Single Independent Trade Union of Workers at TARRANT Mexico (SUITTAR), and that a subsequent appeal in this respect was also rejected. The complainant states that the request for recognition was rejected for unofficial and trivial reasons and without giving the union in question the opportunity to correct any errors.

- 1056.** *The Committee notes that, according to the Government, the measure taken by workers against the decision of the Conciliation and Arbitration Board was to bring an amparo action before the Third District Court of the State of Puebla. According to the Government, the workers were able to defend their rights before the competent legal authorities and take the measures for challenging legal decisions established by the Mexican legal system; in this respect, according to the Government, an amparo action was the remedy available to SUITTAR to challenge the resolution passed on 3 October 2003 by the Conciliation and Arbitration Board, and SUITTAR brought such an action within the time and in the manner established in law. Although the Committee notes that the Government underlines that SUITTAR subsequently dropped its action, to suit its interests, and that the company has been closed, the Committee observes that the complainant raises the issue that, if errors of form or trivial matters occur when a trade union organization requests registration from the competent authority, the organization in question is offered no opportunity to correct any such errors. The Committee also notes that the Government itself states that the Federal Labour Act does not establish mechanisms for the Conciliation and Arbitration Boards to grant trade union organizations the opportunity to correct any mistakes in their register entries. The Committee points out that, although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 248]. This being the case, the Committee recalls that in previous cases it has had to examine instances of delays and obstacles in the free establishment of trade union organizations and certain shortcomings in the legal processes of registering trade union organizations, and that it requested the Government to take measures to ensure that in future, if the body responsible for granting legal recognition considers that there are irregularities in the documentation submitted, an opportunity is provided to the organizations in question to rectify such irregularities [see 334th Report, Case No. 2282 (Mexico), para. 638, approved by the Governing Body at its 290th Session (June 2004)]. The Committee must again reiterate this recommendation and requests the Government to keep it informed of measures taken to follow up on its request.*

The Committee's recommendation

- 1057.** *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 that, in future, if the body responsible for granting legal recognition considers that there are irregularities in the documentation submitted, an opportunity is provided to the organizations in question to rectify such irregularities. The Committee requests the Government to keep it informed of measures taken to follow up on its request.

CASE NO. 2268

INTERIM REPORT

**Complaint against the Government of Myanmar
presented by
the International Confederation of Free Trade Unions (ICFTU)**

Allegations: (1) allegations relating to legislative issues: unclear legislative framework covering freedom of association; serious discrepancies between legislation and Convention No. 87; repressive texts, in particular military orders and decrees, detrimental to freedom of association and which contribute to a climate of denial of fundamental freedoms and to annihilate and destroy any form of labour organization; (2) allegations relating to factual issues: total lack of legally registered workers' organizations; systematic practice of repression by public authorities of any form of labour organization; the Federation of Trade Unions of Burma (FTUB) cannot function freely and independently on the Myanmar territory and its General Secretary has to face criminal prosecution because of his legitimate trade union activities; murder, detention and torture of trade unionists; continuing repression of seafarers for the exercise of their trade union rights; arrest and dismissal of workers in connection with collective labour protests and claims, in particular at the Unique Garment Factory, the Myanmar Texcamp Industrial Ltd. and the Myanmar Yes Garment Factory; intervention of the army in labour disputes

- 1058.** The Committee examined this case at its March 2004 meeting and submitted an interim report to the Governing Body [see 333rd Report, paras. 642-770, approved by the Governing Body at its 289th Session (March 2004)].
- 1059.** Following the publication of its interim report in this case, the Committee received a communication dated 14 April 2004 from the International Transport Workers' Federation (ITF) in which it refuted the Government of Myanmar's statement that the Myanmar Overseas Seafarers' Association (MOSA) was affiliated to it. This statement had been recorded in paragraph 716 of the Committee's interim report.
- 1060.** The Government sent new observations in communications dated 23 September 2004, and 7 and 28 January 2005.

1061. Myanmar 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. Previous examination of the case

1062. At its March 2004 meeting, the Committee made the following recommendations in relation to this case [see 333rd Report, para. 770]:

- (a) Noting the absence of a legal basis for freedom of association in Myanmar, the Committee requests the Government to:
 - (i) elaborate a legislation whereby the respect for, and the realization of, freedom of association will be guaranteed for all workers, including seafarers, and employers;
 - (ii) include in the aforementioned legislation specific measures whereby any other legislation, including Orders Nos. 2/88 and 6/88, will not apply in a manner which would undermine the guarantees relating to freedom of association and collective bargaining.
- (b) Bearing in mind the serious implications of the lack of legal basis for freedom of association in Myanmar, the Committee is convinced that the Government should accept the technical assistance of the Office to remedy the situation.
- (c) Noting that workers' welfare associations are not substitutes for free and independent trade unions, and pending the outcome of the legislative process, the Committee requests the Government to refrain from any acts preventing the free operation of any form of organized collective representation of workers, including of seafarers, freely chosen by them to defend and promote their economic and social interests; this request includes workers' organizations, which operate in exile as they cannot be recognized in the prevailing legislative context of Myanmar; the Committee requests the Government to issue clear instructions in this regard to its agents and to keep it informed of developments. The Committee recalls that the right of workers and employers to freely establish and join organizations of their own choosing cannot be said to exist unless such freedom is fully established and respected in law and practice.
- (d) The Committee requests the Government to establish an independent panel of experts who could be considered impartial by all the parties concerned, to undertake an independent investigation into the murder of Saw Mya Than and to inform it of the decision in this regard.
- (e) Concerning the General Secretary of FTUB, the Committee requests the Government to adduce evidence illustrating that the grounds on which the criminal charges were pressed against the General Secretary of FTUB had no connection with his trade union activities; it requests copies of the decision, referred to in the Government's reply, by which he was found guilty under section 122 of the Penal Code, as well as any documents relating to the other case filed against him under the Public Protection Preservation Law, 1947.
- (f) Concerning the interconnected cases of Myo Aung Thant and Khin Kyaw, and taking into account that they did not benefit from a fair trial with access to legal counsel of their choice and that the conviction of Myo Aung Thant allegedly rested on a confession obtained under torture, the Committee urges the Government to take the necessary steps to have both Myo Aung Thant and Khin Kyaw released from prison.
- (g) The Committee regrets that the Government has not provided any replies to the allegations made in Thet Naing's case and firmly requests the Government to submit a comprehensive reply together with the copies of any relevant documents, including any judicial decision under which Thet Naing might have been sentenced; if any sentence has been handed down, the Committee requests the Government to provide evidence to prove that it has no connection with any activity related to freedom of association and, in the absence of conclusive evidence, to take urgent steps to release Thet Naing from prison.

- (h) The Committee requests the Government to submit a detailed reply on the allegations relating to Shwe Tun Aung's case, including any relevant documents to support its comments; the Committee requests the Government to provide any contract or document signed or accepted by Shwe Tun Aung before he could take up his first assignment as seafarer, as well as any document on the basis of which seafarers can currently take up their first assignment.
- (i) Concerning the various cases of alleged repression or threats towards factory workers for having pursued their labour grievances:
 - (i) the Committee requests the Government to provide copies of the relevant legal instruments governing the dispute-resolution mechanism and, in particular, details on the composition, the role and the functioning of the Township Workers' Supervisory Committee and the Supervisory Committee of the Industrial Zones;
 - (ii) in the case of the Motorcar tyre factory, in view of the direct conflicting versions given by the complainant and the Government, the Committee requests the Government to provide copies of the company's records of employees on 9 and 31 March 2001 with due explanations of any differences so as to resolve this issue;
 - (iii) the Committee requests the complainant to submit additional information in light of the comments made by the Government on labour disputes which occurred in the Unique Garment Factory, the Myanmar Texcamp Factory and the Myanmar Garment Factory;
 - (iv) the Committee requests the Government to provide copies of all agreements (or to detail the terms of the agreements if no formal document was signed by the parties) referred to in its reply and in particular: (1) the agreements relating to the disputes of 6 October 2000 and 15 December 2001 concerning the Unique Garment Factory; (2) the agreements relating to the disputes of 8 January, 2 December 2002 and 5 July 2003 concerning the Myanmar Texcamp Factory; and (3) the agreements relating to the dispute of 24 May 2002 concerning the Myanmar Yes Garment Factory; the Committee requests the Government to submit any other records of the process leading to the conclusion of the agreements and to detail by whom and the manner in which they have since been implemented;
 - (v) the Committee requests the Government to specify the grounds on which the following dismissals have occurred and to detail the agreements reached as to the conditions under which the dismissals were eventually settled: (1) the dismissal of the 77 night shift workers from the Unique Garment Factory; (2) the workers from the Myanmar Yes Garment Factory who disagreed on 16 September 2002 with the conditions under which they had previously been laid off; the Committee also requests the Government to submit further information on the dismissals which have occurred in the Myanmar Texcamp Factory due to the economic situation.
 - (vi) Noting that the Government denies any intervention of the army in labour conflicts, the Committee requests the Government to explicitly protect workers' and employers' organizations from any interference by the public authorities in the forthcoming legislation on freedom of association.

B. The Government's new observations

1063. The Government submitted further information in response to the Committee's recommendations in communications dated 23 September 2004, and 7 and 28 January 2005.

Legislative issues

1064. Referring to the Committee's earlier conclusions concerning both the absence of a legal basis for freedom of association in Myanmar and the workers' welfare associations, the Government stated, in its communication dated 23 September 2004, that since 1988, when the Constitution was suspended, there has been no trade union in Myanmar that conforms

to the requirements of Convention No. 87 and that until a new Constitution is drawn up, no such trade union can be established. The Government referred to its “seven-step road map” and stated that it cannot be changed in any way. The Government indicated that, in any case, the legal rights of workers are well protected as it has mentioned previously. Workers’ welfare associations still function and the Government is striving to build a healthy industrial relations system that meets the country’s present requirements.

Factual issues

Responses concerning workers’ welfare associations

- 1065.** The Government indicated in its communication dated 7 January 2005 that it ensures that the associations are involved in workers’ economic and social interests, and that the Government does not interfere in their affairs. The Government stated that representatives are freely chosen and that there are many associations in both the public and private sectors.

Response concerning the death of Saw Mya Than

- 1066.** In its communication dated 23 September 2004, the Government repeated its earlier statements that Saw Mya Than had not been murdered, that a thorough investigation had been carried out, and that compensation had been given to his family.

Response concerning the General Secretary of the FTUB

- 1067.** Regarding the matter of the General Secretary of the FTUB – known as either Maung Maung or Pyithit Nyunt Wai – the Government informed the Committee in its communication dated 23 September 2004 that a press conference had been held on 26 June 2004 in connection with the explosion of mines planted by expatriate groups in the environs of the Yangon railway station. Maung Maung’s involvement in that incident was published in the newspaper on that date and the Government attached a copy of an article from a newspaper.

Response concerning the imprisonment of Myo Aung Thant, Khin Kyaw and Thet Naing

- 1068.** In its communication dated 28 January 2005, the Government indicated that Thet Naing was released from prison on 19 November 2004. In relation to Myo Aung Thant, the Government stated that he had been charged under section 122(1) of the Penal Code (High Treason) and sentenced to ten years’ imprisonment, in addition to seven years’ imprisonment for violation of sections 5(c) and (j) of the Emergency Provision Act and three years’ imprisonment for violation of the Unlawful Association Act. The Government indicated that there is no record of imprisonment of Khin Kyaw.

Response concerning Shwe Tun Aung

- 1069.** In relation to the case of Shwe Tun Aung, the Government stated in its communication dated 23 September 2004 that as he had a seafarer’s card, it recognized him as a Myanmar seaman. The Government indicated that because his contract with CTM Trading Co. Ltd. to work on the M/V Great Concert had been signed in Bangkok, it was not able to provide a copy of it as requested by the Committee. The Government only became aware of Shwe Tun Aung’s situation upon receipt of a fax dated 25 December 2000 from the ITF to the Director-General of the Department of Marine Administration, a copy of which it attached to its communication to the Committee. This fax advised that Shwe Tun Aung had been stranded in Venezuela for six months and, despite two telephone calls informing the

Director-General of this and requesting the issuance of a passport for him, the Government of Myanmar had taken no positive action. The ITF indicated that if there was again no response within one week, it would internationally publicize the case.

- 1070.** The Government explained that the Seamen Employment Control Division (SECD) of the Department of Marine Administration, Ministry of Transport responded to that fax by a letter dated 26 December 2000, a copy of which was attached to the communication. In that letter, the SECD advised the ITF that it had requested a certificate of identity to be issued for Shwe Tun Aung, "which can be used as a passport in going back to Myanmar". The SECD further indicated that the Ministry of Foreign Affairs had already instructed the Myanmar Embassy in Brasilia to issue Shwe Tun Aung with travel documents since October 2000. Finally, the SECD sought information from the ITF as to Shwe Tun Aung's location, so that it might directly contact him, as he was required to attend an upgrading course in accordance with the "STCW 95 requirements". The Government indicated that Shwe Tun Aung would be issued with a certificate of identity by the Brasilia Embassy if he should contact it and that to date it had not received any information as to his whereabouts.

Response concerning the Myanmar Overseas Seafarers' Association

- 1071.** In response to a letter from the ITF indicating that the statement of the Government that MOSA is affiliated to the ITF is a total fabrication and should be disregarded by the Governing Body, and adding that its executive board would not accept into affiliation an organization which is clearly the creation of the Burmese Government, the Government stated in its communication dated 23 September 2004 that MOSA had sent affiliation information to the ITF in a letter dated 23 July 2003, but since then there has been no formal letter from the ITF to either MOSA or the Department of Marine Administration. The Government attached a copy of the letter sent by MOSA to the ITF. The Government further indicated that MOSA had "inherited" the Burma Seamen's Union which was a genuine seafarers' association, that all its members were bona fide seamen, that its executive was composed of members with at least four years' service as seamen, and that it uses the same building and logo, etc. of the Burma Seamens' Union, which was already affiliated to the ITF. The Government stated that during the transitional period, because of the major political, economic and social change in Myanmar, there was a lack of communication between the ITF and the Burma Seamen's Union.

- 1072.** For those reasons, the Government stated, it cannot understand the reaction of the ITF as MOSA is a genuine non-governmental organization with the right to affiliate with international federations and confederations in regard to matters relating to seafarers' rights. The Government stated that the overtures made to the ITF for affiliation are an obligation of the party concerned. Further, the Government listed the following instances in which MOSA conciliated on the settlement of disputes in which benefits and compensation were paid to its members:

- (a) Seaman Kyaw Zin Lat: 11 December 2002, complaint filed against CTM Trading Co. Ltd. for back payment of salary and compensation; 12 August 2003, MOSA coordinated and conciliated the dispute; 17 September 2003, compensation of Kyats 40 lakh paid and case closed;
- (b) Seaman Aung Kyaw Htoo; 11 August 2003, complaint against H Brother Co. Ltd. for back payment of four months' salary; 16 October 2003, MOSA coordinated and conciliated the dispute; 4 November 2003, four months' salary (Kyats 12 lakh) paid and case closed;

- (c) Seaman Aung Ko Oo: 11 August 2003, complaint against H Brother Co. Ltd. for back payment of four months' salary; 16 October 2003, MOSA coordinated and conciliated the dispute; 4 November 2003, four months' salary (Kyats 9 lakh) paid and case closed;
- (d) Seaman Si Thu Win: 1 September 2003, complaint against H Brother Co. Ltd. for back payment of four months' salary; 16 October 2003, MOSA coordinated and conciliated the dispute; 4 November 2003, four months' salary (Kyats 9 lakh) paid and case closed;
- (e) Seaman U Phone Kyaw: 17 October 2003, complaint against New Asia Shipping Co. Ltd. for medical benefits; MOSA coordinated and conciliated the dispute; 24 November 2003, medical benefits amounting to FEC 1,000 paid and case closed;
- (f) Seaman Maung Hla Htwe: 31 October 2003, complaint against Richfield Ship Management Co. Ltd. for back payment of salary; 20 November 2003, MOSA coordinated and conciliated the dispute; 14 May 2004, documents concerning the receipt of the back pay were submitted, complainant submitted a letter of receipt, and the case was closed;
- (g) Seaman Maung Tint Lwin: 31 October 2003, complaint against Richfield Ship Management Co. Ltd. for back payment of salary; 20 November 2003, MOSA coordinated and conciliated the dispute; 14 May 2004, documents concerning the receipt of the back pay were submitted, complainant submitted a letter of receipt, and the case was closed;
- (h) Seaman Myo Set Oo: 31 October 2003, complaint against Richfield Ship Management Co. Ltd. for back payment of salary; 20 November 2003, MOSA coordinated and conciliated the dispute; 14 May 2004, documents concerning the receipt of the back pay were submitted, complainant submitted a letter of receipt, and the case was closed.

**Response concerning alleged labour unrest
and dismissals of workers**

(a) Disputes resolution

1073. The Government stated, in its communication dated 23 September 2004, that on 25 May 2003, the Ministry of Labour reorganized the Central Trade Disputes Committee (CTDC), with the Minister for Labour as chairperson, the Director-General of the CTDC as secretary, and composed of eight other governmental members. The Government attached an untranslated announcement of the change and provided details of the relevant legal instruments governing the disputes resolution mechanism as follows.

1074. The Government stated that the directive governing the CTDC was issued by the Office of the CTDC under section 6 of the Trade Disputes Rules, 1963, and includes measures on how to solve disputes. The duties and functions of the CTDC are:

- (a) Duty of a "board" to bring about a settlement of a dispute referred to it and, for this purpose shall, in such manner as it thinks fit and without delay, investigate the dispute and all matters affecting its merits and settlement, and in so doing may do all things it thinks fit for the purpose of inducing the parties to reach a fair and amicable settlement, and may adjourn the proceedings for any period to allow the parties to agree upon terms.

- (b) If a settlement is reached by the parties during the course of the board's investigation, a memorandum of settlement shall be drawn up by the board and signed by the parties and the board shall send it together with a report to the authority by which it was appointed.
- (c) If no settlement is reached during the investigation, the board shall, as soon as possible after the closure of the case, send a report to the authority by which it was appointed, setting out the proceedings and steps taken by the board to ascertain the relevant facts and attempt to reach a settlement, together with a statement of the facts and circumstances, its findings and recommendations for the determination of the dispute.
- (d) The board's recommendation shall deal with each item of the dispute and shall state the board's opinion as to what ought to be done by the respective parties.
- (e) If an agreement is reached as a result of negotiations conducted either by a board or a conciliation officer, it shall be legally binding on both parties to the dispute and failure to comply with or carry out any of the terms shall be punishable by simple imprisonment of a maximum of three years, or a fine, or both.

1075. The Government stated that the role and functions of the Township Workers' Supervisory Committee (TWSC) are set out in a guide entitled "the conciliation process of disputes between the employer and worker" issued by the Department of Labour. The Government indicated that the guide contains a detailed process of activities to conciliate the disputes between employers and workers. The TWSC were formed under section 2(A) of the Trade Disputes Act, 1929, and are empowered to handle conciliation and negotiation under sections 7 and 27 of the Act. The TWSC are invested with the responsibilities for negotiation and conciliation among employers and workers in "case with related disputes". Their duties and functions are:

- (a) to carry out conciliation and negotiation in order to solve disputes;
- (b) to include the right to enter factories, establishments or enterprises, after having informed of their intention to do so, as well as to inspect papers and documents;
- (c) to summon relevant persons or their representatives; should such a person not appear within the prescribed time, action will be taken against him or her according to existing law;
- (d) to ensure confidentiality upon a request that a person's papers and information remain confidential;
- (e) a contract or memorandum signed under the TWSC's authority is legally binding and if either party breach or fail to comply with it, action will be taken against them or their representatives under the existing labour law.

1076. The Government attached additional information to its communication dated 23 September 2004 about cases of disputes conciliated by the TWSCs. This information indicated that between 2000 and 2004, 1,169 cases were conciliated and negotiated by the TWSC in various industrial zones, involving 19,186 workers.

1077. The Government further indicated that Directive No. 1/97 of the Management of Industrial Zones is concerned with the Supervisory Committee of the Industrial Zones and was issued by the Department of Human Settlement and Housing Development, Ministry of Construction; and, moreover, that these mechanisms are also mentioned in the procedures

to be followed by the Secretary of the Townships Trade Disputes Committees and States/Divisional Trade Disputes Appeal Committee.

(b) *Motorcar tyre factory*

1078. Regarding the allegations concerning the Motorcar tyre factory, the Government attached to its communication dated 23 September 2004 a list setting out the attendance of workers on 9 March 2001 and 31 March 2001, as requested by the Committee in its last examination of this case. The list indicated that between 9 March and 31 March 2001, the total workforce at the factory in the payment category 5400-100-5900, increased by one; in the payment category 4800-100-5300, decreased by two; and in the payment category 3000-100-3500, decreased by one. In all other payment categories the total number of the workforce remained steady. The information was provided by way of a table prepared by the factory management.

(c) *Unique Garment Factory, Myanmar Texcamp Industrial Ltd. and Myanmar Yes Garment Factory*

1079. Concerning the information requested by the Committee, the Government attached “unauthenticated translation” of contracts or memoranda of understanding between employers and workers of the Unique Garment Factory, the Myanmar Texcamp Industrial Ltd. and the Myanmar Yes Garment Factory, under the TWSC. The Government indicated that it would not be possible to undertake the translation of all the other records of the process leading to the conclusion of the agreements, as there are so many agreements, but further included some other agreements for the Committee’s information.

Unique Garment Factory

- The Government attached an agreement between Daw Khin Shwe Win and ten other employees and the owner of the Unique Garment Factory dated 6 October 2000 which concerned the reinstatement of the 11 workers, the involvement of expatriate personnel in the management of the factory and overtime.
- The Government attached an agreement between Thandar Win and Ma San San Oo (employees) and the owner of the Unique Garment Factory dated 15 December 2001. The agreement concerned working hours, pay increases, overtime, late arrival at the factory, administration of the factory in relation to the overall affairs of workers, medical leave, the role of the interpreter, the relationship between supervisors and workers, a guarantee that workers who submitted these claims would not be dismissed from work, transportation and information for workers concerning the price of the goods.
- In its communication dated 7 January 2005, concerning the dismissal of 77 night shift workers from the factory, the Government stated that due to economic sanctions imposed against the country, the factory closed on 31 August 2003. In fact, all workers employed by the Unique Garment Factory were laid off, with due compensation paid. The Government indicated that there were 30 male and 242 female workers at the factory at that time.

Myanmar Texcamp Industrial Ltd.

- The Government attached an agreement between Ma Aye San, Ma Thet Thet Aung, Ma Tin Win Myint, Ma Sein Sein, Ma Ohmar Win, Ma Win Win Thein and Na Thandar Oo (employees) and the owner of the Myanmar Texcamp Industrial Ltd. dated 8 January 2002 which concerned pay increases, transportation, time of payment

of wages and salary, annual prize-giving ceremony and a guarantee of the full daily wage in the case of lack of work.

- The Government attached an agreement between Daw Khin Thida Win and U Aung Kyaw Soe (employees) and the owner of the Myanmar Texcamp Industrial Ltd. dated variously 5 July and 1 August 2002. The agreement concerned pay increases, transportation, date for payment of wages or salary, annual prize-giving ceremony, and a guarantee that workers will be paid the full daily wage in the case of lack of work.
- The Government stated in its communication dated 7 January 2005 that the factory employed 87 male and 494 female workers. Following the adoption of economic sanctions, the factory was affected by both reduction in orders and inability to source raw materials and, as a result, on 1 August 2003 some production was stopped. At that time, the factory informed the concerned departments, explained the situation, and advised that the operation of the factory would be stopped on 1 August 2003 and 340 workers would be laid off. The Government attached a list of compensation paid to those workers by the employer.

Myanmar Yes Garment Factory

- The Government attached an agreement between Min Min Htwe and Ma Shu Ti (employees) and the owner of the Myanmar Yes Garment Factory dated 24 May 2002 which concerned increases in basic salary, provision and storage of factory equipment, overtime and enforcement of working hours, provision of drinking water, the behaviour of supervisors and a guarantee not to dismiss workers unless they breach factory or workplace regulations.
- The Government stated that the case commenced on 15 September 2002, when Mg Zin Min Thu was absent from work without informing his superior. The following day, when the general manager sought a signed confession from him, he refused and was dismissed for not obeying work discipline requirements under the employment contract. Mg Zin Min Thu had been employed for five months; he refused to accept compensation of two months' salary as offered by the employer. The Government indicates that his manager advised him to submit a complaint to the TWSC, but that Mg Zin Min Thu consulted with Mg Min Min Htwe who was a representative of the workers' group that had reached the agreement with the employer in May 2002 described immediately above. The Government indicated that Mg Zin Min Thu made a verbal complaint to the TWSC but did not submit his complaint in writing, indicating that he did not wish to accept the compensation. On 16 September 2002, he "organized" the workers Min Min Htwe, Kyaw Min Oo, Win Zaw Oo, Kyaw Soe and Win Aung and submitted a complaint containing ten demands, including the manner of management of the factory, overtime and working hours, religious and cultural rights and grudges held against certain workers. The Government indicated that following negotiations, an agreement was reached with which all workers were satisfied. Mg Zin Min Thu however did not attend that meeting nor the factory and, to date, he has not attended to receive his two months' salary as compensation.

Agreements in relation to other factories

- The Government attached three further agreements between the employees and owners of the Myanmar April Garment factory (dated 13 November 2002), Esquire Int'l. Co. Ltd. (dated variously 11 March and 8 January 2002) and the Kyone Li Leather Bag factory (dated 2 and 18 July 2001 concerning various matters).

C. The Committee's conclusions

1080. *The Committee recalls that this case concerns both allegations relating to the lack of legislative basis for freedom of association in Myanmar, and factual allegations concerning the total absence of recognized workers' organizations in Myanmar, including opposition by the authorities to the organized collective representation of seafarers and to the exiled FTUB; the arrest, imprisonment and death of trade unionists; and threats against, and dismissals and arrests of, workers who had pursued labour grievances.*

Legislative issues

- 1081.** *The Committee recalls that the legislative issues raised by the allegations concern, paradoxically, the absence of any legislative guarantees of freedom of association, as well as the existence of Order No. 6/88 that subjects the establishment of unions to previous authorization by the Ministry of Home and Religious Affairs and bans organizations on broad terms, giving rise to a situation which is clearly in breach of Convention No. 87. The Committee recalls that its previous recommendations in this regard concerned the need to both elaborate legislation guaranteeing freedom of association and to ensure that other legislation would not be applied so as to undermine that guarantee. The Committee regrets to note that the Government has limited its reply in relation to the legislative issues of this case to stating that trade unions conforming to the requirements of Convention No. 87 would not be possible until a new Constitution is adopted in the country and, in the meantime, the "seven-step road map" could not be deviated from. The Committee once again observes in this respect that the lack of a State constitution since 1974 has not prevented all legislative activities in Myanmar and, in fact, legislative instruments such as Order No. 6/88 have been enacted that directly contradict the Convention.*
- 1082.** *The Committee deplores the fact that, despite considerable concern being expressed about the lack of conformity of Myanmar legislation with Convention No. 87 for a number of years by the Committee of Experts and the Conference Committee on the Application of Standards, and despite this Committee's previous request to the Government to elaborate legislation guaranteeing freedom of association for all workers in Myanmar, no concrete steps have been taken to begin this process.*
- 1083.** *The Committee deeply regrets moreover that the Government has not given any indication that suggests that it is considering, in good faith, steps to provide for a legal basis for freedom of association as requested by the Committee. The Committee must recall that this persistent failure to take any measures to remedy the lack of legislation in this regard constitutes a serious and ongoing breach by the Government of its obligations flowing from its voluntary ratification of Convention No. 87.*
- 1084.** *Accordingly, the Committee strongly urges the Government to enact legislation whereby the respect for, and the realization of, freedom of association is guaranteed for all workers, including seafarers, and employers; to include in that legislation specific measures whereby other legislation, including Orders Nos. 2/88 and 6/88, will be abolished so as not to undermine the guarantees relating to freedom of association and collective bargaining; to explicitly protect workers' and employers' organizations from any interference by public authorities, including the army; and to ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee further urges the Government, once again, to take advantage of the technical assistance of the Office to remedy the legislative situation and to bring it into line with Convention No. 87 and collective bargaining principles. The Committee requests the Government to keep it informed of all developments in respect of legislation enacted or envisaged.*

Factual issues

1085. *The Committee recalls that the factual issues considered in its previous examination of this case concerned the need: to ensure that the organized collective representation of workers, including seafarers and organizations in exile, was not prevented pending the adoption of legislation as requested by the Committee; to establish an impartial and independent panel of experts to investigate the death of Saw Mya Than; for evidence that the criminal charges against the General Secretary of the FTUB were unconnected with his trade union activities; to release Myo Aung Thant and Khin Kyaw from prison; for comprehensive replies regarding the cases of Thet Naing and Shwe Tun Aung; and for further detailed information on the disputes resolution mechanisms and the situations at the Motorcar tyre factory, the Unique Garment Factory, the Myanmar Texcamp Industrial Ltd. and the Myanmar Yes Garment Factory.*

Workers' welfare associations and Myanmar
Overseas Seafarers' Association

1086. *Concerning the need to ensure that the organized collective representation of workers was not prevented, the Committee recalls that it had noted that the workers' welfare associations to which the Government had referred were not substitutes for free and independent trade unions and had requested the Government to issue clear instructions to its agents to refrain from preventing the organized collective representation of workers, including seafarers and organizations operating in exile. The Committee notes the information provided by the Government in this regard that it ensures that the workers' welfare associations are involved in workers' economic and social interests, that the Government does not interfere in their affairs, and that representatives are freely chosen.*

1087. *The Committee notes that the Government provided further information concerning the representation of seafarers, in response to the letter from the ITF advising that the Myanmar Overseas Seafarers' Association (MOSA) was not an affiliated organization as had been suggested by the Government. The Committee notes that the Government indicated, in response, that MOSA had sent affiliation information but had not received any reply from the ITF, and that as MOSA was the inheritor of the Burma Seamen's Union, an ITF affiliate and actively represented its members in negotiations and conciliations, the Government could not understand any obstacle to MOSA's affiliation.*

1088. *The Committee recalls in this regard its previous comments that workers' welfare associations, of which MOSA is an example, are not substitutes for free and independent trade unions. This will be so for as long as they fail to present guarantees of independence in their composition and in their functioning and, at least as far as seafarers are concerned, for as long as these workers are prevented from establishing or joining the association of their own choosing. For workers' welfare associations to truly be considered, as the Government submitted in its earlier observations, forerunners of trade unions, they must enjoy, at least, guarantees of independence and represent autonomous groupings of workers, free from Government interference, in order to constitute real preliminary steps towards the setting up of free and independent trade unions.*

1089. *In addition, the Committee recalls that in its previous examination of the case it had noted that paragraph 5 of Chapter 4 of the rules of MOSA explicitly limits seafarers' freedom of choice to establish and join associations, as MOSA is the sole association representing seafarers [see 333rd Report, para. 741]. In any event, by the Government's own submission in its observations to the Committee, no trade unions exist in Myanmar that conform with the requirements of Convention No. 87.*

1090. *The Committee is obliged to note, finally, that the Government has neither responded to the Committee's request to refrain from any acts preventing the free operation of any form of freely chosen organized collective representation of workers, nor has it provided any information suggesting that it has issued instructions to its agents to ensure the unimpaired collective representation of workers, including seafarers and organizations operating in exile. The Committee once again requests the Government to refrain from any acts preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including seafarers' organizations and organizations which operate in exile as they cannot be recognized in the prevailing legislative context of Myanmar. The Committee further requests the Government to issue instructions to that effect to its civil and military agents as a matter of urgency and to keep it informed of all measures taken in this regard.*

Death of Saw Mya Than

1091. *In relation to the need to establish an independent and impartial panel of experts to undertake an investigation into the death of Saw Mya Than, the Committee regrets to note that the Government has limited its observations to repeating its earlier comments that Saw Mya Than was not murdered, that a thorough investigation was carried out, and that compensation had been paid to his family. Emphasizing that serious cases such as the alleged murder of a trade unionist require the institution of independent judicial inquiries in order to shed full light, at the earliest date, on the facts and the circumstances in which such actions occurred and in this way, to the extent possible, determine where responsibilities lie, punish the guilty parties and prevent the repetition of similar events [see **Digest of decisions and principles of the Freedom of Association Committee**, 1996, para. 51], the Committee once again firmly requests the Government to convene as a matter of urgency an independent and impartial panel of experts to investigate this death and to keep it informed in this regard.*

Criminal charges against the General Secretary of the FTUB

1092. *In relation to the need to ensure that the criminal charges brought against the General Secretary of the FTUB had no connection with his trade union activities, the Committee notes that the Government provided the Committee with a copy of a newspaper report based on a press conference held by various deputy ministers and the Vice-Chief of Military Intelligence on 26 June 2004 that indicated that the General Secretary had been involved in planting mines. Recalling that in cases involving the arrest, detention or sentencing of a trade union official, the Committee, taking the view that individuals have the right to be presumed innocent until found guilty, has considered that it was incumbent upon the Government to show that the measures it had taken were in no way occasioned by the trade union activities of the individual concerned [see **Digest**, op. cit., para. 65], the Committee considers that a newspaper report does not provide sufficient, or even admissible, proof that the criminal charges against the General Secretary of the FTUB were unconnected with his trade union activities.*

1093. *The Committee must express its deep concern at the lack of evidence produced by the Government to prove that the charges brought against the General Secretary of the FTUB were unrelated to his trade union activities. The paucity and nature of the proof presented in such an important case leads the Committee to seriously query whether these charges were indeed unrelated to his trade union activities. It once again requests the Government to provide copies of the decision which found the General Secretary guilty of high treason under section 122 of the Penal Code, and any documentation relating to the case the Government explained had been filed against him under the Public Preservation Law, 1947.*

Imprisonment of Myo Aung Thant, Khin Kyaw and Thet Naing

- 1094.** In relation to the imprisonment of Myo Aung Thant and Khin Kyaw, the Committee notes that the Government has indicated that Myo Aung Thant had been sentenced to a total of 20 years' imprisonment under the Penal Code, the Emergency Provision Act and the Unlawful Association Act. The Committee further notes the information provided by the Government that there is no record of the imprisonment of Khin Kyaw.
- 1095.** The Committee notes that the Government has still not disputed the allegations of trade union involvement, the arrest of families, secret trials without freely chosen legal representation and torture in the case of these two trade unionists. In these circumstances, the Committee deeply deplores that the Government has not taken any steps to ensure the release of Myo Aung Thant and once again urges the Government to take the necessary steps to ensure his immediate release from prison.
- 1096.** As regards Khin Kyaw, the Committee further recalls that the Government's previous reply had indicated that both Myo Aung Thant and Khin Kyaw, together with other accomplices, had decided on 4 June 1997 to instigate workers' unrest in Yangon and to commit crimes; they were arrested on the same day, explosives and other evidence were seized in Kawthoung and both Myo Aung Thant and Khin Kyaw were sentenced for their crimes. In light of the clear contradiction between the Government's earlier reply and its present observations in respect of Khin Kyaw, the Committee urges the Government to take the necessary steps to ensure his immediate release from prison and, in the event he has already been released, to provide precise information in this respect. The Committee requests the Government to keep it informed in respect of the cases of both Myo Aung Thant and Khin Kyaw.
- 1097.** In relation to the case of Thet Naing, the Committee notes that the Government indicated that Thet Naing was released from prison on 19 November 2004.

Seafarer Shwe Tun Aung

- 1098.** In relation to the case of Shwe Tun Aung, the Committee notes the information provided by the Government that it recognized Shwe Tun Aung as a Myanmar seafarer as he had a seafarer's card, that it had instructed that a certificate of identity be issued for him that he could use to travel back to Myanmar, and that it had sought his whereabouts as he was required to attend an upgrading course.
- 1099.** Recalling that this case concerned serious allegations of anti-union discrimination, the Committee once again requests the Government to submit a detailed reply on the allegations of anti-union discrimination relating to Shwe Tun Aung's case and, in particular, the allegations that before taking his first position as a seafarer, the Seaman Employment Control Division (SECD) obliged Shwe Tun Aung to sign a document warning against union membership; that other M/V Great Concert crew members who returned to Myanmar were forced by the SECD to refund wages increased by the union action, fined heavily, and forbidden to leave the country for three years; and that, following his trade union activities, Shwe Tun Aung's name was on a government "blacklist". The Committee further requests the Government to provide a copy of any contract or document that Myanmar seafarers in general are currently obliged to sign prior to taking up their first work assignment. If these allegations relating to anti-union harassment are found to be true, the Government is requested to take immediate measures so that Shwe Tun Aung and all Myanmar seafarers are free to join the trade union of their own choosing.

1100. *The Committee further notes the allegations that the passport eventually issued for Shwe Tun Aung contained a special instruction from the Ministry of Foreign Affairs and the Home Ministry, in charge of the special branch police who investigate all cases before passports are issued, informing authorities to whom the passport would be shown that the Government sought the return of Shwe Tun Aung to Myanmar. As regards this allegation relating to the seafarer's freedom of movement, the Committee wishes to draw the Government's attention to the importance which it attaches to the principle set out in the Universal Declaration of Human Rights that everyone has the right to leave any country, including his own, and to return to his country.*

Disputes resolution mechanisms

1101. *The Committee notes that the Government has provided, as requested in the previous recommendations, certain information concerning the relevant legal instruments governing disputes resolution in the country. In particular, the Committee notes the information provided by the Government concerning the composition and functioning of the Central Trade Disputes Committee (CTDC), the functioning of the Township Workers' Supervisory Committee (TWSC) and the legal provisions governing the Committee of Industrial Zones, Township Trade Disputes Committees and the States/Divisional Trade Disputes Appeal Committee.*

1102. *As a preliminary point, the Committee must once again note that a disputes resolution process that exists within a system with a total absence of freedom of association in law and practice cannot fulfil the requirements of Convention No. 87. Further, the Committee notes that while it appears that these various committees are all involved in some way in conciliation and negotiation of disputes between employees and employers in Myanmar, their exact interaction and relative jurisdictions are unclear. The Committee notes that the composition of the TWSC, the procedure to be followed should agreement not be reached by the TWSC, and the nature of the representation of employees and employers before the committees is equally unclear. Pending the adoption in Myanmar of legislation that protects and promotes freedom of association, the Committee requests the Government to take measures to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in the country and to keep it informed of the measures taken in this regard.*

1103. *The Committee recalls that in the following four instances, factory workers had allegedly been dismissed, arrested or threatened for pursuing their labour grievances.*

Motorcar tyre factory

1104. *Recalling that, in its previous comments, the Government had refuted the allegations that 19 workers at the Motorcar tyre factory were arrested on 9 and 10 March 2001 and that arrests at the factory continued on 11 March 2001. The Committee notes that the Government provided, as requested, a list indicating the number of employees employed by the factory on 9 and 31 March 2001. The Committee notes that this list shows that the total number of employees at the factory fell by three and increased by one during that period. In light of this information, the Committee requests the Government to provide due explanations of the differences in total workforce on these two dates and, in particular, to provide details concerning the cases of those three workers whose employment at the factory ceased during that period of time, as well as an indication as to whether any other workers left their employment at the factory during this period, but were replaced. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.*

Unique Garment Factory, Myanmar Texcamp Industrial Ltd.
and Myanmar Yes Garment Factory

- 1105.** *The three other matters concerned garment factories in the Hlaing That Ya industrial zone. As a preliminary point, the Committee notes that the complainant has failed to provide it with the additional information in relation to the allegations concerning these three factories that the Committee had requested in its previous consideration of the case. In the absence of the clarifications requested, the Committee regrets that it only has before it the information provided by the Government.*
- 1106.** *In relation to the Unique Garment Factory, where the allegations concerned the alleged dismissal of workers involved in a workers' movement in November 2001 in relation to overtime, the Committee notes that the Government provided copies of two agreements signed under the TWSC's authority concerning employees at the factory, to which it had referred in its previous observations. The first of these was dated 6 October 2000 and concerned, inter alia, the reinstatement of 11 workers and overtime; the second was dated 15 December 2001 and concerned various matters, again including overtime. The Committee notes that both these agreements were apparently signed following conciliation and on the same date as that upon which the Government stated that the dispute arose.*
- 1107.** *The Committee recalls that in its previous observations the Government had raised the case of 77 night shift workers who were dismissed from the Unique Garment Factory following a dispute on 10 July 2001, during their probationary period and following a conciliation by the TWSC. The Committee notes that in its latest observations, the Government has stated in this regard that, due to the economic sanctions, the factory closed on 31 August 2003 at which point all 272 workers were laid off with due compensation paid. Noting that the closure of the factory occurred two years after the 77 workers were dismissed, the Committee regrets to note that no further information was provided in relation to this matter, which was first raised by the Government, and once again requests further details in relation to these earlier dismissals, including in particular a copy of the conciliation agreement reached under the authority of the TWSC to which the Government referred in its previous observations. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.*
- 1108.** *In relation to the Myanmar Texcamp Industrial Ltd., the Committee recalls that the allegations concerned threats and the involvement of the military following the organized request by workers for higher wages and better working conditions in January 2002, and notes that the Government provided translations of two agreements. The first was dated 8 January 2002 and the second was dated both 5 July and 1 August 2002; both concern various matters including pay. The Committee notes that the information provided by the Government did not include a copy of an agreement to which it had referred in its previous observations concerning a dispute at the factory that apparently arose on 5 July 2003, involved 300 workers, and was conciliated by the Department of Labour. The Committee notes the further information provided by the Government that economic sanctions resulted in certain parts of Texcamp's production being stopped and 340, out of a total of 581 workers, being laid off on 1 August 2003 with due compensation paid.*
- 1109.** *The Committee is concerned that the number of workers laid off for economic reasons at the Myanmar Texcamp Industrial Ltd. is approximately equal to the number that had been involved in a labour dispute to which the Government referred as having occurred three weeks earlier at the factory. For this reason, the Committee requests the Government to provide a copy of the agreement to which it referred in its previous observations*

concerning a dispute between 300 workers and the Myanmar Texcamp Industrial Ltd. which was conciliated by the Department of Labour, as well as information indicating the criteria upon which the 340 workers who were laid off for economic reasons were chosen from the total workforce of 581 workers. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.

- 1110.** In relation to the Myanmar Yes Garment factory, the Committee recalls that the allegations concerned the involvement of the military and the arrest of workers following a protest in relation to wages on 5 October 2000. The Committee notes that the Government provided an agreement dated 24 May 2002, to which it had referred in its previous reply, concluded under the authority of the TWSC concerning a dispute at the factory. The Committee further notes the information provided by the Government concerning a dispute on 16 September 2002, also referred to previously, and which apparently resulted in an agreement concluded by the TWSC; this agreement was not, however, provided to the Committee. The Committee notes the Government's reference in relation to this case that it commenced with the dismissal of Mg Zin Min Thu for disciplinary reasons on 16 September 2002, and that, apparently on the same day, he "organized" five other workers to submit a complaint about which an agreement was reached with which all workers were satisfied; according to the Government, Mg Zin Min Thu did not attend those negotiations nor has he since been to the factory to receive his dismissal compensation. The Committee requests the Government to establish an impartial investigation into this matter and to keep it informed in this regard. It further requests the Government to provide a copy of the agreement dated 16 September 2002 and any further information that the Government may have in relation to the dismissal of Mg Zin Min Thu from the Myanmar Yes Garment Factory.
- 1111.** As a final and overall point, the Committee is deeply concerned to observe that while the Government has submitted further information in relation to many of the Committee's recommendations, much of that information fails to truly reply to the requests made by the Committee and the substance of its recommendations. Indeed, the Committee deeply regrets that very little can be gleaned from the Government's reply to indicate that it intends to take any steps to implement the Committee's recommendations in this very serious and urgent case. The Committee further deplores that the Government has felt compelled to justify the dismissals and the closing of two enterprises by the fact of the imposition of economic sanctions aimed at combating forced labour. The Committee urges the Government in the strongest terms to undertake real steps towards ensuring the respect for freedom of association in law and in practice in Myanmar in the very near future and once again reminds the Government of the availability of the Office to assist in this respect.

The Committee's recommendations

- 1112.** In light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:
- (a) The Committee strongly urges the Government to enact legislation whereby the respect for, and the realization of, freedom of association is guaranteed for all workers, including seafarers, and employers; to include in that legislation specific measures whereby other legislation, including Orders Nos. 2/88 and 6/88, will be abolished so as not to undermine the guarantees relating to freedom of association and collective bargaining; to explicitly

protect workers' and employers' organizations from any interference by public authorities, including the army; and to ensure that any such legislation so adopted is made public and its contents widely diffused. The Committee further urges the Government, once again, to take advantage of the technical assistance of the Office to remedy the legislative situation and to bring it into line with Convention No. 87 and collective bargaining principles. The Committee requests the Government to keep it informed of all developments in respect of legislation enacted or envisaged.

- (b) *Recalling that the right of workers and employers to freely establish and join organizations of their own choosing cannot exist unless such freedom is established and recognized in both law and practice, the Committee once again requests the Government to refrain from any acts preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including seafarers' organizations and organizations which operate in exile since they cannot be recognised in the prevailing legislative context of Myanmar. The Committee further requests the Government to issue instructions to that effect to its civil and military agents as a matter of urgency and to keep it informed.*
- (c) *The Committee once again firmly requests the Government to convene as a matter of urgency an independent and impartial panel of experts to investigate the death of Saw Mya Than and to keep it informed in this regard.*
- (d) *Expressing its deep concern at the paucity and nature of the evidence provided by the Government aimed at proving that the criminal charges brought against the General Secretary of the FTUB were unrelated with his trade union activities, the Committee once again requests the Government to provide copies of the decision by which the General Secretary had been found guilty under section 122 of the Penal Code, and any documentation relating to the case the Government explained had been filed against him under the Public Preservation Law, 1947.*
- (e) *Deploring the Government's failure to take any steps to ensure the immediate release of Myo Aung Thant and Khin Kyaw, the Committee urges the Government to do so as a matter of urgency and to keep it informed in this regard.*
- (f) *The Committee once again requests the Government to submit a detailed reply on the allegations of anti-union discrimination relating to Shwe Tun Aung's case and, in particular, the allegations that before taking his first position as a seafarer, the SECD obliged Shwe Tun Aung to sign a document warning against union membership; that other M/V Great Concert crew members who returned to Myanmar were forced by the SECD to refund wages increased by the union action, fined heavily and forbidden to leave the country for three years; and that, following his trade union activities, Shwe Tun Aung's name was on a Government "blacklist". The Committee further requests the Government to provide a copy of any contract or document that Myanmar seafarers in general are currently*

obliged to sign prior to taking up their first work assignment. If these allegations relating to anti-union harassment are found to be true, the Government is requested to take immediate measures so that Shwe Tun Aung and all Myanmar seafarers are free to join the trade union of their own choosing.

- (g) *Pending the adoption of legislation that protects and promotes freedom of association, the Committee requests the Government to take measures to ensure the freely chosen representation of employees and employers in cases conciliated by the various disputes resolution committees operating in Myanmar and to keep it informed of the measures taken in this regard.*
- (h) *Taking account of the figures contained in the table provided by the Government for the Motorcar tyre factory, the Committee requests the Government to provide due explanations of the differences in the total workforce on 9 and 31 March 2001 and, in particular, to provide details concerning the cases of those three workers whose employment at the factory ceased during that period of time as well as an indication as to whether any other workers left their employment at the factory during this period, but were replaced. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.*
- (i) *The Committee once again requests further details in relation to the case of 77 night shift workers who were dismissed from the Unique Garment Factory following a dispute on 10 July 2001 during their probationary period and following a conciliation by the TWSC including, in particular, a copy of the conciliation agreement reached under the authority of the TWSC to which the Government referred to in its previous observations. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.*
- (j) *The Committee requests the Government to provide a copy of the agreement to which it referred to in its previous observations concerning a dispute between 300 workers and the Myanmar Texcamp Industrial Ltd. that arose on 5 July 2003 and that was conciliated by the Department of Labour, as well as information indicating the criteria upon which the 340 workers who were laid off for economic reasons on 1 August 2003 were chosen from the total workforce of 581 workers. If it is found that the dismissals in question were due to legitimate trade union activities, the Committee requests the Government to take the appropriate steps with a view to their reinstatement or, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.*
- (k) *The Committee requests the Government to establish an impartial investigation into this matter and to keep it informed in this regard. It*

further requests the Government to provide a copy of the agreement at the Myanmar Yes Garment Factory dated 16 September 2002 and any further information that the Government may have in relation to the dismissal of Mg Zin Min Thu.

CASE NO. 2286

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

**Complaint against the Government of Peru
presented by
the National Federation of Petroleum and
Allied Workers of Peru (FENPETROL)**

Allegations: The complainant alleges that, as a result of the establishment of a trade union at Petrotech Peruana S.A., the enterprise dismissed the General Secretary and various workers who belonged to the trade union organization and furthermore filed a criminal complaint against the General Secretary of the trade union for having allegedly forged documents

1113. The Committee examined this case at its March 2004 meeting and presented an interim report to the Governing Body [see 333rd Report, paras. 863-877, approved by the Governing Body at its 289th Session (March 2004)].

1114. The Government sent its observations in a communication dated 12 January 2005.

1115. Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

1116. At its March 2004 meeting, on examining allegations that refer mainly to dismissals and acts of intimidation to force workers into leaving the trade union, the Committee made the following recommendations [see 333rd Report, para. 877]:

- (a) As regards the alleged intimidation of workers at Petrotech Peruana S.A. into leaving the trade union, the Committee requests the Government to conduct an independent investigation without delay into these allegations and to send its observations in this regard, as well as to punish the guilty parties if the allegations are found to be true.
- (b) With reference to the dismissal of Mr. Leonidas Campos Barrenzuela, General Secretary of the trade union at the enterprise, the Committee requests the Government to provide further information on the alleged serious misconduct and the acts allegedly committed by the trade union officer in question and which led to his dismissal, as well as information on the outcome of the legal proceedings and, should the legal authority conclude that his dismissal was unjustified, to guarantee that Mr. Leonidas Campos Barrenzuela be reinstated in his job, without loss of pay.

- (c) As regards the criminal complaint against Mr. Leonidas Campos Barrenzuela, General Secretary of the trade union at Petrotech Peruana S.A., for having allegedly forged documents, the Committee requests the Government to keep it informed of the outcome of the criminal investigation under way.
- (d) The Committee notes with regret that the Government failed to send its observations on the allegations of dismissal of various workers who belonged to the trade union for alleged serious misconduct, with the sole aim of weakening the new trade union, and requests the Government to conduct an independent investigation into this matter and, should it conclude that the workers in question were dismissed owing to their membership of the trade union recently established at the enterprise, to take measures so that they are reinstated in their jobs, without loss of pay.

B. The Government's reply

1117. In its communication dated 12 January 2005, the Government reports that, on 6 July 2004, the Legal Adviser's Office of the Ministry of Labour and Employment Promotion sent official letter No. 265-2004-MTPE/OAJ to the 20th Labour Court of Lima, requesting the relevant information regarding the progress of the appeal against dismissal lodged by Mr. Leonidas Campos Barrenzuela against the Petrotech Peruana S.A. enterprise. On 9 July 2004, the 20th Labour Court of Lima sent the requested information, indicating that the aforementioned appeal was admitted by means of court decision No. 1 on 14 January 2003, and that it expected a ruling in favour of the claimant (which was issued on 30 January 2004). Furthermore, the ruling has been upheld by decision No. 24 of 12 April 2004. However, given the fact that the enterprise failed to comply with the ruling, court decisions Nos. 25 and 26 were issued ordering it to reinstate the claimant in his job, calling upon the Judge of Talara to implement this reinstatement order.

C. The Committee's conclusions

- 1118.** *The Committee observes firstly that the Government has only sent information concerning one of the pending allegations. The Committee therefore regrets the Government's lack of cooperation with regard to this case, which concerns acts alleged to have taken place more than three years ago.*
- 1119.** *With regard to the dismissal of Mr. Leonidas Campos Barrenzuela, General Secretary of the trade union at the Petrotech Peruana S.A. enterprise, concerning which the Committee had requested the Government to provide further information on the alleged serious misconduct and the acts allegedly committed by the trade union officer in question and which led to his dismissal, as well as information on the outcome of the legal proceedings currently under way, the Committee notes that the Government reports that on 30 January 2004 the judicial authority ruled in favour of the worker ordering that he be reinstated in his job, and has requested the Judge of Talara to take measures in this respect. In these circumstances, the Committee requests the Government to ensure compliance with the court order to reinstate trade union leader Mr. Leonidas Campos Barrenzuela in his job.*
- 1120.** *As regards the criminal investigation against Mr. Leonidas Campos Barrenzuela for having allegedly forged documents, which began on 15 April 2003, the Committee trusts that this investigation will soon be completed and requests the Government to keep it informed its outcome.*
- 1121.** *As regards the alleged intimidation of workers at Petrotech Peruana S.A. into leaving the trade union, the Committee urges the Government to ensure that workers at the enterprise are not subject to pressure or threats owing to their membership of the trade union.*

1122. Finally, as regards the alleged dismissal of various workers who belonged to the trade union at the Petrotech Peruana S.A. enterprise for alleged serious misconduct, with the sole aim of weakening the new trade union, the Committee had requested the Government to conduct an independent investigation into this matter and, should it conclude that the workers in question were dismissed owing to their membership of the trade union recently established at the enterprise, to take measures so that they are reinstated in their jobs without loss of pay. While regretting the fact that the Government has not sent information on the subject, the Committee reiterates its previous recommendation. The Committee requests the Government to keep it informed in this respect without delay.

The Committee's recommendations

1123. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

- (a) The Committee requests the Government to ensure compliance with the court order to reinstate Mr. Leonidas Campos Barrenzuela, General Secretary of the trade union at the Petrotech Peruana S.A. enterprise, in his job.
- (b) As regards the criminal investigation against Mr. Leonidas Campos Barrenzuela for having allegedly forged documents, which began on 15 April 2003, the Committee trusts that this investigation will soon be completed and requests the Government to keep it informed of its outcome.
- (c) As regards the alleged intimidation of workers at Petrotech Peruana S.A. into leaving the trade union, the Committee requests the Government to ensure that the workers of the Petrotech Peruana S.A. enterprise are not subject to pressure or threats owing to their membership of the trade union.
- (d) As regards the alleged dismissal of various workers who belonged to the trade union for alleged serious misconduct, with the sole aim of weakening the new trade union, the Committee once again requests the Government to conduct an independent investigation into this matter and, should it conclude that the workers in question were dismissed owing to their membership of the trade union recently established at the enterprise, to take measures so that they are reinstated in their jobs, without loss of pay. The Committee requests the Government to keep it informed in this respect without delay.

CASE NO. 2293

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

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

- the Peruvian Petroleum Workers' Federation (FETRAPEP)
- the Single Trade Union of Talar Petroleum Refinery of Peru S.A. (SUTREPPSA) and
- the National Trade Union of Health Social Security Workers (SINACUT ESSALUD)

Allegations: Refusal by health and social security authorities to recognize SINACUT ESSALUD and excessive requirements for the deduction of trade union dues from wages

- 1124.** The Committee examined the substance of this case at its November 2004 meeting and presented an interim report [see 335th Report, paras. 1216-1239, approved by the Governing Body at its 291st Session (November 2004)].
- 1125.** Subsequently, the National Trade Union of Health Social Security Workers (SINACUT ESSALUD) sent new allegations in a communication dated 4 January 2005.
- 1126.** The Government sent further observations in a communication dated 10 January 2005.
- 1127.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No 98).

A. Previous examination of the case

- 1128.** In its previous examination of the case, the Committee made the following recommendations [see 335th Report, para. 1239]:
- (a) As concerns the freezing of salaries pursuant to Act No. 28034, to which the complainants object, the Committee notes that, according to the Government's statements, this Act expired on 31 December 2003 since it was only applicable to the 2003 tax and budget year and that, according to PETROPERU S.A., negotiations are still being conducted with the unions to reach a collective agreement. The Committee recalls that 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 workers' living standards.
 - (b) The Committee recalls that any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the employers' and workers' organizations in an effort to obtain their agreement and hopes that in future the public authorities will be able to guarantee fully the right to collective bargaining in the public sector.
 - (c) As regards the new allegations presented by SINACUT ESSALUD concerning the non-recognition of that organization because it does not represent 20 per cent of all workers

entitled to unionize, the Committee requests the Government to send its observations in this respect.

- 1129.** The allegations referred to in paragraph (c) of the recommendations were sent by SINECUT ESSALUD in a communication of 2 August 2004, and refer to a letter from the Central Human Resources Authority for Social Services dated 1 July 2004, in which the Secretary-General of SINECUT ESSALUD was given the following information:

Re: Recognition as a trade union

It is my duty to inform you of the following:

- In accordance with the provisions of article 9 of Presidential Decree No. 003-82-PCM, for a trade union of public officials to be set up and to exist, it must represent at least 20 per cent of the total number of officials entitled to unionize in the department concerned.
- According to the assessment carried out by this office, the association known as the National Trade Union of Health Social Security Workers (SINACUT) does not represent this number of officials within the system of public workers as a proportion of the total number of officials in that system employed by the institution at this time.
- Therefore, the association currently represented by you has not met the requirements laid down in the aforementioned Decree, which must be fulfilled for the trade union to be established and to exist.
- For this reason, we inform you that until you succeed in attaining the minimum legal number of members, applications relating to strikes, trade union dues, trade union leave, collective bargaining etc. by the association known as SINACUT will not be considered for processing, and, in general, the association will not be covered by institutional and legislative standards pertaining to trade union organizations.

**B. New allegations by the trade union
SINACUT ESSALUD**

- 1130.** In its communication of 4 January 2005, the National Trade Union of Health Social Security Workers (SINACUT ESSALUD) encloses a letter from the Central Director of Human Resources for Health Social Security dated 5 August 2004, which states the following:

Re: Procedure for deduction of trade union dues

Dear Sir or Madam,

I have the honour of writing to you to request that you inform this Central Authority and/or transmit information to it regarding increases and decreases in the number of workers affiliated to your trade union organizations. To this end, you must send the information electronically, in the established format, with the following enclosures:

- When new workers join, each trade union or association of workers under your auspices must attach the membership card (original) and a copy of the National Identity Document (DNI) of the worker.
- Furthermore, an appropriate affidavit by the General-Secretary of the union must be enclosed with the list of members, declaring the veracity of the information contained in the list in question.
- Each union under your auspices must add a copy of the time and date certificate [*cargo*] or the letter of application of the voluntary disaffiliation of a worker from that union, in order that the Central Authority, through the Compensations Subdepartment, may terminate deductions for that worker.
- Each union affected by a worker's affiliation must enclose not only [a statement of] the express intention of the worker but also, where appropriate, a copy of the letter

containing the relevant membership stamp and a copy of the [statement of] resignation of the same worker from the other union.

- Please note that the request for the aforementioned documentation is made in virtue of the provisions contained in section 46 of Act No. 27209, the Act on management of the state budget, and in section 4(a) of Presidential Decree No. 001-98-TR, which states that any deductions made from a worker's wages shall be authorized by her/him. Where a worker does not approve the deduction, it shall not be made, and, if made, shall lead to the appropriate legal action for the recovery of improper deductions.
- Lastly, in accordance with Act No. 27806, as amended by Act No. 27927, the Act on transparency and access to public information, this institution will publish a list of all trade union members, as reported by the representative of each union, in the official periodical of ESSALUD.

1131. The complainant organization finds these forms of registration for the deduction of trade union dues from workers' wages to be in violation of trade union rights.

C. The Government's reply

1132. In its communication of 10 January 2005, the Government states that the organization SINACUT was entered onto the register of trade union organizations on 2 July 2004, and enjoys full legal personality. Thus, the union can oppose this acquisition of legal personality for reasons deemed appropriate by Health Social Security. The Government highlights the fact that the state of affairs to which the complainant objects, in citing the 1 July 2004 letter from Health Social Security, has since been altered with the registration of the complainant on 2 July 2004. With reference to the contents of the letter in question, the Government explains that it is not for the employer to verify fulfilment of the legal requirements for the establishment of trade unions in the public services; that is the duty of the registration authority.

D. The Committee's conclusions

1133. *The Committee observes the complainant's allegation that Health Social Security (ESSALUD) does not recognize the complainant (SINACUT ESSALUD), as well as the allegations of excessive requirements for the deduction of trade union dues from wages.*

1134. *With regard to the first allegation, the Committee notes that it emerges from the allegations and the Government's reply that the refusal to recognize the complainant organization on the part of ESSALUD (on the basis of a claim by ESSALUD that the union did not meet the legal minimum membership required by section 9 of Supreme Decree No. 003-82-PCM for public departments, of 20 per cent of the workers), as stated in the letter of 1 July 2004, related to a legal situation that has since changed, since on 2 July of that year, the competent authority entered the complainant on the register of trade unions. The Committee is satisfied to note this information. The Committee, however, requests the Government, in consultation with the employers' and workers' organizations concerned, to take the necessary measures so as to avoid obstacles to the establishment of trade unions in the public sector and to keep it informed in this regard.*

1135. *As regards the allegation concerning the requirements made by ESSALUD to the union for the deduction of trade union dues from workers' wages, the Committee observes that the Government has not sent its observations on this matter. In respect of such requirements as the demand that the union provide a copy of a worker's identity document and her/his membership card (for new members), a list of members, an affidavit by the General-Secretary of the union stating the veracity of the list of members and a copy of an affiliated worker's request to leave the union, the demand that a worker leave one union on joining*

another and the requirement for ESSALUD to publish the list of members in its official periodical, the Committee considers that all these requirements combine to violate the principles of freedom of association and underlines that, in deducting trade union dues from wages, ESSALUD should restrict itself to requesting evidence for members' affiliation and disaffiliation. Furthermore, as regards ESSALUD's plan to publish the list of trade union members in its official periodical, the Committee finds this practice particularly unacceptable; it has nothing to do with the deduction of trade union dues and, moreover, violates the privacy of union members. Under these circumstances, the Committee requests the Government to take steps to ensure that health and social security authorities comply with the criteria laid down in respect of the deduction of trade union dues from wages and to keep it informed of all measures taken in this respect.

The Committee's recommendations

1136. 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 consultation with the employers' and workers' organizations concerned, to take the necessary measures so as to avoid obstacles to the establishment of trade unions in the public sector and to keep it informed in this regard.*
- (b) *The Committee requests the Government to take steps to ensure that health and social security authorities comply with the criteria laid down in respect of the deduction of trade union dues from wages and to keep it informed of all measures taken in this respect.*

CASE NO. 2389

DEFINITIVE REPORT

**Complaint against the Government of Peru
presented by
the General Confederation of Peruvian Workers (CGTP)**

Allegations: Anti-trade union acts perpetrated by the enterprise Jockey Club del Perú, in particular the collective removal from their posts of 34 unionized workers including three trade union leaders, with the aim of eliminating the trade union

1137. The complaint is contained in a communication from the General Confederation of Peruvian Workers (CGTP) dated 8 September 2004.

1138. The Government sent its observations in a communication dated 12 January 2005.

1139. Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1140.** In its communication dated 8 September 2004, the General Confederation of Peruvian Workers (CGTP) alleges that in order to break up, destroy the leadership of and eliminate the trade union organization, the enterprise Jockey Club del Perú initiated a collective procedure for financial reasons with the intention of removing from their posts 8 per cent of the permanent workforce (34 workers, including three trade union leaders) and replacing them with temporary workers, contravening Peruvian legislation which states that such collective actions may only be undertaken as a result of technical advances and not owing to financial reasons. Consequently, the enterprise's actions are groundless as they cannot be justified on technical grounds. The complainant organization states that the enterprise is attempting to use the Ministry of Labour in order to secure these objectives.
- 1141.** The CGTP states that it fears that the enterprise, possessing as it does significant financial resources and political influences, will apply pressure in order to obtain a ruling in its favour, for which reason the complainant organization presented this complaint to the Committee on Freedom of Association.

B. The Government's reply

- 1142.** In its communication dated 12 January 2005, the Government states that, through a communication dated 13 August 2004, in accordance with the provisions of article 46 subparagraph (b) of Legislative Decree No. 728, Law on Productivity and Labour Competitiveness, the enterprise Jockey Club del Perú requested the collective termination of the labour contracts of 34 workers for financial reasons, arguing that the number of workers exceeds current needs, with total personnel costs up to May 2004 reaching 3,013,892 new soles and annual personnel costs at 8,438,000 new soles; from 2001 to 2003 the enterprise made a financial loss due to the fall in the number of bets placed at the Club.
- 1143.** According to the Government, the employer submitted an expert report prepared by the firm of auditors Urbizagástegui, Rivas & Asociados Sociedad Civil, the Union of Workers of the Jockey Club del Perú and the Union of Permanent Employees of the Jockey Club del Perú also presented an expert report within the deadline laid down by the law.
- 1144.** The Government states that on 30 September 2004, the Directorate for Dispute Prevention and Resolution issued Directoral Resolution No. 136-2004-DRTPELC-DPSC rejecting the request for the collective termination of the labour contracts on the basis of the reasons provided for the dismissals, which were financial in nature. The Directoral Resolution also found against the complete interruption of work of those workers affected and ordered the immediate resumption of work and the payment of wages not paid during the period of suspension amongst other things, a ruling which was based on the fact that the employer failed to justify the requested measure by not demonstrating that the enterprise's deficit was a consequence of the high cost of employing the staff members in question on the payroll.
- 1145.** Through Directoral Resolution No. 019-2004-MTPE/DVMT-DRTPELC of 18 October 2004, the Regional Labour and Employment Promotion Directorate of Lima-Callao ruled on Appeal No. 0016711, lodged by the Jockey Club del Perú, confirming the rejection of the request for the collective termination of the labour contracts, as well as the immediate resumption of work and the payment of wages remaining unpaid. The National Labour Relations Directorate issued a Directoral Resolution dated 4 November 2004, declaring the appeal for review lodged by the Jockey Club del Perú to be groundless and confirming the decision issued by the court of appeal.

- 1146.** Finally, the Government states that the parties agreed from 16 November 2004 to reinstate in their posts those workers who had been suspended, undertaking to meet in order to reach an agreement on the wages outstanding, according to the document signed by both parties.

C. The Committee's conclusions

1147. *The Committee notes that, in this case, the complainant organization alleges that the enterprise Jockey Club del Perú attempted to remove from their posts 34 unionized workers in order to break up, destroy the leadership of and eliminate the trade union, citing financial reasons for such a move.*

1148. *The Committee notes the rulings issued by the administrative authorities with regard to this case, rejecting the collective termination of the labour contracts for financial reasons and notes with interest the agreement concluded between the Union of Workers of the Jockey Club del Perú and the enterprise Jockey Club del Perú by which the enterprise undertakes from 16 November 2004 to reinstate in their posts those workers who had been suspended and that the parties undertake to reach an agreement on the wages outstanding.*

The Committee's recommendation

1149. *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 2395

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

**Complaint against the Government of Poland
presented by
the Independent and Self-Governing Trade Union NSZZ "Solidarnosc"**

Allegations: the complainant alleges that the management of the Hydrobudowa-6 S.A. discontinued the deduction of trade union fees for the NSZZ "Solidarnosc" trade union in the enterprise and dismissed Sylwester Fastyn and Henryk Kwiatkowski, chairperson and member of the executive committee of the abovementioned trade union respectively, in violation of the relevant legislation. The complainant also alleges that the Government and the judicial authorities have had an indulgent attitude towards these acts of anti-union discrimination and that there have been serious delays in the proceedings concerning the reinstatement of the abovementioned trade union officials

1150. The complaint is contained in a communication from the Independent and Self-Governing Trade Union NSZZ "Solidarnosc" dated 9 November 2004.

1151. The Government replied in a communication dated 24 February 2005.

1152. Poland has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

A. The complainant's allegations

1153. In its communication dated 9 November 2004, the complainant alleges several acts of anti union discrimination in Hydrobudowa-6 S.A. company in the context of a dispute with the NSZZ "Solidarnosc" trade union in the enterprise. In particular, the complainant alleges that industrial relations have been very difficult in the Hydrobudowa-6 S.A. company since September 1999 when the employer withdrew from the enterprise-level collective agreement and stopped negotiations with trade unions because the latter would not accept the planned amendments to the agreement that were highly unfavourable to the workers. Up to the time of the complaint, the employer had not signed a new collective agreement and had been allegedly violating various workers' rights and regulations concerning, inter alia, wages (failure to pay anniversary premiums to 57 workers from June 2000 to the end of 2001 although they were entitled to this reward after 15 years of work according to the collective agreement which was in force at that time; failure to pay the so-called 13th wage, an additional remuneration paid once a year, on the basis of the collective agreement). The enterprise trade union informed the National Labour Inspection about the situation in the enterprise. The Inspection carried out several controls in the enterprise and supported the charges of the trade unions. The complainant attaches three letters of the National Labour Inspection (in Polish) in support of its allegations.

1154. The complainant further alleges that the workers in the Hydrobudowa-6 S.A. company who were members of the NSZZ "Solidarnosc" trade union in the enterprise had expressed their consent for trade union fee deduction from their remuneration parallel to signing the declaration of trade union membership. Thus, the employer was obliged to deduct the fees in accordance with article 33 of the Act of 23 May 1991 on trade unions which requires a written application from the enterprise-level trade union organization as well as the written consent of the workers concerned.

1155. Nevertheless, the employer introduced a new requirement for the workers to sign additional declarations of consent in a letter to the staff dated 3 January 2002. The employer justified the introduction of this requirement by a re-organization of the administrative structure of the enterprise. Specifically, the declarations signed so far were kept by the Financial Department while the new declarations would be kept by the Payments Department. The complainant alleges that although the letter concerned trade union matters, it was directed exclusively to the staff, bypassing the trade union. No information or consultation activities were carried out. On the contrary, the whole action was of a confrontational nature, aimed at discouraging workers from trade union affiliation. The letter clearly mentioned for instance, that a worker does not have to agree on trade union fee deduction. Moreover, the employer introduced a rule that the lack of consent to trade union fee deduction during a period of two weeks would be treated as a refusal of the fee deduction. The complainant attaches a letter of the human resources director dated 18 March 2004 (in Polish) in support of its allegations.

1156. The complainant adds that the reorganization of the employer's administrative structure did not influence the existence of the obligation to deduct trade union fees from the workers' remuneration. A worker's consent was addressed to the employer as a single

entity and was not influenced by the organizational unit which undertook to deal with this matter. The complainant adds that although the National Labour Inspection shared this view in its letter of 26 March 2004, it did not have jurisdiction over the issue of the employer's conformity with the Trade Unions Act, which addresses the issue of fee deduction, and could only point towards the possibility of lodging a complaint with the Public Prosecutor's Office.

- 1157.** Although the complainant informed the Public Prosecutor's Office of the violation, the latter did not qualify the activities of the employer as unlawful and the proceedings were discontinued. According to the complainant, the Public Prosecutor's Office justified its decision by repeating the employer's argument that the requirement of a worker's consent for trade union fee deduction from remuneration is legal. The argument that the workers concerned had already given their written consent was not taken into account. The complaint was therefore dismissed by the criminal court. The complainant attaches the decision of the Warsaw-Praga North District Prosecutor dated 6 September 2002 and the decision of the Warsaw-Praga District Court (Criminal Division) of 29 January 2003 (in Polish).
- 1158.** The complainant further alleges that on 27 February 2002 the employer informed the NSZZ "Solidarnosc" trade union in the enterprise about his intent to proceed with the disciplinary measure of dismissal of Henryk Kwiatkowski, member of the trade union executive committee, due to serious neglect of duty (refusal to work overtime). According to the complainant, Henryk Kwiatkowski had been employed in the enterprise on an unlimited contract since 1976. Because of his position in the trade union committee he was entitled to special protection of his contract on the basis of article 32 of the Trade Unions Act of 23 May 1991 according to which the employer cannot dismiss or terminate the employment of a member of the committee of an enterprise-level trade union organization without the committee's consent.
- 1159.** According to the complainant, the employer invoked two events in justification of the dismissal. First, on 12 February 2002 a group of 11 workers, including Henryk Kwiatkowski, refused to work overtime at the building site, arguing that the weather conditions were very bad and that the delay in works on that day was caused by the unprepared building site due to wrong organization of work.
- 1160.** Second, on 13 February 2002 Henryk Kwiatkowski took part in the General Assembly of the members of the enterprise-level Social Aid Fund which is, according to Polish law, an entity without legal personality created by no less than ten employees of the enterprise in which the Fund is supposed to exist and aims to help its members (employees and pensioners formerly employed in the enterprise) by giving them loans or subsistence allowances according to its statute. A statutory "social supervision" over the Social Aid Fund's activities is performed by trade unions. The meeting was planned to take place after work hours and the employer had been notified about the date and hour of the meeting. Nevertheless, the day before the General Assembly, the employer instructed the group of workers (11 persons) including Henryk Kwiatkowski to perform overtime work at a time which was irreconcilable with the time of the meeting. When he was informed by the workers that they refused to perform overtime work since they planned to take part in the meeting, the employer initially asked one of the members of the Fund's Board to change the time of the meeting, without success, and then agreed with the member of the Fund's Board that the latter would come to the building site in order to give the necessary information to the group of workers who would be deprived of the possibility to take part in the meeting due to overtime. However, in the view of the workers, a meeting with one of the members of the Board was not equivalent to participation in the General Assembly of the Fund since the agenda of the meeting comprised issues of primary importance which required social supervision, such as voting on regulations of the Fund's activities,

evaluation of the activities of the former Board of the Fund and election of the new authorities. In order to accommodate the employer's interests, the workers decided that only four of them would take part in the General Assembly in order to represent the rest of the group. Henryk Kwiatkowski participated in the General Assembly of the Social Aid Fund both as a member of the Fund and as a member of the trade union committee in the enterprise obliged to carry out the social supervision of the Fund's activities.

- 1161.** The complainant adds that although the enterprise trade union did not give its approval to the dismissal of Henryk Kwiatkowski, considering the intention to dismiss him as a repressive measure towards the trade union as a whole, Henryk Kwiatkowski was dismissed on 13 March 2002. Nobody else from the group of workers (11 persons) was dismissed for the events of 12 and 13 February 2002. According to the complainant, it is astonishing that the employer justified the most serious sanction – disciplinary dismissal without notice – simply by the fact that Henryk Kwiatkowski was a trade union official. In particular, in the letter dated 27 February 2002 concerning the intention of disciplinary dismissal without notice of Henryk Kwiatkowski, the employer stated that "Although in the case of an ordinary employee it would be possible to search for special mitigating circumstances for the evaluation of such behaviour, Henryk Kwiatkowski – who is the member of the trade union authorities in the enterprise – consciously abuses the privilege of special protection of the labour contract of a trade union official".
- 1162.** The complainant further alleges that on 18 March 2002 Henryk Kwiatkowski filed a suit to the Warsaw Labour Court, demanding recognition of the dismissal as ineffective. As of September 2004, merely two sittings of the court had taken place and the next sitting was planned to take place on 26 October 2004. According to the complainant, this long delay in the judicial proceedings (2.5 years at the time of the complaint) is in itself a denial of justice. The complainant attaches several documents in Polish in support of its allegations (Cabinet Decree of 19 December 1992 on employees' social aid funds and cooperative saving funds in the enterprise, letter of 27 February 2002 concerning the intention of disciplinary dismissal without notice of Henryk Kwiatkowski and letter dated 29 February 2002 by the trade union concerning its objection to the intention of disciplinary dismissal without notice of Henryk Kwiatkowski).
- 1163.** The complainant adds that one month after the dismissal of Henryk Kwiatkowski, on 30 April 2002, Sylwester Fastyn, chairperson of the NSZZ "Solidarnosc" trade union in the enterprise, was dismissed. His dismissal was based on serious negligence of duty due to "publicly offensive behaviour towards the Board of Directors of the company". Sylwester Fastyn had taken the floor during the General Assembly of the company in order to comment on the management's plans to withdraw the guarantees of the price at which the employees' shares could be bought back and to radically reduce (by more than 15 times) the price of the employees' shares. Sylwester Fastyn had been employed in the Hydromontaż-6 S.A. company on an unlimited contract since 1979. When the enterprise was privatized, the employees of the enterprise became shareholders, as they bought shares for a reduced price. The controlling shares were bought by the enterprise Bilfinger&Berger AG. On 12 April 2002 Sylwester Fastyn took part in the General Assembly of the shareholders of the Hydromontaż-6 S.A. company. The discussion concerned the amendment of the company's statute and in particular, of the guarantees to the shareholders-employees to buy back their shares for a price equal to that paid by Bilfinger&Berger AG to the Treasury at the time of the privatization. According to the amendment presented by the management of the company, these guarantees were supposed to be withdrawn and the price of the shares drop to a few PLN instead of 100 PLN. Sylwester Fastyn asked the following question: "Do the authors of this amendment realize that such proposal will be judged by the employees-shareholders as robbery in broad daylight?" and then added in answering the employer's comments: "Gentlemen, you rob people in broad daylight." Finally, during the discussion on the report of the Supervisory

Board, he asked the question; "Does the Supervisory Board know the course of the dispute that took place between the NSZZ "Solidarnosc" trade union organization in the enterprise and the company's management? In what way does the Supervisory Board intend to counteract this dispute?"

- 1164.** According to the complainant, the Board of the company felt offended by Sylwester Fastyn's comments to such an extent that it informed the trade union about its intention to dismiss Sylwester Fastyn without notice for serious neglect of duty due to "publicly offensive behaviour towards the Board of Directors of the company". Although the trade union expressed its objection to the dismissal, the employer terminated the contract without notice on 30 April 2002. The complainant emphasizes that since Sylvester Sylwester Fastyn was the chairperson of the trade union in the enterprise, the employer was not entitled to terminate his contract without the consent of the trade union. Moreover, the employer tried to justify the most serious sanction against Sylwester Fastyn by his trade union activism by noting that "The behaviour of every employee, and in particular the behaviour of the leader of the trade union organization, cannot interfere with the business of the company" (letter of the president of the Board of Hydrobudowa-6 S.A. company dated 24 April 2004 concerning the intention of disciplinary dismissal without notice of Sylwester Fastyn). Finally, the employer prohibited Sylwester Fastyn, who remained the leader of the trade union in the enterprise as a full-time union officer after his dismissal, to remain in the trade union office "unless in the presence of workers", thus seriously obstructing the trade union's activities.
- 1165.** The complainant alleges that the employer brought a civil lawsuit against Sylwester Fastyn for protection of personal goods and chattels. This groundless action was of a seriously repressive nature and brought about the need to participate for two years in the proceedings. The civil court in its first sitting dismissed the lawsuit although this happened only in 2004. The employer lodged an appeal.
- 1166.** The National Labour Inspector initiated proceedings before the Warsaw District Court (Criminal Division) for an offence of article 281, item 3, of the Criminal Code, that is, termination of the labour contract without the consent of the enterprise-level trade union. The Court passed a sentence after a year, on 27 August 2003, judging the president of the Board of Hydrobudowa-6 S.A. company guilty of unlawful termination of the contract of Sylwester Fastyn. The President of the Board appealed. The Court of Appeal upheld the sentence and adjudged a fine, one year and a half after the dismissal of Sylwester Fastyn.
- 1167.** The complainant adds that on 8 May 2002 Sylwester Fastyn brought a lawsuit before the Warsaw Labour Court claiming reinstatement. On 10 July 2002, the employer requested the suspension of the proceedings until the abovementioned decision of the Criminal Court. The Labour Court granted the application. After the appeal of Sylwester Fastyn against this decision, the court of second instance ordered the revival of the proceedings. However, the abovementioned actions (civil lawsuit for protection of personal goods and chattels and criminal proceedings) caused the lawsuit on reinstatement to be still pending.
- 1168.** The complainant attaches various documents in Polish in support of its allegations (letter dated 24 April 2004 by the employer concerning the intention of disciplinary dismissal without notice of Sylwester Fastyn, letter dated 26 April 2002 by the trade union concerning its objection to the intention of disciplinary dismissal without notice of Sylwester Fastyn, Decision of the Public Prosecutor's Office of 6 September 2002 and Decision of the Warsaw Court of Appeal (Criminal Division) of 22 January 2004).
- 1169.** The complainant concludes by emphasizing that, although the above acts were a result of anti-union discrimination for trade union activities aimed at preventing violations of workers' rights by the employer, the Public Prosecutor's Office did not recognize the

employer's actions as anti-union discrimination (although the Criminal Court subsequently recognized that Sylwester Fastyn had been dismissed unlawfully – see above). The complainant emphasizes that decisions to discontinue proceedings in cases of anti-union discrimination, concerning non-deduction of trade union fees or dismissal of trade union officials without the required consent of the trade union concerned, is a daily practice in Poland in recent years. Even though an employer's act is recognized as an offence, the proceedings are often discontinued because of the act's "minor social harmfulness". Nevertheless, the complainant adds, the non-deduction of trade union fees constitutes a serious obstacle for trade unions which have to be properly protected in such cases. The complainant adds that the line of argumentation according to which the behaviour of trade union officials is supposed to be in accordance with higher requirements as to "dignity" or "respect for the priority of the company's business" than in the case of ordinary workers (as in the case of the arguments used by the employer against Henryk Kwiatkowski and Sylwester Fastyn) reflects the general atmosphere of tolerance for acts of anti-union discrimination in the case law of the Public Prosecutor's Office in Poland. Moreover, the delays of the labour court proceedings concerning reinstatement in case of unlawful dismissal of trade union officials are reprehensible. The above trends – i.e., indulgent attitude towards anti-union discrimination and serious delays in proceedings concerning reinstatement in case of unlawful dismissal – of which the situation in the Hydrobudowa-6 S.A. company is but an example– constitute serious threats for the rights guaranteed in Conventions Nos. 87 and 98.

B. The Government's reply

- 1170.** In its communication dated 24 February 2005, the Government indicates first, with regard to the termination of the collective agreement in the enterprise, that according to article 241 of the Labour Code, in case of termination of a collective agreement, the current agreement shall remain in effect until a new one is concluded, unless the parties declare that they do not intend to conclude any such new agreement. The termination of a company collective agreement by the employer obliges him to start negotiations on concluding a new agreement, if the trade union has made such a demand (article 241, paragraph 3, clause 3). Thus, the duty relates to starting negotiations, not to concluding an agreement. As it follows from the complaint, the employer did commence negotiations, which, however, failed to lead to the conclusion of a new agreement. The fact that the collective agreement remained in force after it had been terminated, meant that the employer was obliged to pay to the employees the benefits provided for in the said agreement. However, the situation changed after a decision passed by the Constitutional Court on 26 November 2002 pursuant to which article 241, paragraph 4, of the Labour Code had lost its binding effect. This means that the employer is not bound by the provisions of an enterprise collective agreement after it has been terminated. The employer is bound, however, by the labour- and remuneration-related conditions provided for in the said agreement, until the termination period expires.
- 1171.** With regard to the deduction of trade union fees, the Government indicates that, pursuant to article 33 of the Trade Unions Act of 23 May 1991, the employer is obliged to deduct trade union fees from the employee's wages if two conditions are fulfilled: the trade union must submit a written application and the employee must provide the employer with a written authorization to deduct the declared amount of the fees. Failure of the employer to meet the above obligation may result in the imposition of a fine or the limitation of liberty (article 35, paragraph 1, clause 4, of the Act). Such penalties are imposed in the course of penal proceedings.
- 1172.** With regard to the specific action undertaken by the law enforcement authorities when the employer terminated the deduction of trade union fees in this case, the Government indicates that upon receiving a notice from the union concerning the commitment of a

crime consisting in violating the rights of employees in Hydrobudowa-6 S.A. company, the Warsaw Praga North District Prosecutor conducted an investigation that was concluded with a decision, dated 6 September 2002, to discontinue the investigation due to the lack of statutory attributes of a prohibited act. The aforementioned decision was appealed against by the Mazowsze Region NSZZ "Solidarnosc" Company Committee No. 1771. The Warsaw District Prosecutor decided that the appeal was unjustified, and referred it to the Warsaw-Praga District Court. By means of its decision dated 29 January 2003, the District Court rejected the appeal and sustained the verdict issued by the Warsaw-Praga District Court. This procedurally exhausted the available means of recourse and the Prosecutor's decision was examined by an independent court, in compliance with due process principles. The decision of the District Court and its justification indicate that the Court has not found any reasons to question the prosecutor's handling of the case. Irrespective of the said decision, upon application by the NSZZ "Solidarnosc" trade union in the enterprise to renew the discontinued proceedings, the Warsaw Appellate Prosecutor examined the case file and ordered that the necessary procedural actions be undertaken to collect evidence so as to verify the circumstances justifying the potential issuing of a new decision to renew the discontinued proceedings. Having performed the actions ordered, i.e., having collected additional documents and having heard the witnesses, the District Prosecutor acknowledged that no circumstances existed to renew the validly discontinued proceedings. His position was shared by the Warsaw District Prosecutor. The present complaint, which was notified to the Minister of Justice in order to prepare the Government's response, was considered as a subsequent application for renewal of the discontinued proceedings. If no new circumstances have taken place, the plaintiffs will be notified of the result of the file review carried out within the framework of the procedural supervision.

- 1173.** With regard to the dismissal of the chairperson and a member of the trade union executive committee, the Government indicates that, according to the legal provisions in force when the employment contracts of trade union officials are terminated, the employer can terminate or provide a notice of termination of their employment relationship, provided that approval of the executive committee of the trade union in the enterprise has been obtained. If the procedure is not complied with, the employee can seek justice in a labour court. As far as the presence of a trade union official who is not an employee of a given company on the said company's premises is concerned, relevant arrangements should be made between the employer and the trade union organization.
- 1174.** As regards the action undertaken by the law enforcement authorities on the dismissal of Sylwester Fastyn, Chairperson of the NSZZ "Solidarnosc" trade union in the enterprise, the Government indicates that, in its decision of 22 January 2004, the Warsaw District Court (Criminal Division) declared Gregor Sigmund Sobisch (the Chairperson of the Board of Directors of the Hydrobudowa-6 S.A. company) guilty of gross violation of legal provisions and imposed upon him a penalty of PLN 1,000 for terminating on 30 April 2002 the employment contract of Sylwester Fastyn without notice and despite the lack of the prior consent of the trade union committee.
- 1175.** On 5 June 2002, a lawsuit for the protection of personal goods and chattels was filed in the Warsaw District Court by Mr. Gregor Siegmund Sobisch and others against Sylwester Fastyn. In its decision dated 30 March 2004, the Warsaw District Court rejected the lawsuit, having conducted ten hearings, and having interviewed 13 witnesses and parties. Then, after an appeal had been filed by the plaintiff, the case was examined by the Court of Appeal which dismissed the appeal in its decision of 9 December 2004. Unlike what is stated in the complaint, the Court did not dismiss the claim immediately, during the first hearing, without collecting sufficient evidence.

- 1176.** Mr. Sylwester Fastyn filed his suit for reinstatement to work on 7 May 2002. On 10 July 2002 an explanatory meeting was held, during which the defendant's counsel put forward a motion to suspend the proceedings until the abovementioned civil case for the protection of personal goods and chattels and the penal case for the violation of labour law provisions were concluded. The District Court approved the said motion and suspended, by means of its decision dated 3 February 2003, the proceedings until the aforementioned cases were concluded. The District Court overruled, by means of its decision dated 30 June 2003, an appeal by the plaintiff.
- 1177.** Upon the examination of the complaint by the criminal court, the case file was returned to the District Court on 12 September 2003, with the aim to continue the proceedings. During a hearing scheduled for 16 March 2004, the parties' counsels were obliged to submit motions as to evidence within a 21-day period, or they would not be examined. During the next hearing held on 14 October 2004, the court heard five witnesses and adjourned the proceeding until 8 November 2004. Four more witnesses were summoned for the new hearing. During the hearing held on 8 November 2004, the Court heard two witnesses and adjourned the proceedings until 6 April 2005. Six more witnesses and the president of the Board of the defendant company would be heard at that time. The Government states that considering the above, one can assume that the proceedings will be concluded at the aforementioned date. The Government indicates that the proceedings' length was significantly influenced by the appeal procedure concerning the suspension of the proceedings, and by long intervals between individual hearings.
- 1178.** With regard to the dismissal of Henryk Kwiatkowski, member of the trade union executive committee, the Government indicates that the action for reinstatement to work, filed by Henryk Kwiatkowski, was registered by the Warsaw-Praga District Court on 18 March 2002. By means of the Court's decision of 9 September 2002, the proceedings were suspended, as the plaintiff had failed to assume, within the period of time specified by the court, a standpoint with regard to the defendant's answer to the lawsuit. Despite the fact that the copy of the decision to suspend the proceedings was delivered to him along with the notification about the measures of appeal, the plaintiff failed to submit his complaint. Then, by means of its decision of 28 November 2002, the District Court refused to reinitiate the suspended proceedings, as requested by the plaintiff in his letter of 9 October 2002. The plaintiff has also failed to file an appeal against the said decision.
- 1179.** The Government adds that by means of a decision of 24 January 2003 the Court decided to reinitiate the suspended proceedings. The hearing date was scheduled for 6 June 2003. One witness was heard during that hearing. The Court gave up hearing two remaining witnesses, justifying the decision by the fact that the judge was not well. The hearing was adjourned without specifying the date of the subsequent meeting. The relevant Department's chairperson issued a decision on 24 June 2003 by means of which the case was submitted for examination to an assistant judge, for whom a new division was being established. The assistant judge resigned several months later, without holding any hearings in the case in question. As a result, a new judge had to be appointed. After the change, a new hearing date was scheduled for 20 May 2004. On that day, the Court heard three witnesses and adjourned the meeting until 9 March 2005.
- 1180.** The Government notes that the proceedings in this case were lengthy mainly due to the fact that they were suspended between 9 September 2002 and 24 January 2003. The duration of the trial was also impacted upon by long intervals between individual hearings. It has to be kept in mind that the plaintiff, despite being properly instructed, failed to appeal against the decision on suspending the proceedings, and against the decision to refuse to reinitiate the suspended proceedings.

- 1181.** The Government also points out that long intervals between individual hearings are common in other cases examined by the Warsaw-Praga District Labour Court. The situation is caused due to a large number of incoming cases and a large number of cases from previous years which still await examination. These circumstances, although justifying the lengthy nature of the proceedings that have been in progress for several years, should not exist. Therefore, in order to prevent further extension of the legal proceedings, the Minister of Justice ordered that the cases of Mr. Sylwester Fastyn and Mr. Henryk Kwiatkowski be supervised by the Common courts' Department. The supervision means that monthly reports need to be submitted by the Courts on any actions undertaken with regard to the cases in question. Any unjustified delay in the proceedings results in disciplinary penalties. The above means in practice that the cases covered by the Common Courts Department's supervision are sped up.
- 1182.** The Government concludes by expressing the hope that the actions undertaken by the Ministry of Justice and in particular the covering of the cases in question with a supervision procedure, will facilitate their prompt conclusion, will make the law enforcement authorities sensitive to cases related to trade union protection and will contribute to the observance of freedom of association regulations in Poland.

C. The Committee's conclusions

- 1183.** *The Committee notes that this case concerns allegations that the management of the Hydrobudowa-6 S.A. company discontinued the deduction of trade union fees for the NSZZ "Solidarnosc" trade union in the enterprise and dismissed Sylwester Fastyn and Henryk Kwiatkowski, chairperson and member of the executive committee of the abovementioned trade union respectively, in violation of the relevant legislation. The complainant also alleges that the Government and the judicial authorities have had an indulgent attitude towards these acts of anti-union discrimination and that there have been serious delays in the proceedings concerning the reinstatement of the abovementioned trade union officials.*
- 1184.** *The Committee notes that, according to the complainant, several acts of anti-union discrimination took place in the Hydrobudowa-6 S.A. company in the context of a dispute with the NSZZ "Solidarnosc" trade union in the enterprise which started in September 1999 when the employer withdrew from the enterprise-level collective agreement and stopped the negotiations with the trade union because the latter would not accept the planned amendments to the agreement.*
- 1185.** *The Committee takes note of the Government's observations with regard to the termination of the collective agreement in the enterprise, to the effect that negotiations between the parties failed to lead to the conclusion of a new collective agreement and that the employer is not bound by the provisions of an enterprise collective agreement after it has been terminated, but is bound by the labour- and remuneration-related conditions in the agreement until the termination period expires. The Committee also notes from the text of the decision of the Warsaw-Praga North District Prosecutor which is attached to the complaint, that the employer finally reimbursed the workers for certain premiums and rewards due under the collective agreement which were not paid in time due to the difficult financial condition of the company.*
- 1186.** *The Committee further notes that the complainant alleges the non-deduction of trade union fees since January 2002 when the employer introduced a requirement for the workers to sign a declaration (in addition to the one which they had already signed when they joined the union) giving their consent to the deduction. The employer allegedly justified this requirement by an administrative reorganization of the enterprise. In particular, the declarations signed so far were kept by the Financial Department while the new*

declarations would be kept by the Payments Department. The employer moreover allegedly introduced this new requirement without any consultation with the union and in an allegedly confrontational manner, stating clearly in the relevant letter that a worker does not have to agree to trade union fee deduction and considering that a two-week delay in providing written consent is equivalent to a refusal. When the complainant informed the Public Prosecutor's Office of the violation, the latter failed to qualify the activities of the employer as unlawful and the judicial proceedings were discontinued without taking into account the workers' argument that they had already given their written consent to the deduction.

- 1187.** *The Committee notes from the Government's response that article 33 of the Trade Unions Act of 1991 contains an obligation for the employer to deduct trade union fees where the trade union has submitted a written application and the employee has provided a written authorization to this effect; failure by an employer to meet this obligation is punishable by a fine or the limitation of liberty according to article 35 of the Act. However, in the case at hand, the Warsaw-Praga North District Prosecutor found that the statutory attributes of the prohibited act had not been fulfilled and decided to discontinue the investigation. This decision was confirmed by the Warsaw-Praga District Court and the Warsaw Appellate Prosecutor. The present complaint was considered as a subsequent application for renewal of the discontinued proceedings.*
- 1188.** *Although the Committee takes due note of the fact that the decision of the Warsaw-Praga North District Prosecutor to discontinue the investigation on the termination of the deduction of trade union fees has been confirmed by further judicial instances, it must also observe that neither the text of the decision nor the Government's response indicate the grounds justifying the unilateral termination of this facility, which had allegedly been available in the past on the basis of written authorizations provided in accordance with the law. The Committee recalls that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 435]. The Committee also notes that the reasons allegedly put forward by the employer for requiring a new written authorization for the deduction of trade union fees, namely, that the new authorizations would be treated by the Payments Department instead of the Financial Department, are not convincing at first sight since they concern an issue which is proper to the employer and should not influence in any way the validity of the authorizations which were previously given by the trade union members. Finally, with regard to the allegedly unilateral and confrontational manner in which this requirement was introduced, the Committee recalls that attempts by employers to persuade employees to withdraw authorizations given to a trade union could unduly influence the choice of workers and undermine the position of the trade union, thus making it more difficult to bargain collectively which is contrary to the principle that collective bargaining should be promoted [see **Digest**, op. cit., para. 766]. Noting that the check-off facility in the Hydromonta-6 S.A. company has been allegedly unilaterally modified since January 2002, the Committee requests the Government to intercede with the parties (either in the framework of the renewal of the discontinued proceedings or otherwise) with a view to re-establishing the previously available check-off facility and to keep it informed of progress made in this respect.*
- 1189.** *The Committee notes that the complainant further alleges that: (1) on 13 March 2002 the employer dismissed without notice Henryk Kwiatkowski, member of the trade union's executive committee, on the ground that his refusal to work overtime in order to perform trade union activities constituted a serious neglect of duty; (2) on 30 April 2002 the employer dismissed without notice Sylvester Fastyn, chairperson of the NSZZ "Solidarnosc" enterprise union on the ground that the statements he made during the*

General Assembly of the shareholders of the Hydrobudowa-6 S.A. company were a public offence to the Board of Directors and constituted a serious neglect of duty; (3) both dismissals were carried out without the trade union's approval and despite its objections, contrary to the requirements of article 32 of the Trade Unions Act of 1991; (4) the Public Prosecutor's Office did not recognize the employer's actions as anti-union discrimination (although the Criminal Court subsequently recognized that Sylwester Fastyn had been dismissed unlawfully).

- 1190.** *The Committee notes that the Government indicates that, according to the legal provisions in force when the employment contracts of the trade union officials are terminated, the employer can terminate or provide a notice of termination of their employment relationship, provided that approval of the executive committee of the trade union in the enterprise has been obtained. If the procedure is not complied with, the employee can seek justice in a labour court.*
- 1191.** *The Committee draws the Government's attention to Convention No. 135 and Recommendation No. 143 concerning the protection and facilities to be afforded to workers' representatives in the undertaking, adopted by the International Labour Conference in 1971, in which it is expressly established that workers' representatives in the undertaking should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as workers' representatives or on union membership, or participation in union activities in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements [see Digest, op. cit., para. 732]. One of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see Digest, op. cit., para. 724]. The Committee expresses regret at the dismissal of Sylwester Fastyn and Henryk Kwiatkowski, respectively chairperson and member of the executive committee of the NSZZ "Solidarnosc" trade union in the Hydrobudowa-6 S.A. company, which was carried out contrary to the law in respect of the procedures to be followed for dismissal of trade union officials.*
- 1192.** *With regard to the progress of the cases of Henryk Kwiatkowski and Sylwester Fastyn before the competent tribunals, the Committee notes that according to the complainant: (1) although Henryk Kwiatkowski filed a lawsuit to the Warsaw Labour Court on 18 March 2002, demanding recognition of the dismissal as ineffective, merely two sittings of the court had taken place at the time of the complaint leading to a long delay of 2.5 years in the judicial proceedings; (2) the proceedings brought by Sylwester Fastyn in order to obtain reinstatement are still pending since 8 May 2002 (7 May 2002 according to the Government) although on 27 August 2003 the Warsaw District Court (Criminal Division) found the employer guilty of unlawful termination of the contract of Sylwester Fastyn and imposed a fine on the employer.*
- 1193.** *The Committee notes that according to the Government: (1) the long delay in the proceedings brought by Henryk Kwiatkowski was mainly due to the long intervals between hearings and the fact that the proceedings were suspended between 9 September 2002 and 24 January 2003 as the plaintiff had failed to assume a standpoint with regard to the defendant's answer to the suit within the deadlines specified by the Court and then failed*

to lodge an appeal within the legal deadlines, despite being properly instructed to do so; in spite of the above, the courts finally decided to reinstate the suspended proceedings on 24 January 2003; (2) as for Sylwester Fastyn, the length of the proceedings was justified by their suspension and by long intervals between individual hearings; in particular, the suit he filed for reinstatement on 7 May 2002 was suspended until the conclusion of a civil lawsuit filed by the employer for protection of personal goods and chattels as well as penal proceedings for unjustified dismissal (in this latter case, the Warsaw District Court (Criminal Division) found the employer guilty of gross violation of the legal provisions on 22 January 2004 and imposed a fine of PLN 1,000 for terminating the contract of Sylwester Fastyn without notice and despite the lack of the prior consent of the enterprise trade union); the proceedings recommenced as of 12 September 2003 and were expected to be concluded during a hearing which had been scheduled for 6 April 2005; (3) in order to prevent a further extension of the legal proceedings in this case, the Minister of Justice ordered that the cases of Sylwester Fastyn and Henryk Kwiatkowski be supervised by the Common Courts' Department so that monthly reports may indicate the actions undertaken with regard to the case in question and any unjustified delay in the proceedings may result in disciplinary penalties.

- 1194.** *While taking due note of the Government's statement that it has adopted measures to avoid any further delay in the proceedings initiated by Sylwester Fastyn and Henryk Kwiatkowski, the Committee must also observe that these cases have been pending since April and March 2002 respectively. The Committee recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned. Justice delayed is justice denied [see Digest, op. cit., paras. 105 and 749]. The Committee expects that the measures now taken by the Government will effectively speed up the judicial proceedings initiated by Sylwester Fastyn and Henryk Kwiatkowski for reinstatement and the recognition of the dismissal as ineffective respectively, and requests the Government to keep it informed of the progress of the proceedings as well as their final outcome.*
- 1195.** *The Committee further notes that, according to the complainant, the employer prohibited Sylwester Fastyn, who remained the chairperson of the trade union in the enterprise as a full-time union officer after his dismissal, to remain in the trade union office "unless in the presence of workers", thus seriously obstructing the trade union's activities.*
- 1196.** *The Committee notes that the Government answers this allegation by indicating that, where the trade union official is not an employee of a given company, relevant arrangements should be made between the employer and the trade union organization.*
- 1197.** *The Committee observes that the dismissal of Sylwester Fastyn, chairperson of the NSZZ "Solidarnosc" trade union in the enterprise, for which the employer has already been sentenced and fined, as well as the long delay in the reinstatement proceedings, should not hinder the activities of the trade union by enabling the employer to prohibit Sylwester Fastyn's presence in the trade union office unless he is accompanied by an employee. Convention No. 135 calls on ratifying member States to supply such facilities in the undertaking as may be appropriate in order to enable workers' representatives to carry out their functions promptly and efficiently, and in a manner as not to impair the efficient operation of the undertaking concerned [see Digest, op. cit., para. 950]. The Committee requests the Government to intercede with the parties with a view to enabling Sylwester Fastyn, who has kept his post as chairperson of the trade union, to exercise his trade union activities without any further interference by the employer, in particular, to be*

able to remain in the trade union office without having to be accompanied by an employee. The Committee requests to be kept informed in this respect.

- 1198.** *The Committee further notes that according to the complainant the situation in the Hydrobudowa-6 S.A. company is but an example of an indulgent attitude towards anti-union discrimination on behalf of the authorities and serious delays in proceedings concerning reinstatement in case of unlawful dismissal. According to the complainant, decisions to discontinue proceedings concerning anti-union discrimination are daily practice; even though an employer's act is recognized as an offence, the judicial proceedings are discontinued due to the act's "minor social harmfulness".*
- 1199.** *The Committee notes the Government's statement that the problem of delay in the administration of justice is a generalized one and is due to a large number of incoming cases as well as cases from previous years which still await examination. The Committee observes from the Government's response that in the case of Sylvester Fastyn for instance, the intervals between the court hearings reached seven months on two occasions. In the case of Henryk Kwiatkowski the intervals reached 11 months on one occasion and ten months on another. The Committee finally observes that the Government has not provided a response to the allegation that it is daily practice to discontinue judicial proceedings for anti-union discrimination, even though an employer's act is recognized as an offence, due to the act's "minor social harmfulness".*
- 1200.** *The Committee emphasizes that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by speedy procedures to ensure that effective protection against such acts is guaranteed. The Government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned. The existence of legislative provisions prohibiting acts of anti-union discrimination is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice [see Digest, op. cit., paras. 738, 739 and 742.] The Committee therefore requests the Government to take all necessary measures as soon as possible with a view to establishing procedures which are prompt, impartial and considered as such by the parties concerned, in order to ensure that trade union officials and members have the right to an effective remedy by the competent national tribunals for acts of anti-union discrimination. The Committee requests to be kept informed of developments in this respect.*

The Committee's recommendations

- 1201.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *Noting that the check-off facility in the Hydrobudowa-6 S.A. company has been allegedly unilaterally modified since January 2002, the Committee requests the Government to intercede with the parties (either in the framework of the renewal of the discontinued proceedings or otherwise) with a view to re-establishing the previously available check-off facility and to keep it informed of progress made in this respect.*

- (b) *The Committee expects that the measures now taken by the Government will effectively speed up the judicial proceedings initiated for reinstatement by Sylwester Fastyn, chairperson of the NSZZ "Solidarnosc" trade union in the Hydrobudowa-6 S.A. company, and for recognition of dismissal as ineffective by Henryk Kwiatkowski, member of the executive committee of the trade union, and requests the Government to keep it informed of the progress of the proceedings as well as their final outcome.*
- (c) *The Committee requests the Government to intercede with the parties with a view to enabling Sylwester Fastyn, who has kept his post as chairperson of the trade union, to exercise his trade union activities without any further interference by the employer, in particular, to be able to remain in the trade union office without having to be accompanied by an employee. The Committee requests to be kept informed in this respect.*
- (d) *The Committee requests the Government to take all necessary measures as soon as possible with a view to establishing procedures which are prompt, impartial and considered as such by the parties concerned, in order to ensure that trade union officials and members have the right to an effective remedy by the competent national tribunals for acts of anti-union discrimination. The Committee requests to be kept informed of developments in this respect.*

CASE NO. 2334

DEFINITIVE REPORT

**Complaint against the Government of Portugal
presented by
the Union of Independent Trade Unions (USI)**

Allegations: The complainant objects to its exclusion from the Economic and Social Council (CES) and the Permanent Commission for Social Partnership (CPCS), along with the legislative provisions that mention by name the trade unions which are members of these bodies

- 1202.** The complaint is contained in a communication from the Union of Independent Trade Unions (USI) dated 10 March 2004.
- 1203.** The Government sent its observations in a communication dated 9 February 2005.
- 1204.** Portugal 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

- 1205.** In its communication of 10 March 2004, the Union of Independent Trade Unions (USI) states that it currently brings together eight trade union organizations from various sectors of the economy (banking, energy, telecommunications, healthcare, public works and railways) across the whole country, representing some 50,000 workers. The USI states that it constitutes a confederation which is significantly representative within the national arena.
- 1206.** The USI objects to its exclusion from the Economic and Social Council (CES) and the Permanent Commission for Social Partnership (CPCS), which are national bodies for social partnership. The complainant states that act no. 108/91 of 17 August expressly provides for the presence of three representatives of the General Confederation of Portuguese Workers (CGTP-IN) and three representatives of the General Union of Workers (UGT) on the CPCS, and states that eight representatives of representative workers' organizations shall participate in the CES.
- 1207.** The USI states that it has attempted, through consultations with all the parliamentary groups, to have Act No. 108/91 of 17 August amended to delete the express reference to the CGTP-IN and the UGT, allowing other confederations access to the Permanent Commission for Social Partnership (CPCS), but that it has not succeeded.
- 1208.** Specifically, the USI states the following with regard to the content of Act No. 108/91 of 17 August: (1) section 3.1(d) states that eight representatives of representative workers' organizations, appointed by their respective confederations, which for this purpose shall be selected by the chairman of the CES, shall be members of the CES; (2) section 6.1(c) states that the CPCS shall be one of the constituent bodies of the CES and that its mandate shall be to promote dialogue and cooperation between the social partners and to contribute to developing policies on prices and incomes, employment and vocational training; and (3) section 6.2(ii) and (iii) states that the CPCS shall include three management-level representatives of the CGTP-IN, one of whom shall be the coordinator, and three management-level representatives of the UGT, including its general secretary.
- 1209.** Lastly, the complainant states that, bearing in mind the fact that it is a representative trade union confederation, it is entitled to be included in the CES and CPCS, but that this is prevented by Act No. 108/91 in the case of the CPCS and, in the case of the CES, by a lack of invitation from the chairman. According to the USI, this exclusion violates freedom of association and involves a restriction which contravenes the provisions of Convention No. 87.

B. The Government's reply

- 1210.** In its communication of 24 January 2005, the Government states, with regard to membership of the Permanent Commission for Social Partnership (CPCS), that the complainant's statement does not reflect the provisions of current legislation. In fact, Act No. 12/2003 of 20 May amended section 9.2 of Act No. 108/91 of 17 August and established the following composition for the CPCS: four Government members appointed by the Prime Minister's office; two management-level representatives of the General Confederation of Portuguese Workers (CGTP-IN); two management-level representatives of the General Union of Workers (UGT); the president of the Confederation of Portuguese Agriculture Workers; the president of the Confederation of Commerce and Services of Portugal; the president of the Portuguese Confederation of Industry; and the president of the Portuguese Confederation of Tourism.

- 1211.** According to the Government, no guarantee of participation in social partnership bodies is included in Convention No. 87.
- 1212.** With regard to the composition of the Economic and Social Council (CES), the Government states that, among others, there are eight representatives of representative workers' organizations on the Council. These representatives are appointed by representatives of the CPCS, and the posts are given to four representatives of the CGTP-IN and four representatives of the UGT.
- 1213.** The Government states that the selection of trade union confederations to be represented on the CPCS, and consequently the CES, is based on their respective representativity. According to the Government, the CGTP-IN and the UGT are the most representative confederations within the Portuguese trade union structure. The Government states that the USI only represents trade unions, and not federations or unions thereof.
- 1214.** The mandate of the CES and CPCS covers the whole country and all sectors of activity. The generic mandate of the CES is determined by the Constitution and Act No. 108/91 of 17 August. It exists for consultation and cooperation in the area of economic and social policy and participates in drawing up proposals for socio-economic development. The CPCS is responsible for promoting dialogue and cooperation between the social partners and contributing to developing policies on prices and incomes, employment and vocational training. Bearing in mind the mandates of these two institutions, one of the criteria for judging the representativity of workers' organizations for the purpose of participation must be linked to how much of the country and which sectors of activity they cover.
- 1215.** The Government states that national legislation does not expressly mention the objective criteria used to determine the representativity of the workers' and employers' organizations which are members of the CES or CPCS. Despite this, the Government states that there are objective criteria which allow the representativity of the USI to be assessed and compared with that of the CGTP-IN and the UGT. The Government states that: (1) the CGTP represents 45.6 per cent of the Portuguese trade union structure, the UGT 14.2 per cent and the USI 2.6 per cent. The remaining trade union associations do not belong to representative confederations that would enable them to be represented on the CES and CPCS; (2) according to the information available, the USI represents some 18,120 workers. The CGTP and UGT have not reported the number of workers whom they represent, but the area of the country which they cover can be determined by taking into account the number of agreements concluded by these organizations; (3) the unions which constitute the USI are made up of workers in the sectors of gas, water and electricity production and distribution, transport, storage and communications, financial activities, healthcare (administrative workers) and social action; (4) between 1997 and 2004, 2,712 collective agreements were concluded: 1,174 by associations belonging to the CGTP-IN, 1,028 by associations belonging to the UGT, 385 by associations belonging to both the CGTP-IN and the UGT, 63 by associations belonging to the USI and 62 by other associations; (5) all workers' organizations are entitled to participate in preparing labour legislation at the public consultation stage, whether or not they are represented on the CES and CPCS. The CGTP-IN has done so on 14 occasions, the UGT on 11 and the USI on two; (6) with regard to the level of national coverage, according to their statutes, the USI and its member unions cover the whole country, the CGTP-IN covers the whole country and also has several member unions specifically covering the autonomous regions of the Azores and Madeira, and the UGT covers the whole country and has several member unions which cover the autonomous region of the Azores; (7) with regard to sectors of activity covered, the USI only covers gas, water and electricity production and distribution, transport, storage and communications, financial activities with the exception of insurance, and administrative workers in the healthcare sector. The CGTP-IN and UGT cover all sectors of activity.

1216. Lastly, the Government states that, in accordance with the principles of the Committee on Freedom of Association, Portuguese legislation guarantees less representative organizations many rights to defend their members (for example, concluding collective agreements, carrying out union activities at enterprises, taking strike action, participating in the preparation of labour legislation, etc.).

C. The Committee's conclusions

1217. *The Committee observes that the complainant alleges that, although it is a significantly representative confederation at national level, it is prevented from participating in the Economic and Social Council (CES) and the Permanent Commission for Social Partnership (CPCS). The Committee further observes that the complainant objects to the provisions of Act No. 108/91 of 17 August which mention by name the trade union organizations which are members of these bodies.*

1218. *The Committee notes the Government's statements that: (1) the selection of the trade union confederations CGTP-IN and UGT to be represented on the CPCS, and consequently the CES, is based on their respective representativity; (2) the CGTP-IN and the UGT are the most representative confederations within the Portuguese trade union structure (the Government includes information in this regard on the number of members, collective agreements signed, area of the country and sectors of activity covered, etc.); (3) national legislation does not expressly mention the objective criteria used to determine the representativity of the workers' and employers' organizations which are members of the CES or CPCS, but despite this there are objective criteria which allow the representativity of the USI to be assessed and compared with that of the CGTP-IN and the UGT; and (4) Portuguese legislation guarantees less representative organizations many rights to defend their members (for example, concluding collective agreements, carrying out union activities at enterprises, taking strike action, participating in the preparation of labour legislation, etc.). The Committee also notes that, according to the Government, the CGTP-IN represents 45.6 per cent of the Portuguese trade union structure, the UGT 14.2 per cent and the USI 2.6 per cent.*

1219. *Firstly, the Committee notes that, according to the information submitted by the Government, the trade union organizations CGTP-IN and UGT are more representative than the USI (although the Government does not give the number of workers affiliated to the CGTP-IN or UGT, the number of agreements concluded by these organizations is markedly higher than those concluded by the USI). In this regard, the Committee recalls that "the mere fact that the law of a country draws a distinction between the most representative trade union organizations and other trade union organizations is not in itself a matter for criticism. Such a distinction, however, should not result in the most representative organizations being granted privileges extending beyond that of priority in representation, on the ground of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organizations that are not recognized as being among the most representative of the essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87" [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, para. 309]. The Committee therefore considers that the selection in practice of the CGTP-IN and the UGT to be members of the social consultation and cooperation bodies (CES and CPCS) as the most representative organizations, according to the information and figures given by the Government, does not violate the principles of freedom of association. The Committee further considers that neither does the exclusion of the USI from these bodies violate these principles, given its low representativity.*

1220. However, bearing in mind the Government's statement that national legislation does not expressly mention the objective criteria used to determine the representativity of workers' and employers' organizations, the Committee considers that this could give rise to a conflict situation in the future if a workers' organization achieves the same or higher representativity as that enjoyed by the CGTP-IN or the UGT. In this regard, the Committee recalls that it has underlined, on numerous occasions, that pre-established, precise and objective criteria for the determination of the representativity of workers' and employers' organizations should exist in the legislation and such a determination should not be left to the discretion of governments [see *Digest*, op. cit., para. 315]. This being the case, the Committee requests the Government to determine, in consultation with the most representative workers' and employers' organizations, predetermined, precise and objective criteria to evaluate the representativity and independence of workers' and employers' organizations, and that the legislation is modified so that there is no mention by name of the workers' organizations (CGTP-IN and UGT) which shall be members of the CES and CPCS, restricting itself to stating the above criteria, in order to enable representativity to be re-examined if necessary.

1221. 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

1222. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

- (a) The Committee requests the Government to determine, in consultation with the most representative workers' and employers' organizations, predetermined, precise and objective criteria to evaluate the representativity and independence of workers' and employers' organizations, and that the legislation is modified so that there is no mention by name of the workers' organizations (CGTP-IN and UGT) which shall be members of the CES and CPCS, restricting itself to stating the above criteria in order to enable representativity to be re-examined if necessary.
- (b) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case.

CASE NO. 2244

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

**Complaint against the Government of the Russian Federation
presented by
the Russian Labour Confederation (KTR)**

Allegations: The complainant alleges the violation of trade union rights of the Russian Trade Union of Railway Engine Crews (RTUREC) (the KTR's affiliate) and, in particular, lack of consultations with workers' representatives when decisions affecting their social and labour rights are being adopted; refusal to bargain collectively; denial of registration of the newly formed organizations and of the amendments made to the rules of the existing ones; interference of the authorities in trade union activities and violation of the right to draw up their rules in full freedom; ban on strikes; and favouritism towards the other trade union (Rosprofzhel) and discrimination against all other trade unions that exist in the railway transport

1223. The complaint is contained in a communication dated 11 December 2002 from the Russian Labour Confederation (KTR).

1224. The Government forwarded its observations in communications dated 5 September 2003 and 1 March 2005.

1225. 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

1226. In its communication dated 11 December 2002, the KTR alleges the violation of trade union rights of the Russian Trade Union of Railway Engine Crews (RTUREC), the KTR's affiliate.

1227. The KTR states that the RTUREC, representing workers of engine crews of railway transport enterprises of the Russian Federation, was established in January 1992. On the date of the complaint it had the status of an All-Russian union and represented over 3,500 people. Before 1992, for about 70 years there was only one trade union active within railway transport – the Russian Trade Union of Railway Workers and Transport Builders (Rosprofzhel).

1228. The complainant further states that the Ministry of Communication Lines (MCL) is in charge of all railway transport enterprises. The MCL is a federal executive body charged with implementing the state policy in the railway transport, as well as with regulating the economic activities of the railways in the Russian Federation. The KTR submits that as all the directives of the MCL are binding for railway enterprises, it is the MCL that regulates working conditions in these enterprises.

1229. According to the KTR, the emergence of an independent trade union in the railway transport caused an extremely negative reaction on the part of the employers at all levels, from the administration of separate railway transport subdivisions to the MCL officials. The complainant alleges that from the moment the RTUREC was established, it has not been recognized and its actions were hindered by the MCL. In particular, the complainant alleges lack of consultations with workers' representatives on issues affecting their social and labour rights; refusal to bargain collectively; denial of registration of the newly formed organizations and of the amendments made to the rules of the existing ones; interference of the authorities in trade union activities and violation of the right to draw up their rules in full freedom; ban on strikes; and favouritism towards the Rosprofzhel and discrimination against all other trade unions that exist in the railway transport.

Lack of consultations with workers' representatives on issues affecting their social and labour rights

1230. The complainant submits that in accordance with section 11 of the Law on Trade Unions, Their Rights and Guarantees of Activity of 12 January 1996 (further Law on Trade Unions), "drafts of normative legal acts affecting workers' social and labour rights shall be considered and adopted by executive and local municipal bodies with due account of the opinion of the respective trade unions". However, on 8 May 2001, the Government adopted the Programme of the Structural Reform of the Railway Transport, which directly influenced workers' social and labour rights as it provided for a reduction of number of workers, decrease of social expenses, changes in the system of paying wages, etc., without any consultation with the RTUREC despite the numerous appeals to participate at the MCL board dealing with the issues of the structural reform.

1231. The KTR points out that the railway transport enterprises have a practise of consulting only with the Rosprofzhel. Furthermore, once the administration adopts the documents, the RTUREC finds it impossible to get familiarized with these documents.

Refusal to bargain collectively

1232. According to the complainant, the Russian legislation does not assign the role to conclude collective agreements to the most representative trade union, but confers this right to all trade unions. It points out that pursuant to section 6 of the Law on Collective Agreements of 11 March 1992, if there are several workers' organizations at the enterprise, or at the federal, sectoral, professional or other levels, each of them shall be given the right to bargain on behalf of their trade union members or workers they represent. This section also obliges employers to bargain collectively on the issues put forward by trade unions. The complainant alleges that in October-November 1997, several primary trade union organizations of the RTUREC brought forward their demands to the administration of their respective enterprises. However, the heads of the locomotive depots refused to start conciliation procedures, claiming that only the Moscow Railways (MR) could satisfy demands brought by these trade unions. From February 1997 till August 1998, demands were repeatedly sent to the head of the MR together with a proposal to start collective bargaining. Asserting that the MR was not the employer, the MR refused to bargain collectively. The complainant points out that such a problem has never occurred with the

Rosprofzhel. The complainant explains that by its letter of 27 May 1998, the MR administration notified the RTUREC of its refusal to negotiate. The KTR points out, however, that in the same letter, the MR referred to the existence of the collective agreement it negotiated with the Rosprofzhel in 1997. The KTR further states that the Moscow Office of Transport Prosecutor concluded to the illegality of the refusal of the MR administration to bargain collectively and requested the Department of the Settlement of Collective Labour Disputes and the Development of Social Partnership of the Ministry of Labour and Social Development to take measures to settle the dispute. It recognized that the MR represented the interests of the railway transport and had the power to conclude collective agreements. The central interregional body of the Ministry of Labour and Social Development concluded that the MR was competent to address the demands brought by the RTUREC. Seeking to settle the conflict, the RTUREC requested the assistance of the Moscow Tripartite Commission for Regulating Social and Labour Relations. On 27 April 1998, in conformity with section 17 of the Law on the Settlement of Collective Labour Disputes, according to which in the cases where strike is prohibited, the President of the Russian Federation makes the decision concerning the labour dispute within ten days, the union addressed the President of the Russian Federation. The issue was passed over to the Government and then to the MCL for consideration. Seeing no results, the chairpersons of primary trade union organizations once again addressed the President but that did not bring any results either.

- 1233.** Up to the date of the complaint, the RTUREC has not managed to bargain collectively with the railway transport enterprises in order to elaborate and include in the collective agreement provisions reflecting specific working conditions of engine crew workers. The situation is allegedly aggravated by the Rosprofzhel's refusal to form a unified body for the collective bargaining purposes. The complainant states that even in cases where the RTUREC representatives at separate enterprises are able to become members of the commission elaborating collective agreement, the administration accepts to sign the agreement only with the Rosprofzhel.
- 1234.** According to the complainant, the Russian legislation does not provide that sectoral tariff agreements should be concluded by the most representative trade union organization. All All-Russian trade unions and their associations are given the right to conclude such agreements. The RTUREC, in its quality of All-Russian trade union, is therefore guaranteed the right to conclude tariff agreement in transport sector. However, the MCL refuses to negotiate with it referring to the existence of the sectoral tariff agreement concluded with the Rosprofzhel, which covers all workers of the federal railway transport. The complainant alleges that the MCL suggested that the RTUREC formed a unified representative body with the Rosprofzhel. However, the latter did not reply to the numerous proposals of the RTUREC and sectoral tariff agreements for 1998-2000 and 2001-03 were concluded without the RTUREC's participation.

Denial of registration of the newly formed trade unions and of the amendments made to the trade union rules

- 1235.** The complainant explains that the legislation allows trade unions to carry out their activities without being registered with the institutions of justice. Registration is necessary for a trade union to obtain the status of a legal entity. Article 8 of the Law on Trade Unions provides for an obligation for the institution of justice to register trade unions. However, according to the complainant, this norm is virtually ineffective in practise. The KTR claims that the institutions of justice systematically refuse to register the rules of the newly formed organizations of the RTUREC and amendments to the rules of the existing trade unions. The absence of the status of a legal entity often impedes effective protection of workers' interests. In particular, the KTR refers to the following cases of denial of registration:

- the main board of Justice of Moscow has twice denied registration of the Interregional Association of the Trade Unions of Moscow Railways;
 - on 21 April 2000, registration was denied to the territorial organization of the RTUREC of the Moscow Railways; and
 - registration was twice denied to the primary trade union organization of the RTUREC of the Uzlovaya locomotive depot of Moscow Railways.
- 1236.** The KTR submits that the reasons given by the State authorities for denial of registration relate either to the failure to submit all documents for registration within one month from the day the trade union was formed, or to the fact that the internal structure of trade unions is different from the structure provided for in section 3 of the Law on Trade Unions. The KTR states that although section 8 of the Law on Trade Unions provides for one-month period to register a trade union, section 21 of the Law on Non-Profit Associations provides for a three-month period. Moreover, the complainant states that, according to the Law on Trade Unions, a trade union has the right to decide independently whether to register as a legal entity or not, and that the decision to register could be taken at any time. As concerns the internal structure of trade unions, the complainant refers to section 14 of the Law on Non-Profit Associations, which allows non-profit organizations to form such structural subdivisions as branches and representatives. The complainant further states that the list of the documents to be submitted for the registration is provided for in section 8 of the Law on Trade Unions. However, the bodies of the Ministry of Justice requests instead the documents listed in the normative acts of the Ministry of Justice. Finally, the KTR points out that the bodies of the Ministry of Justice, pursuant to the Regulation for Considering Applications for the State Registration of Non-profit Associations, can recommend that the trade union in question eliminates the violations found in its constituent documents. The KTR concludes that it became impossible to register a trade union until the violations are eliminated.

Interference of the authorities in trade union activities and violation of the right to draw up their rules in full freedom

- 1237.** The KTR alleges that existence of legal provisions guaranteeing trade union independence does not guarantee their application in practise. The complainant refers to one example of interference in trade union affairs. It alleges that the administration of the Golutvin permanent way division of the Ramenskoye station of Moscow Railways tried to put pressure on members of the Trade Union of Railways Workers (TURW). After some unsuccessful attempts of the administration to make the union stop its activities, the Prosecutor's Office also begun to put pressure on the union. On 31 July 1998, the Moscow-Ryazan Transport Prosecutor's Office applied to the Ramenskoye People's Court of the Moscow Region requesting to declare the Rules of the TURW of the Golutvin permanent way division null and void. The Court obliged the trade union to make amendments to its Rules. As the result of never-ending pressure on the part of the administration and the law enforcement authorities, the trade union ceased its existence.

Ban on strikes in railway transport

- 1238.** The KTR submits that the Law on the Federal Railway Transport deprives all railway transport workers of their right to strike. This ban concerns all categories of the railway transport workers, irrespective of whether work stoppage would lead to an obvious and inevitable danger to people's lives, their personal safety and to the health of the population. The Law provides for a possibility of imposing a disciplinary action for work stoppage.

1239. As an alternative procedure, the Law on the Order of Settling Collective Labour Disputes provides for an appeal to the President of the Russian Federation who has to reach a decision within ten days. According to the complainant, this procedure is not efficient since in practise, the issues are settled by specific federal bodies, and in the case of railway transport, by the MCL, which, due to its direct interest in the matter, is not capable of settling the collective labour dispute objectively. The complainant refers to a particular case where, in 1997, a collective labour dispute following the employer's refusal to start a collective bargaining, the RTUREC applied to the President requesting him to settle the conflict. However, the appeal was transferred for consideration to the Government and then to the MCL and the Ministry of Labour and Social Development.

Favouritism and discrimination in respect of particular organizations

1240. The complainant submits that despite section 2 of the Law on Trade Unions, which provides for the equality of rights of all trade unions, in reality, this norm is not only unobserved, but the inequality is sanctioned by other legislation which provides individual benefits to the trade union convenient for the MCL. The complainant indicates that the Law on the Federal Railway Transport of 20 July 1995 gives the Government the right to define the order and terms of free use of transport for the workers of the railway transport enterprises and institutions. On 24 June 1996, the Government issued a Decree that gave the right to obtain, for their personal needs, free single tickets to the full-time officials of trade union organizations operating in the federal railway transport. On the basis of this Decree, the MCL adopted the Regulation on Issuing Free Tickets to the Federal Railway Transport Workers. Although several trade unions were active at the federal railway transport, only the Rosprofzhel officials were provided with tickets. The KTR claims that by such a policy, the MCL supported trade union monopoly of the Rosprofzhel. The KTR indicates that the then chairperson of the RTUREC primary trade union applied to the Supreme Court requesting to declare null and void the abovementioned Regulation. The Court rejected the claim, but declared in its decision of 23 June 1997 that "the RTUREC is also a sectoral trade union, i.e. a union operating within one sector and uniting workers by their professional interests. Therefore, officials of this trade union [...] should enjoy the right to free use of transport in case of their domestic and personal needs". At the same time, the Court considered it legal that only the Rosprofzhel officials should be granted the right to free transport. The failure of the administration to provide tickets to the officials of the RTUREC has been repeatedly appealed. In October 1998, the Zheleznodorozhnyi City Court ruled that the refusal to allow free use of transport to the chairperson of the territorial organization of the Moscow Railway of the RTUREC was illegal. However, this ruling was later contested and overruled.

1241. On 22 September 1999, the Government amended the Decree of 24 June 1996. In accordance with the amendments, only the full-time officials of the Rosprofzhel could enjoy the right to free use of transport for their domestic and personal needs. Thus, the officials of the railway transport enterprises received legal grounds to refuse to provide free tickets to the full-time officials of the RTUREC. These changes were appealed in court but without any result. On 21 July 2000, the chairperson of the territorial organization of the RTUREC applied to the Russian Government requesting to amend the Decree so as to repeal the advantages given to one trade union. This application was transferred to the MCL, which did not find any violation of the ILO Conventions. On 26 April 2001, the RTUREC applied to the President of the Russian Federation requesting him to deal with the matter and eliminate the discriminating situation. The matter was passed to the MCL for consideration, but to the date of the complaint there was no answer given to the trade union concerned.

B. The Government's reply

- 1242.** In its communications of 5 September 2003 and 1 March 2005, the Government explains that social and labour relations between employees and their representatives, on one hand, and employers and their representatives, on another, are governed by the Labour Code. The draft version of the Code was discussed by the conciliation commission, which included representatives of All-Russian trade union organizations, All-Russian employers' associations and other public organizations.
- 1243.** The Government further indicates that in accordance with section 29 of the Labour Code, employees can be represented in social partnership by trade unions and their associations, or by other union organizations provided for in the by-laws of the All-Russian trade unions, or, in certain cases defined by law, by other representatives elected by workers at the general assembly (section 31 of the Code). The participation of other representatives alongside representatives of primary trade union organizations is possible only at the enterprise level and for the purposes of collective bargaining, conclusion and amendment of collective agreements, follow up of their implementation, as well as during the exercise of the right to participate in the management of an enterprise and in the investigation of labour disputes between employees and employers.
- 1244.** Where several primary trade unions exist within an enterprise, each of them has the right to be represented in a single representative body created for collective bargaining purposes on the basis of proportional representation. The right to bargain collectively and to sign agreements in the name of all workers is granted to the majority union only in the absence of an agreement to form a single representative body. In this case, minority trade unions retain the right to be represented in the single representative body up to the time of the signing of a collective agreement. This procedure is described in section 37 of the Labour Code.
- 1245.** As concerns higher-level trade unions, section 36(2) of the Labour Code states that unions and their associations have the right to bargain collectively at the level of the Russian Federation, its constituent territory, industry and region. If several unions exist at a particular level, they each have the right to be represented in a single representative body for the collective bargaining purposes on a basis of proportional representation. The right to bargain collectively is granted to the majority union only in the absence of an agreement to form a single representative body. Collective agreements can be concluded to protect specific interests and regulate particular aspects of specific occupations and can be concluded at any level of social partnership.
- 1246.** As regards the disagreements between different trade unions on the question of representation, the Government indicates that this matter is an internal trade union matter in which it should not interfere.
- 1247.** In its communication of 1 March 2005, the Government indicates that as a result of administrative reform, radical changes have taken place in the structure of the transport sector. The Ministry of Transport, which was created by Presidential Decree No. 649 of 20 May 2004, is not a party to sectoral tariff agreements; neither does it monitor the implementation process of such agreements. Reorganization in the federal railways has led to the creation of a single carrier – a commercial organization Open Stock Company “Rossiiskie Zheleznye Dorogi” (OAO RZhD) or Russian Railways, which forms the sole employer in the sector. Moscow Railways (MR) is an affiliate of OAO RZhD. The Government notes that the greatest number of complaints of failure to observe the principles of social partnership were formulated by the RTUREC against the MR. In the Government's opinion, it would be more constructive for the RTUREC to resolve disputes that have arisen at local level by working together with the MR and the OAO RZhD. The

Government further indicates that the first conference of workers of the OAO RZhD was held on 21 October 2004. The delegates approved the General Collective Agreement for 2005, which increases the level of social protection of railway workers. This Agreement is valid for all workers irrespective of their trade union membership. Among other social benefits provided for by the Agreement is a right to have one-day free train ticket for personal use.

- 1248.** Concerning the right to strike, the Government indicates that such a right is recognized by the Russian Constitution. The right to strike as a means of resolving collective labour disputes is permitted under section 409 of the Labour Code. Sections 409-415 regulate the strike action. The Government further indicates that since the decision to declare a strike affects personal rights of every worker, such a decision should be confirmed at every enterprise by an assembly of workers (section 410 of the Code).
- 1249.** Federal legislation lays down procedures and time limits for the presentation of demands, the declaration and the conduct of strike action and requires that a certain minimum level of necessary services be carried out during the strike. Legislation has also been introduced to limit the right to strike for various categories of workers. The purpose of these laws is to minimize the negative effect of a strike on the economy, society's vital activities, the economic activities of the enterprises in question and the position of its workers. The legislation aims to spur workers and their representatives to strive to resolve collective labour disputes through conciliation procedures before declaring strike action.
- 1250.** As concerns the restriction on strike action imposed by the legislation in the transport sector, the Government indicates that these restrictions should not be seen as totally prohibiting strike actions. The Government explains that when a trade union organizes a strike to resolve a collective labour dispute, the organizers have an accompanying obligation to guarantee a minimum level of necessary work (services). In accordance with section 412 of the Labour Code, and Government Decree No. 901 of 17 December 2002, the relevant lists of minimum necessary tasks (services) to be guaranteed during a strike in transport establishments have been compiled in agreement with the national sectoral trade unions and approved by the Ministry of Communication Lines (MCL) (by Order No. 12 of 27 March 2003, registered by the Ministry of Justice on 11 April 2003 as No. 4408) and the Ministry of Transport (by Order No. 197 of 7 December 2002, registered by the Ministry of Justice on 6 January 2004 as No. 5379). Moreover, in order to meet the requirements of labour legislation regulating labour relations in the transport sector, a list of occupations (positions) and duties directly associated with transport is currently being compiled by the newly formed Ministry of Transport. It will help to implement the standards of Federal Act. No. 17-FZ of 10 January 2003 "On rail transport in the Russian Federation", which regulates the procedure of declaring a strike in rail transport unlawful.

C. The Committee's conclusions

- 1251.** *The Committee notes that the complainant in this case alleges the violation of trade union rights of the Russian Trade Union of Railway Engine Crews (RTUREC) and, in particular, lack of consultations with workers' representatives when decisions affecting their social and labour rights are being adopted, refusal to bargain collectively; denial of registration of the newly formed organizations and of the amendments made to the rules of the existing ones; interference by the public authorities in the administration and activities of the trade union, including ban on strikes; and favouritism towards the other trade union (Rosprofzhel) and discrimination against all other trade unions that exist in the railway transport. The Committee notes that the Government limits its comments to general observations.*

Lack of consultations with workers' representatives on issues affecting their social and labour rights

- 1252.** As concerns the first set of allegations, the Committee notes that the complainant refers more particularly to the lack of consultations with the RTUREC over the Programme of the Structural Reform of the Railway Transport, adopted by the Government, and which affected workers' social and labour rights, despite the numerous appeals to participate at the meetings dealing with the issues of the structural reform. Moreover, the complainant alleges that the railway transport enterprises have a practise of consulting only with the Rosprofzhel. Furthermore, once the administration adopts the documents, the RTUREC finds it impossible to get familiarized with these documents.
- 1253.** The Committee notes the Government's statement to the effect that consultations with trade unions do take place and, as an example, it states that the draft Labour Code was discussed by a commission which included representatives of All-Russian trade unions.
- 1254.** The Committee emphasizes the importance that should be attached to full and frank consultation taking place on any questions or proposed legislation affecting trade union rights. The Committee considers it useful to refer to the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), Paragraph 1 of which provides that measures should be taken to promote effective consultation and cooperation between public authorities and employers' and workers' organizations without discrimination of any kind against these organizations. In accordance with Paragraph 5 of the Recommendation, such consultation should aim at ensuring that the public authorities seek the views, advice and assistance of these organizations, particularly in the preparation and implementation of laws and regulations affecting their interests [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996, paras. 927 and 928]. The Committee further refers to the Workers' Representatives Recommendation, 1971 (No. 143), Paragraph 16 of which provides that the management should make available to workers' representatives such [...] information as may be necessary for the exercise of their functions. The Committee therefore requests the Government to take measures so as to ensure that, in practise, trade unions can participate in consultation on any questions or proposed regulation affecting the rights of workers they represent. It further requests the Government to ensure that trade unions have access to the information concerning rights of workers they represent. The Committee requests the Government to keep it informed in this respect.

Refusal to bargain collectively

- 1255.** The Committee notes the complainant's statement to the effect that the Russian legislation does not assign the role to conclude collective agreements to the most representative trade union, but confers this right to all trade unions. According to the complainant, it follows from section 6 of the Law on Collective Agreements of 11 March 1992, that if there are several workers' organizations at the enterprise, or at the federal, sectoral, professional or other levels, each of them shall be given the right to bargain on behalf of their trade union members or workers they represent. The Committee further notes the complainant's allegation that despite numerous demands to bargain collectively with a view to include in the collective agreement provisions reflecting specific working conditions of engine crew workers, and despite numerous complaints to the relevant instances, the management of railway transport enterprises, including the Moscow Railways, refused to bargain collectively with the RTUREC. According to the complainant, another trade union, the Rosprofzhel, constantly refuses to form a single unified body for collective bargaining purposes. The Committee further notes the similar allegations as concerns collective bargaining at sectoral level.

- 1256.** *The Committee notes that the Government states that, according to section 37 of the Labour Code, where several primary trade unions exist within an enterprise, each of them has the right to be represented in a single representative body created for collective bargaining purposes on the basis of proportional representation. The right to bargain collectively and to sign agreements in the name of all workers is granted to the majority union only in the absence of an agreement to form a single representative body. In this case, minority trade unions retain the right to be represented in the single representative body up to the time of the signing of a collective agreement. At a higher level (level of the Russian Federation, its constituent territory, industry and region), if several unions exist, each of them has the right to be represented in a single representative body for collective bargaining purposes on a basis of proportional representation. The right to bargain collectively is granted to the majority union only in the absence of an agreement to form a single representative body. Collective agreements can be concluded to protect specific interests and regulate particular aspects of specific occupations and can be concluded at any level of social partnership. As regards the disagreements between different trade unions on the question of representation, the Government indicates that this matter is an internal trade union matter in which it should not interfere. The Committee further notes the Government's information on the recent restructuring in the transport sector, which took place with the creation of the Russian Railways Company. The Government further states that a general collective agreement, applicable to all railway workers, was concluded for 2005 at the Russian Railways Company.*
- 1257.** *The Committee notes that since the day of the complaint, a new Labour Code, which regulates the procedure of collective bargaining, was enacted. The Committee recalls that it had examined the wording of section 37 of the Labour Code in Cases Nos. 2216 and 2251. In these cases, the Committee concluded that, according to section 37(5), at the enterprise level, a 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 also considered that the approach favouring the most representative trade union for collective bargaining purposes at the enterprise or a higher level is not incompatible with Convention No. 98 [see 322nd Report, Case No. 2216, para. 907 and 333rd Report, Case No. 2251, para. 979]. The Committee further notes with interest the conclusion of a general collective agreement applicable to all railways workers.*
- 1258.** *The Committee notes the complainant's statement to the effect that the RTUREC represents over 3,500 workers and has a status of All-Russian trade union. While it is not clear to the Committee whether its primary trade unions represent the majority of workers at transport enterprises where the administration refused to bargain collectively with the RTUREC's representatives, as well as in the transport sector in general, the Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations [see *Digest*, op. cit., para. 814].*

Denial of registration of the newly formed trade unions and of the amendments made to the trade union rules

- 1259.** *The Committee notes the complainant's allegation that the institutions of justice systematically refuse to register the newly formed organizations of the RTUREC, as well as the amendments to the rules of the existing trade unions. In particular, the KTR refers to the following cases of denial of registration: the main board of Justice of Moscow has twice denied registration of the Interregional Association of the Trade Unions of Moscow Railways; registration was also denied to the territorial organization of the RTUREC of the Moscow Railways and twice denied to the primary trade union organization of the Russian Trade Union of Railway Engine Crews of the Uzlovaya locomotive depot of Moscow Railways. The KTR submits that the reasons given by the state authorities for*

denial of registration relate either to failure to submit all documents for registration within one month from the day the trade union was formed or to the fact that the internal structure of trade unions is different from the structure provided for in section 3 of the Law on Trade Unions. The KTR states that although section 8 of the Law on Trade Unions provides for a one-month period to register a trade union, section 21 of the Law on Non-Profit Associations provides for a three-month period. Moreover, the complainant states that according to the Law on Trade Unions, a trade union has the right to decide independently whether to register as a legal entity or not, and that the decision to register could be taken at any time. As concerns the internal structure of trade unions, the complainant refers to section 14 of the Law on Non-Profit Associations, which allows non-profit organizations to form structural subdivisions as branches and representatives. The complainant further states that the list of the documents to be submitted for registration is provided for in section 8 of the Law on Trade Unions. However, the bodies of the Ministry of Justice request instead the documents listed in the normative acts of the Ministry of Justice. Finally, the KTR points out that the bodies of the Ministry of Justice, pursuant to the Regulation for Considering Applications for the State Registration of Non-profit Associations, can recommend that the trade union in question eliminates the violations found in its constituent documents. The KTR concludes that it became impossible to register a trade union until the violations are eliminated.

- 1260.** *The Committee notes that no information was provided by the Government in respect of the allegations thereof.*
- 1261.** *The Committee recalls that member States can provide such formalities in their legislation as appear appropriate to ensure the normal functioning of occupational organizations. Such formalities are compatible with the provisions of Convention No. 87, provided, of course, that these regulations do not impair the guarantees laid down in the Convention. The Committee considers that the time frame of one month to register an organization is reasonable. As concerns the structural organization of trade unions, the Committee finds that the KTR's allegation is unclear. The Committee therefore is unable to reach a conclusion in this respect. Finally, as concerns the documents required for trade union registration, the Committee notes that the KTR indicates that, if registration is denied on the basis that not all documents were provided, the bodies of the Ministry of Justice, pursuant to the Regulation for Considering Applications for the State Registration of Non-profit Associations, can recommend that the trade union in question eliminates the violations found in its constituent documents. The Committee considers this approach to be in line with Convention No. 87.*
- 1262.** *As concerns the particular cases of denial of registration of the trade unions mentioned by the complainant, the Committee requests the Government to provide the reasons therefor.*

Interference of the authorities in trade union activities and violation of the right to draw up their rules in full freedom

- 1263.** *The Committee notes that the KTR refers to one particular example of the alleged interference in trade union affairs. It alleges that the administration of the Golutvin permanent way division of the Ramenskoye station of Moscow Railways tried to put pressure on members of the Trade Union of Railways Workers (TURW). After some unsuccessful attempts of the administration to make the union stop its activities, the Prosecutor's Office also began to put pressure on the union. On 31 July 1998, the Moscow-Ryazan Transport Prosecutor's Office applied to the Ramenskoye People's Court of the Moscow Region requesting to declare the Rules of the TURW of the Golutvin permanent way division null and void. The Court obliged the trade union to make*

amendments to its Rules. As the result of never-ending pressure on the part of the administration and the law enforcement authorities, the trade union ceased its existence.

- 1264.** *The Committee notes that no information was provided by the Government in respect of the allegations thereof.*
- 1265.** *Recalling that pressure exerted on workers may be an informal way of influencing their trade union membership and in the view that no information was provided by the Government, the Committee requests the Government to conduct, without delay, an independent inquiry on the allegation of pressure and interference by the enterprise administration and authorities as concerns the TURW at the Ramenskoye station of Moscow Railways and keep it informed in this respect.*

Ban on strikes in railway transport

- 1266.** *The Committee notes the KTR's allegation that the Law on the Federal Railway Transport deprives all railway transport workers of their right to strike. This ban concerns all categories of the railway transport workers, irrespective of whether work stoppage would lead to an obvious and inevitable danger to people's lives, their personal safety and to the health of the whole population or its part. The Law provides for a possibility of imposing a disciplinary action for work stoppage. The complainant further explains that as an alternative procedure, the Law on the Order of Settling Collective Labour Disputes provides for an appeal to the President of the Russian Federation who has to reach a decision within ten days. According to the complainant, this procedure is not efficient since in practise, the issues are settled by specific federal bodies, and in the case of railway transport, by the MCL, which, due to its direct interest in the matter, is not capable of settling the collective labour dispute objectively. The complainant refers to the particular case where, in 1997, a collective labour dispute following the employer's refusal to start collective bargaining, the RTUREC applied to the President requesting him to settle the conflict. However, the appeal was transferred for consideration to the Government and then to the MCL and the Ministry of Labour and Social Development.*
- 1267.** *The Committee notes that the Government generally states that the right to strike is recognized by the Russian Constitution. The right to strike as a means of resolving collective labour disputes is permitted under section 409 of the Labour Code. The Government further indicates that federal legislation lays down procedures and time limits for the presentation of demands, the declaration and the conduct of strike action and requires that a certain minimum level of necessary services be carried out during the strike. Legislation has also been introduced to limit the right to strike for various categories of workers. The purpose of these laws is to minimize the negative effect of a strike on the economy, society's vital activities, the economic activities of the enterprises in question and the position of its workers. The legislation aims to spur workers and their representatives to strive to resolve collective labour disputes through conciliation procedures before declaring strike action. The Committee further notes that in its recent communication, the Government indicates that there is no general prohibition of strike in the transport sector and that organizers of strike have an obligation to ensure the minimum services. The Government refers to the following pieces of legislation: section 412 of the Labour Code, Government Decree No. 901 of 17 December 2002, MCL Order No. 12 of 27 March 2003 and the Ministry of Transport Order No. 197 of 7 December 2002, listing minimum necessary services to be guaranteed during a strike in transport, as well as the Federal Act. No. 17-FZ of 10 January 2003 "On rail transport in the Russian Federation".*
- 1268.** *The Committee recalls that it had to examine the allegation concerning restrictions on the right to strike imposed on railroad employees in Case No. 2251. On that occasion, the*

Committee recalled that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the state; (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); and (3) in the event of an acute national emergency [see Digest, op. cit., paras. 526 and 527]. The Committee pointed out that railway transport does not constitute essential services in the strict sense of the term and therefore requested the Government to amend its legislation so as to ensure that railroad employees enjoy the right to strike [see 333rd Report, paras. 992 and 993]. The Committee notes that a new law on rail transport has been since adopted, Federal Act No. 17-FZ of 10 January 2003. By virtue of section 26 of the Act, a strike as a means of collective dispute settlement by the workers of railways in services related to the traffic, shunting, service to passengers, freight, as provided by the federal law is illegal and prohibited. On the other hand, the Government also refers to the provisions relative to the establishment of a minimum service in the Labour Code and a number of decrees and orders setting out the minimum services to be guaranteed during a strike in the transport sector, which had been compiled in agreement with the national sectorial trade unions. In these circumstances, the Committee requests the Government to amend section 26 of the Federal Act on Rail Transport so as to bring it into conformity with the abovementioned principles and the apparent practise referred to by the Government under the minimum services provisions of the Labour Code. The Committee requests the Government to keep it informed of developments in this respect.

- 1269.** *As concerns the question of settlement of collective labour disputes when the right to strike is subject to restrictions or a prohibition, the Committee notes that the new Labour Code takes precedence over the Law on the Order of Settling Collective Labour Disputes. The Committee notes, however, that section 413 of the Labour Code provides that the decisions on collective agreement disputes are made by the Government of the Russian Federation. In this respect, the Committee recalls that, if the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example, conciliation and mediation procedures leading, in the event of deadlock, to arbitration machinery seen to be reliable by the parties concerned which should provide sufficient guarantees of impartiality and rapidity [see Digest, op. cit., paras. 546 and 547]. The Committee therefore requests the Government to amend its legislation so as to ensure that in those cases any disagreement concerning a collective agreement is settled by an independent body and not by the Government, and to keep it informed of measures taken or envisaged in this regard.*

Favouritism and discrimination in respect of particular organizations

- 1270.** *The Committee notes that the complainant alleges that following the Government's Decree of 24 June 1996, as amended on 22 September 1999, only full-time officials of the Rosprofzhel can enjoy the right to free use of transport for their domestic and personal needs. The complainant states that such favouritism towards the Rosprofzhel reinforces the policy of the Ministry of Communication Lines (MCL) to support trade union monopoly in the transport sector.*
- 1271.** *The Committee notes that according to the Government, the new collective agreement for 2005 provides for the right to have a one-day free train ticket for the personal use of workers.*
- 1272.** *The Committee understands that although the facilities in question do not generally relate to the exercise by the trade union officials of trade union activities, such an advantage given to the Rosprofzhel's officials by national legislation may give an impression of clear*

preference by the authorities of the Rosprofzhel. The Committee considers that by according favourable or unfavourable treatment to a given organization as compared with others, a government may be able to influence the choice of workers as to the organization which they intend to join. In addition, a government which deliberately acts in this manner violates the principle laid down in Convention No. 87 that the public authorities shall refrain from any interference which would restrict the rights provided for in the Convention or impede their lawful exercise; more indirectly, it would also violate the principle that the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in the Convention. It would seem desirable that, if a government wishes to make certain facilities available to trade union organizations, these organizations should enjoy equal treatment in this respect [see Digest, op. cit., para. 304]. The Committee requests the Government to indicate whether the provisions of the Decree of 24 June 1996 (as amended on 22 September 1999) conferring privileges to the Rosprofzhel's officials was repealed with the restructuring of the transport sector and the entry into force of a new collective agreement.

The Committee's recommendations

1273. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

- (a) *The Committee regrets that, despite the time that has elapsed since the complaint was first presented, the Government has not replied to most of the complainant's allegations. The Committee strongly urges the Government to be more cooperative in the future.*
- (b) *The Committee requests the Government to take measures so as to ensure that, in practise, trade unions can participate in consultation on any questions or proposed regulation affecting the rights of workers they represent and keep it informed in this respect.*
- (c) *The Committee requests the Government to ensure that trade unions have access to the information concerning rights of workers they represent and keep it informed in this respect.*
- (d) *The Committee recalls the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations.*
- (e) *The Committee requests the Government to indicate the reasons for refusal to register the Interregional Association of the Trade Unions of Moscow Railways, the territorial organization of the RTUREC of the Moscow Railways and the primary trade union organization of the Russian Trade Union of Railway Engine Crews of the Uzlovaya locomotive depot of Moscow Railways.*
- (f) *Recalling that pressure exerted on workers may be an informal way of influencing their trade union membership, the Committee requests the Government to conduct, without delay, an independent inquiry on the allegation of pressure and interference by the enterprise administration and authorities as concerns the Trade Union of Railway Workers at the Ramenskoye station of Moscow Railways and keep it informed in this respect.*

- (g) *The Committee requests the Government to amend section 26 of the Federal Act on Rail Transport so as to ensure that railroad employees enjoy the right to strike and that the Act is in conformity with the minimum services provisions of the Labour Code and to keep it informed in this respect.*
- (h) *The Committee requests the Government to amend its legislation so as to ensure that in cases when the right to strike is subject to restrictions or a prohibition, any disagreement concerning a collective agreement is settled by an independent body and not by the Government and to keep it informed of measures taken or envisaged in this regard.*
- (i) *The Committee requests the Government to indicate whether the provisions of the Decree of 24 June 1996 (as amended on 22 September 1999), conferring privileges to the Rosprofzhel's officials, was repealed with a restructuring of transport sector and an entry into force of a new collective agreement.*

CASE NO. 2388

INTERIM REPORT

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

- the International Confederation of Free Trade Unions (ICFTU)
- the Confederation of Free Trade Unions of Ukraine (CFTUU) and
- the Federation of Trade Unions of Ukraine (FPU)

Allegations: The complainants allege interference by the Ukrainian authorities and employers of various enterprises in trade union internal affairs, dismissals, intimidation, harassment and physical assaults on trade union activists and members, denial of facilities for workers' representatives and attempts to dissolve trade unions

- 1274.** The complaint was presented in a letter dated 7 October 2004 from the International Confederation of Free Trade Unions (ICFTU), the Confederation of Free Trade Unions of Ukraine (CFTUU) and the Federation of Trade Unions of Ukraine (FPU). In a communication dated 26 October 2004, the FPU supplied further information. The CFTUU sent additional information in communications dated 10 October and 5 November 2004, and 13 and 20 January 2005. The CFTUU transmitted further additional information contained in communications dated 28 February, 28 March and 7 April 2005.
- 1275.** The Government forwarded its observations in communications dated 16 November, 10, 15 and 28 December 2004.
- 1276.** Ukraine 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

- 1277.** In their communications, the International Confederation of Free Trade Unions (ICFTU), the Confederation of Free Trade Unions of Ukraine (CFTUU) and the Federation of Trade Unions of Ukraine (FPU) allege interference by the Ukrainian authorities and employers of various enterprises in trade union internal affairs, dismissals, intimidation, harassment and physical assaults on trade union activists and members, denial of facilities for workers' representatives and attempts to dissolve trade unions. The specific allegations concern the following trade union organizations and their affiliates.

The Confederation of Free Trade Unions of Ukraine (CFTUU)

Independent Trade Union of Miners (NPGU)

- 1278.** The complainants submitted the following allegations concerning violations of trade union rights of the NPGU, affiliated to the CFTUU.
- 1279.** From May to July 2001, agents of the Security Service of Ukraine (SBU) paid visits to the trade union leaders to "establish contacts", during which they inquired about internal affairs of the NPGU and the NPGU's attitude towards political opposition in the country. Special attention was paid to the forthcoming NPGU Congress and the CFTUU president, Mr. Volynets. In particular, leaders of the regional NPGU trade union organizations at the "Chaykino" and "Rodinskaya" mines, in Kirov city, and at the "Donbassantransit" and "Krasnoarmeyskugol" enterprises, were approached by the SBU officials, as well as by the officials of the regional department of internal affairs, with suggestions to cooperate with the authorities. Trade union leaders were asked to list the delegates to the forthcoming NPGU Congress and requested, sometimes with monetary incentive, to help to change the NPGU leadership. The complainants further allege that in 2004, the SBU officials frequently visited the Donbass office of the NPGU to inquire about its activities. During February-March 2004, SBU officials paid home visits to the accountant and the President of the Shakhtyorsk city NPGU organization. The SBU officials expressed interest in the internal activities of this trade union organization and in trade union members' political opinions. In February and March 2004, Mr. Volynets requested the SBU to conduct an inquiry into the allegations of anti-union discrimination and violation of workers' right to establish and join organizations of their own choosing and on the SBU's interference in the activities of the NPGU. The SBU replied that it had examined the complaints but that no proof of interference had been found.
- 1280.** In June 2001, following numerous wage arrears-related strikes, which took place at the mines of "Shahterskugol" enterprise in Donetsk region, the employer and the Governor of the region launched an anti-union campaign, which included pressure, intimidation and threats of dismissal against the NPGU members working at the "Postnikovskio", "Pervomai", "Vinintzkou" and "Shahtersko-glubokoe" mines. Furthermore, according to the complainants, SBU agents tried to influence the chairpersons of the NPGU councils of these mines (Mr. Shtulman, Mr. Netkachev and Mr. Kantsurak). The representative of the State Health and Safety Agency threatened Mr. Shtulman with dismissal and with a "possible accident" which could happen to him or his family members. Following these threats, on 1 July 2001, on his way home from work, Mr. Shtulman was forced into a car by three people. The aggressors held Mr. Shtulman at gunpoint demanding that he cease his trade union activities and threatening to attack his family. Mr. Shtulman suffered several injuries. Mr. Shtulman informed the local militia about the incident but no investigation was ever launched.

- 1281.** The complainants further alleged an anti-union campaign at the state-owned “Trest Donetskuglestroy” Ltd., which took place in July 2001. Attempts were made to discredit the NPGU and its leaders. At the “Duvannaya” and “Zolotoye” mines, the management strongly advised the delegates to the NPGU Congress to vote against the NPGU president.
- 1282.** On 12 November 2002, the police seized trade union documents from the office of Western Donbass Association of the NPGU, and of its primary organizations at the following mines: “Imeni Gueroyev Kosmosa”, “Imeni Stashkova”, “Stepnaya”, “Blagodatnaya”, “Pavlogradskaya”, “Ternovskaya”, “Zapadno-Donbasskaya”, “Dneprovskaya”, “Samarskaya” and “Yubileinaya”. The documents were seized in violation of procedural norms: trade union premises were entered without prior explanations or formal accusations, without requisition or search orders signed by a competent authority and without signing documents of seizure or issuing a report of proceedings. This took place outside of the normal working hours, sometimes at night, forcing the doors. Although the actions of the police and of the Pavlograd city prosecutor were found illegal by the Prosecutor of Dnepropetrovsk region, the union was not compensated for the material damages and several documents were lost.
- 1283.** During 2001-02, the management of the “Krasnolimanskaya” mine was refusing to recognize the NPGU primary trade union and to provide its representatives with facilities. Although the organization had been legalized according to the legislation in force, the employer has been asking the union to provide additional information on trade union members. Moreover, the employer prohibited the chairperson of the union to enter the mine. In February 2004, the Commercial Court of Donetsk ruled in favour of the lawsuit brought by the employer to cancel trade union registration. The complainants point out, however, that the Commercial Court does not have the competence to revoke trade union registration or legalization. The complainants further state that, although the Ministry of Labour had informed the ILO that it had urged the employer to stop violations of trade union rights, the situation of the union had not improved.
- 1284.** The complainants alleged systematic persecution of the NPGU members by the management of the “Krivorozhsky” iron ore plant at the “Gvardeyevskaya”, “Oktyabrskaya” and “Imeni Lenina” mines. At the “Gvardeyevskaya” mine, the human resource manager promotes, among newly recruited workers, another trade union active at the enterprise and threatens the NPGU members with transfers and obstacles to promotion. One worker was also offered a pay rise, conditional upon withdrawal from his NPGU membership. On 6 February 2004, the director of the plant conducted a meeting with the heads of production shops at the “Oktyabrskaya” mine and ordered them to take measures to destroy the NPGU by taking such measures as dismissals of trade union members within one month, nearly 300 workers had left the union, while the complainants indicate that, during the previous two years, its membership had been increasing. On 11 February 2004, trade union members submitted a complaint to the office of the city prosecutor, who concluded to an absence of trade union rights’ violations. In March 2004, the administration of the same company began a campaign against the NPGU at the “Imeni Lenina” mine. Heads of production shops were also instructed to destroy the union by a specific date. Since then, the NPGU members were intimidated and ordered to join another trade union active at the enterprise. Some trade union members were summoned during their holidays or recuperation days.
- 1285.** At the “Partizanskaya” mine (“Antratsit” coal company), the management, giving only two days notice, ordered the local organization of the NPGU to free its office. The management justified its demand by the absence of legalization of the union. The complainants explained, however, that Ukrainian law does not oblige organizations to be legalized if they belong to a legalized higher level trade union. According to the complainants, the

employer was further putting pressure on trade union members by not paying their salaries on time.

- 1286.** Moreover, in October 2004, the administration of the same mine, in violation of section 44 of the Law on Trade Unions did not transfer money for the cultural activities of the NPGU primary trade union, as provided for in the tariff agreement. The money was transferred, however, to another union. The complainants also accused the administration of the "Stakhanova" mine ("Krasnoarmeyskugol" enterprise) of systematic non-transfer of money for the cultural and recreational activities in violation of the collective agreement. As of 1 January 2005, and as concerns the latter enterprise, the arrears amount to 234,952 UAH (US\$44,000).
- 1287.** On 16 October 2004, the management of the "Knyagynskaya" mine attempted to hamper the holding of a trade union conference. Furthermore, the complainants alleged that one member of the trade union, Mr. Yshenko, was unlawfully dismissed. The court hearing concerning his reinstatement has been delayed for ten months already due to the failure of the management to send its representative to the court.
- 1288.** The administration of the "Krivoy Rog Steal" enterprise has been refusing for six years to provide the primary NPGU organization with an office. The requests sent to the company's management were left without reply.

Trade unions in the railway sector

- 1289.** In December 2002, the Lvov region prosecutor lodged a complaint to the Commercial Court against the establishment of the Federation of Free Trade Unions of Lvov Railways and requested that the union's statutes be declared null and void. After a year of trials, in 2004, the case was still under examination.
- 1290.** The complainants alleged an anti-union campaign at Melitopol locomotive depot, which started in October 2003 when one worker, Mr. Kuzmenko, requested a representative of the Association of Free Trade Unions of the Railway Workers (OVPZU) to explain to workers the role of trade unions. The employer did not allow the OVPZU's representative to attend workers' meeting. Instead, Mr. Kuzmenko was subjected to intimidation by the enterprise administration, which clearly stated that there were many lawful ways to dismiss those who come up with similar initiatives. Nevertheless, on 3 March 2004, the workers of the depot decided to establish an independent trade union, which later affiliated to the OVPZU. Having received the list of trade union members, the depot administration summoned trade union members for individual discussions, following which, several workers left the union. The administration then requested the prosecutor's office to investigate whether the trade union's legalization was carried out in accordance with the law and whether the union could carry out its activities. The investigation was referred to the transport militia.
- 1291.** The complainants also alleged an anti-union campaign at the locomotive depot "Imeni Shevchenko", which took place between December 2003 and February 2004. Members of the union were asked to leave the union. In January 2004, the employer asked the court to revoke the trade union registration.
- 1292.** In February 2004, Mr. Volynets requested an inquiry on the allegations of anti-union discrimination and violation of workers' right to establish and join organizations of their own choosing at the National Railways. The authorities did not reply to the complaints brought by Mr. Volynets.

Trade unions in the education sector

- 1293.** In March 2004, after two primary trade unions of the Free Trade Union of Education and Science (FTUES) were established in the Mena district of the Chernigov region, the district state administration launched an anti-union campaign under the pretext that free trade unions were political organizations, prohibited from carrying out activities in educational institutions. The head of the district Board of Education obliged school principals to demand the members of the CFTUU-affiliated trade union organizations to provide written statements on the reasons to belong to trade unions. Pressure was also put on teachers who were members of the FTUES in the Gorodnia district of the Chernigov region and in Kirovograd where, as of 29 September 2004, ten out of 84 trade unions had been liquidated.
- 1294.** The complainants alleged that the management of the state agrarian technical secondary school of Alexandria city did not recognize the CFTUU-affiliated trade union set up by the employees of the school. Moreover, according to the complainants, the management of the college humiliated the members of the union in every possible way. The deputy chairperson was laid off. On 11 October 2004, the members of the trade union applied to the state inspectorate of the Ministry of Education in connection with the violations of the legislation of Ukraine. No response was provided to the union.

Other affiliated trade unions

- 1295.** In December 2002, following the establishment of a primary CFTUU trade union at "Promproduct" company, the enterprise administration gave all trade union members an ultimatum: to leave the union or lose their jobs. Three trade union members were dismissed two days after the incident. A petition to the prosecutor's office concerning illegal termination of employment contracts was filed on 31 January 2003. According to the documents sent by the complainants, the prosecutor's office did not find any violation of the labour legislation. The case is presently under the court's examination.
- 1296.** The complainants alleged that SBU officials visited the chairperson of the Independent Students' Trade Union (NPS) in Donetsk. The NPS chairperson was inquired about his trade union membership, its activities and contacts with the international NGOs.
- 1297.** According to the complainants, the administration of the "Orzhitsky" sugar refinery plant had been attempting to destroy the enterprise primary trade union. Since June 2001, the union was deprived of its office space and the check-off system was suspended. Under the employer's pressure, 115 workers left the union. Since March 2003, the union chairperson has been denied access to the enterprise and is allowed to enter the plant only when the plant manager is present. The trade union chairperson was not allowed to enter the enterprise to accompany the labour inspector even when one trade union member died in an occupational accident in June 2004.
- 1298.** In 2004, an independent trade union was established at the "Azovstal" enterprise in Mariupol. After the employer was notified of the establishment of this trade union, he lodged a court complaint against the union for the alleged illegitimate use of the company's name in the union's name. The court prohibited the use of the company name and obliged the union to change its statutes. Since the union continued to use the company's name, the Commercial Court of the Donetsk region revoked the union's registration on 1 July 2004 and therefore precluded its activities at the enterprise. Moreover, Mr. Fomenko, who had been providing legal assistance to the trade union, suffered an assault and had to be put on life support for eight days in January 2004. On the same day, another attorney who assisted the union found his car broken into.

- 1299.** In 2003, the general prosecutor's office applied to the Commercial Court of Kiev to declare the by-laws of the All-Ukrainian Trade Union of Football Players of Ukraine null and void and to revoke its registration. On 10 June 2003, the Court rejected the application, but the ruling was appealed by the Association of Football Clubs – an employers' organization. On 25 November 2003, the Court of Appeal declared the trade union by-laws null and void and ruled that the trade union registration should be revoked. Both the Ministry of Justice and the trade union lodged appeals before the Supreme Court of Ukraine, but the case was declared not receivable.
- 1300.** During 2003, the management of the "Alchevsky" metallurgical enterprise refused to recognize the Independent Trade Union of Metallurgists of Ukraine. The employer put pressure on its members by making them choose between the trade union and their job. The union's chairperson, Mr. Kalyuzhny, was severely beaten and forced to resign from his trade union post. Only a few workers remained members of the union.
- 1301.** An anti-union campaign against the trade union of McDonald's was organized by the management of McDonald's Ukraine Ltd. in July 2004. The administration had tried to dissuade workers from becoming trade union members by intimidating them. The deputy chairperson of the organization was not certified (his qualification was not confirmed), although during his almost four years of employment he had been regularly promoted.
- 1302.** The administration of the Maritime Commercial Port of Ilyichevsk refused to bargain collectively with the Independent Trade Union of Workers of the Maritime Commercial Port of Ilyichevsk and did not recognize the labour inspection created by the trade union according to sections 21 and 38 of the Law on trade unions.
- 1303.** The complainants further alleged that on 1 March 2003, Mr. Volynets' car was broken into and his case with documents was stolen (although it was later returned). On 7 March, people in masks and dressed in uniforms (special forces, according to the complainants) kidnapped Mr. Volynets' son. He was beaten up, and later hospitalized with concussion of the brain, haemorrhage and psychological shock. According to the complainants, the authorities and the police did everything to block the investigation and to prevent media coverage of the incident. The son of the CFTUU's chairperson had suffered an armed attack in 2002, but neither the police nor the prosecutor's office had opened an investigation.
- 1304.** The complainants submit that on 18 May 2004, Interim Report No. 5535 of the Temporary Commission of Inquiry of Verkhovna Rada of Ukraine on issues related to establishing of evidence of foreign interference into financing of the election campaign in Ukraine through non-governmental organizations operating on grants of foreign States was disclosed to Parliament. This report treats free trade unions as political organizations and states that the CFTUU and the NPGU are controlled by the director of the Ukrainian Programme of the Solidarity Centre AFL-CIO USA, thus portraying the unions as political organizations carrying out orders of foreign agents.

The Federation of Trade Unions of Ukraine (FPU)

- 1305.** The complainants submit the following allegations concerning violations of trade union rights of the FPU-affiliated organizations. Since December 2002, the director of the "Tomashpilsakhar" enterprise forbade the company's finance department to transfer trade union dues via a check-off system. The trade union was also deprived of its office space. The chairperson of the union was suspended from his work. The district prosecutor's office did not react to the petition filed by the trade union. A petition to the regional prosecutor's office was filed in December 2003.

- 1306.** Also since December 2002, the director of the “Svesky Nasosny Zavod” enterprise had been attacking the primary trade union organization of the Mashmetal Trade Union. The union chairperson was denied access to the enterprise. The FPU asked the general prosecutor’s office in December 2002 to launch a criminal investigation. In its communication of 18 February 2003, the prosecutor of the Yampolski district informed the union of its decision of 30 January 2003 not to launch a criminal investigation due to the absence of *corpus delicti* in the actions of the employer. In January 2003, the enterprise concluded a collective agreement with the union that was created by the employer.
- 1307.** During 2002-03, the employers of the “Brodecke” enterprise and the “Bordecky” sugar refinery plant had not been transferring workers’ membership dues to the FPU-affiliated trade unions. Trade union dues already deducted from workers’ wages were used at the employers’ discretion.
- 1308.** In May 2003, following an order by the director of “Microprylad” Ltd., the telephone lines used by the Trade Union of Machinery and Apparatus Building Workers (PRMPU) were disconnected. Moreover, the transfer of trade union dues was also suspended. The PRMPU and the FPU reported the actions of the management to the prosecutor’s office, who found no grounds for launching a criminal investigation.
- 1309.** In September 2003, at the “Gruzavtoservice” enterprise, the head of the FPU-affiliated trade union organization and two members of the union’s committee were dismissed less than a month after their election. In November 2003, the management of the company organized a trade union meeting to elect new trade union officers. Moreover, the company systematically withheld trade union dues and used them at the employer’s discretion. In November 2003, the Nikolaevsky region trade union council requested the prosecutor’s office to launch a criminal investigation, but this request was denied.
- 1310.** Since the beginning of 2004, the officials of the Ministry of Labour and Social Affairs have interfered in the activities of the FPU-affiliated All-Ukrainian Trade Union of State Agencies’ Employees. Pressure was exercised on members of the union to change their union membership and to join the Trade Union of the Social Sphere, an organization established by the Ministry. Several appeals were made by the union to the Government to take measures against the interference by officials in internal trade union affairs.

B. The Government’s reply

- 1311.** In its communication of 16 November 2004, the Government stated that the issues touched upon in the complaint receive the fullest attention of the Ministry of Labour and the Government and are regularly discussed at meetings of the National Assembly of Social Partners. The Government further assured that the central Government, with the direct participation of trade unions, was continuing its work to bring Ukrainian social and labour legislation in line with ILO Conventions. It indicated that a central concern for the social partners remained the practical implementation of a system for regulating social and labour relations through collective agreements at all levels of management.
- 1312.** According to the Government, there were currently 104 national trade unions and trade union associations. Agreement could not always be reached among such a wide range of trade unions – either within the trade union movement itself or between the social partners. However, the constant consultations and negotiations generally resulted in a significant convergence of positions. Progress was being made in the practice of concluding general, regional, sectoral and collective agreements. Seventy national trade unions and trade union associations were parties to the General Agreement for 2004-05. In the Government’s view such a broad representation testified to the processes of democratization taking place in society and to the rapid development of the trade union movement and enterprise in

Ukraine. Eighty sectoral agreements and 27 regional agreements were currently in force. Particular attention was being paid to social and labour relations at the enterprise level: around 80,000 collective agreements covering 9.5 million workers had been concluded.

- 1313.** As concerns the problems raised in the complaint, the Government indicated that the Ministry of Labour and Social Policy approached the workers' and employers' co-chairpersons of the National Assembly of Social Partners with a proposal for a joint discussion to formulate practical steps to be taken to ensure that freedom of association and the exercise of trade unions' rights was guaranteed in practice. In the Government's view, the problems could only be solved through the consolidated efforts of the Government, trade unions and employers. It considered that the alleged individual violations of the law and the ILO Conventions were the result of unlawful actions by a number of employers, who created obstacles for the activities of the newly formed trade unions.
- 1314.** The Government explained that deliberate obstruction of the lawful activities of a trade union is a criminal offence and refusal by officials to participate in collective bargaining for the conclusion of collective agreements or accords is an administrative offence incurring a fine. Such cases are examined by the courts if a representation is received from one of the parties. Only courts can examine these cases. The executive Government may not interfere in such situations, nor may it interfere in relations between the parties to a collective agreement or accord. Nevertheless, the Government indicated that the Vice-Prime Minister issued an order instructing central and local executive governments to take immediate measures to investigate and to end the violations referred to in the complaint. The Minister of Labour and Social Policy indicated that he has written to the leaders of the national associations of employers' organizations, drawing their attention to the cases of violation of trade union rights and the need to take steps to prevent them.
- 1315.** In its communication of 15 December 2004, the Government provided details on certain specific allegations of violation of trade union rights raised in the complaints. It indicated that Mr. Volynets, in his capacity as a member of parliament, lodged in fact several appeals with the security service regarding alleged instances of unlawful interference in the activities of the NPGU. The allegations were examined but no violation was found. Mr. Volynets was informed of the situation. The Government pointed out that the security service officials worked on the basis of the Law on Security Service of Ukraine and that central or local executive government bodies had no right to interfere with the SBU's work.
- 1316.** With regard to violations by the law enforcement agencies of procedural standards and constitutional rights of member organizations of the NPGU at the "Geroev Kosmosa", "Stashkov", "Stepnaya", "Blagodatnaya", "Pavlogradskaya", "Ternovskaya", "Zapadno-Donbasskaya", "Dneprovskaya", "Samarskaya" and "Yubileynaya" mines, the Government indicated that, according to the information received from the Dnepropetrovsk provincial state administration, the office of the Prosecutor-General of Ukraine, in accordance with Article 121 of the Constitution of Ukraine, was responsible for supervising compliance with the law during searches carried out by state agencies. Interference by government bodies, local authorities and state officials in the work of prosecutors was prohibited by section 7 of the Law on Prosecutors.
- 1317.** Concerning the accusation formulated by the complainants against the employer of the "Krasnolimanskaya" mine, the Government indicated that in December 2003, Mr. Kozhukh, the chairperson of the trade union committee of the NPGU organization at the "Krasnolimanskaya" mine, informed the management of the enterprise that the trade union organization in question had been legally registered by the judicial authorities on 11 November 2003. The mine management demanded further information on members of

the union. According to the Government, such a demand violated the Law on Trade Unions. The Ministry of Labour brought to the attention of the mine's management that, in accordance with the legislation in force, an employer shall not set conditions for trade unions' activities at the enterprise.

- 1318.** As regards the alleged interference by the management of the "Krivorozhsky" iron ore plant in the activities of the primary organization of the NPGU at the "V.I. Lenin", "Gvardeyskaya" and "Oktyabrskaya" mines, the Government indicated that two primary trade unions were active at the plant in question: the Union of Workers of the Metallurgical and Minerals Industries (PTMGP) and the NPGU. As reported by the Ministry of Industrial Policy of Ukraine, an on-site investigation had established that the management of the "Krivorozhsky" plant was not obstructing any lawful activities of the NPGU. This union was authorized to represent and defend the rights and interests of its members and was granted, free of charge, premises, and communication and transport facilities. The management provided these facilities to both unions on exactly the same conditions. All problematic issues that had arisen at the mine were settled at a meeting of representatives of the provincial state administration, the board of the "Krivorozhsky" plant and both trade unions on 2 April 2004. Minutes of the meeting establishing this fact were signed by Mr. Alekseenko, the president of the NPGU. Mr. Volynets was appropriately informed in this respect. The Government indicated that the allegations of unlawful interference by the management in the activities of this trade union have been investigated on more than one occasion by the government corporation "Ukrrudprom" and by the office of the prosecutor. No violation had been found.
- 1319.** With regard to the alleged violation of the rights of the NPGU primary trade union organization at the "Partizanskaya" mine, a part of the state enterprise "Antratsit", the Lugansk provincial state administration reported that the issue of provision of office space for the primary organization has never arisen.
- 1320.** The Government indicated that, in the opinion of the Ministry of Fuel and Energy, several allegations contained in the complaint required a closer on-site investigation. A special commission had therefore been set up within the Ministry in order to examine the allegations. The Government further indicated that further information on the results and conclusions of the commission's work, as well as on the measures taken with regard to any violations of trade union rights that may have taken place, will be provided to the Committee.
- 1321.** In relation to the Federation of Free Trade Unions of the Lvov Railway, the Government indicates that the state registration of that Federation was declared invalid by the decision of 22 May 2003 of the Lvov provincial economic court following a demand by the Lvov Provincial Prosecutor. However, this decision was overturned by a ruling of 17 March 2004 of the upper economic court of Ukraine and the case was referred to the Court of First Instance for a second examination.
- 1322.** With respect to the allegations of violations of trade union rights of the trade union organization at the Melitopol locomotive depot, the Government indicated that the primary organization of the Free Trade Union of Workers at the Melitopol locomotive depot was established on 21 March 2004 and legally registered on 6 September 2004 by the Melitopol Municipal Justice Department. By orders of the depot management dated 23 and 29 June 2004, the trade union was provided with premises and Mr. Kuzmenko, the chairperson of the union committee, was granted one free day each month for performing his union duties. The Government further submitted that the employer's representation to the office of the transport prosecutor was due to the information it had received from Mr. Skiba, Mr. Dyachenko and Mr. Mishakov, who were members of the Trade Union of Railway and Transport Construction Workers and allegedly had not expressed any desire

to leave that union in order to join the newly created free trade union of workers at the depot, but nevertheless found themselves to be members of the new union. Mr. Rudenko, the director of the Melitopol locomotive depot, and Mr. Kulik, the chairperson of the trade union committee, therefore requested the office of the Zaporozhie transport prosecutor to investigate these cases.

- 1323.** As concerns the alleged violations of trade union rights at the "Imeni Shevchenko" locomotive depot, the Government indicated that Mr. Dzyubko, the chairperson of the free trade union organization, was dismissed on 16 January 2004 for absenteeism, on the basis of section 40.4 of the Labour Code. He contested his dismissal in court, but the Smelyansk city court found, in its decision of 5 March 2004, that the dismissal was legal. The Cherkass provincial court confirmed the ruling of the lower court. The Government further indicated that because the union registration was carried out in violation of section 11 of the Law on trade unions (concerning determination of trade union status), the management of the locomotive depot appealed to the Smelyansk city court and the Cherkass economic court to have the registration of the free trade union organization at the depot revoked.
- 1324.** As regards the appeal by Mr. Volynets concerning discrimination against the trade union organizations in the railway sector, the Government indicated that his appeal did not state clearly who was obstructing the organization's activities and which workers were affected, nor was there a specific list of those individuals who had left the trade union at the locomotive depot.
- 1325.** The Government submitted that the Chernigov provincial association of the Trade Union of Education and Science Workers of Ukraine affiliated 971 primary union organizations and represented 44,111 workers. Instances of individual members leaving the union and joining the CFTUU had taken place in the Gorodnyansky district, followed by further instances in the Mena district. Thus, organizations affiliated to the FTUES had been set up at the Oktyabrskaya school and the Mena high school. The Government considered that the head of the Education Department of the Mena district state administration had acted in line with section 42 of the Law on trade unions when he required a written request to be submitted by workers for union membership fees to be deducted from their wages and transferred to the account of a trade union committee. As no such application had been received and the collective agreement did not include any provision to this effect, the union members paid their fees directly to the appropriate trade union body. A similar situation had arisen in educational institutions in the Gorodnia district. In accordance with section 20 of the constitution of the FTUES, issues regarding exclusion from the trade union are settled at the meetings, in the presence of the trade union members in question.
- 1326.** The allegations that member organizations of the FTUES in the cities of Kirovograd and Alexandria were dissolved have been investigated by the Kirovograd provincial state administration and have found no confirmation. Furthermore, the Ministry of Education and Science has issued a directive to all bodies within its departments regarding unconditional compliance with the standards of the Law on trade unions and non-interference in trade union affairs.
- 1327.** The Kharkov provincial state labour inspectorate has carried out an investigation into observance of labour legislation at the "Promproduct" enterprise. This investigation established that, on 5 February 2003, the management of the "Promproduct" enterprise received notice from Mr. Udyansky, the president of the Ukrainian Regional Association of Free Trade Unions, that a trade union organization had been set up at the "Promproduct" enterprise and Mr. Komissarov was elected as its leader. However, the management had no information on union membership. The Government further confirmed the dismissals of three workers – Mr. Komissarov, Mr. Karpov and Mr. Dubovoy. It stated, however, that during the investigation, it was established that they had been dismissed on the basis of

section 40.3 of the Labour Code – that is, for systematic failure, without valid reason, to carry out the duties assigned to them by a collective labour agreement or internal work regulations – in this particular case, for damaging production machinery. Disciplinary measures had previously been taken against these workers in accordance with sections 147-149 of the Labour Code. Therefore, no violation of labour legislation was established in connection with the dismissal of Mr. Komissarov, Mr. Karpov and Mr. Dubovoy. The office of the prosecutor of the Moskovsky district of Kharkov investigated the allegations of wrongful dismissal of these workers in March 2003, but did not find any violation of the legislation in force. The aforementioned workers lodged an appeal in court, claiming unlawful dismissal from work and demanding to be reinstated. On 12 March 2004, the court of the Moskovsky district refused to reinstate Mr. Dubovoy. The case involving Mr. Karpov was not examined due to his non-appearance in court. The substance of the case involving Mr. Komissarov has not yet been examined.

- 1328.** The Central Labour and Social Protection Authority of the Poltava provincial state administration conducted an investigation into the allegations of violation of trade union rights at the “Orzhitsky” sugar refinery plant. In accordance with the Law on trade unions, the management of the enterprise can transfer trade union membership fees from workers’ wages to the account of a trade union committee only if the members of that union have made a written request to that effect. Since 2001, the board of the “Orzhitsky” sugar refinery plant has repeatedly proposed that a request from the members of the independent trade union to deduct trade union dues from their wages be presented to the accountant. To date, however, no such requests have been filed. With regard to the claim that Mr. Krazhan, the chairperson of the trade union committee, was denied access to the premises, the Government points out that the “Orzhitsky” sugar refinery plant operated with a pass system: using their passes, workers have access to the factory; visitors can access the enterprise by requesting a one-time pass. As Mr. Krazhan was not an employee of the factory, he visited the factory using a one-time visitor’s pass. In order to carry out his trade union work, Mr. Krazhan was granted passes on 24 occasions between 1 January and 31 August 2004. The Government further indicated that 45 workers lost their jobs in 2004. Thirty-seven of these left voluntarily, four because of staff cuts, one in connection with his transfer to different work and one by the consent of all parties.
- 1329.** With regard to the situation of conflict between the management of the “Azovstal” metalworking enterprise and the independent trade union, the Government confirmed that the management of the enterprise filed a suit with the Donetsk provincial economic court against the independent trade union of the “Azovstal” enterprise, a public association, for unlawful use of the enterprise’s name. In a ruling of 29 December 2003, the economic court banned the Independent Trade Union of the “Azovstal” enterprise from using the name of the plaintiff, “Azovstal”, in its title, and ordered the union to make the necessary amendments to its statutes. As this was not done, the court ordered the compulsory dissolution of the public association. Moreover, the judicial and law enforcement authorities have found no cases of application of psychological pressure or of unlawful actions with regard to the members of the Independent Trade Union of the “Azovstal” enterprise by the management of the company.
- 1330.** As regards the All-Ukrainian Trade Union of Footballers of Ukraine, the Supreme Court of Ukraine has left unchanged the ruling of the Kiev Court of Appeal that revoked the union’s registration and declared its constitution invalid.
- 1331.** In connection with the complaint alleging discrimination against the Independent Trade Union of Metallurgists of Ukraine (NPMU) at the “Alchevsky” metallurgical enterprise, the Government indicated that this independent union was established at the enterprise in 1997. However, in 2003, 59 workers left the union of their own will. Despite the fact that there are only seven workers who are members of this union (out of a total of

21,000 workers), the union participated in the preparation of a draft collective agreement for the year 2004. Mr. Kalyuzhny, chairperson of the trade union committee of the independent union, was one of the signatories of that draft agreement. Moreover, the Lugansk provincial state administration reported no instances of pressure put on members of the independent union.

- 1332.** In the course of its investigation into the allegations involving the trade union of McDonald's Ukraine Ltd., the state labour inspectorate of the City of Kiev did not establish the existence of any documents to confirm that a trade union organization had been set up and legally registered at the establishment in question.
- 1333.** With regard to the abduction of Mr. A. Volynets, the son of Mr. Volynets, the Ministry of Internal Affairs reported that, on 10 March 2004, the office of the prosecutor of the Darnitsky district of Kiev instituted criminal proceedings in connection with this crime. These proceedings are currently under way.
- 1334.** The Government submitted that the allegations with regard to trade union organizations at the "Bordecke" and "Bordecky" sugar refinery plant in the Vinnitsia province required more thorough examination by the office of the provincial public prosecutor. The Ministry of Labour and Social Protection will therefore send the results of that examination to the ILO at a later date.
- 1335.** The Government indicated that the office of the Lvov provincial public prosecutor reported that all outstanding trade union dues owed by the "Mikropribor" ("Mikoprilad" in the complainants' communications) enterprise have been paid, and that there was no need for an inspection to be carried out at that enterprise.
- 1336.** The territorial inspectorate of the Nikolaev province conducted an inspection to verify the application of labour legislation at the "Gruzavtoservice" enterprise. The inspection showed that the chairperson of the trade union organization, Ms. Gerasyuto, was wrongfully dismissed. She was later reinstated in accordance with a court decision of 19 March 2004. However, with the consent of all parties, she was dismissed from her position by Decree No. 98-k of 22 March 2004. On 17 November 2003, a new trade union committee was elected at the enterprise. The Government indicated that the office of the Nikolaev provincial public prosecutor rightfully refused to begin criminal proceedings for impeding the lawful activities of a trade union against the management of the enterprise. Furthermore, as concerns trade union dues, the Government stated that no written requests had been received from workers at the enterprise to have trade union dues deducted from their salaries; the employer therefore had no grounds, under section 42 of the Law on Trade Unions, to deduct monthly trade union dues from their pay and transfer them to the account of the trade union organization.
- 1337.** Concerning the establishment of the All-Ukrainian Trade Union of Workers of the Social Sector, the Government indicated that, as reported by Ms. Yasnitskaya, the president of this union, the decision to leave the Trade Union of Workers of State Agencies and set up an independent trade union of workers of the social sector was taken by a number of primary trade union organizations as early as the beginning of 2002. In no way did the Ministry interfere or pressure the workers during the process of setting up the union, and no complaints from union members of violations of their right to freedom of association were received. At the Constituent Assembly of the All-Ukrainian Trade Union of Workers of the Social Sector, held on 14 May 2004, the constitution of the union was adopted and elections were held for its governing bodies. Member organizations of the union have been set up in 19 of Ukraine's 27 regions. The All-Ukrainian Trade Union of Workers in the Social Sector is legally registered with the Ministry of Justice.

- 1338.** In its communications of 28 February, 28 March and 7 April 2005, the CFTUU further alleged violation of trade union rights at the “Ordzhonikidze” and “Novodonetskaya” mines, “Meridian” international school, “Ilyich” metallurgical enterprise, “Krasnoarmeyskiy dinasovoy zavod” enterprise and “Krasnolimanskaya” coal company.

C. The Committee's conclusions

- 1339.** *The Committee notes that the complainants in this case allege that the Ukrainian authorities and employers of various enterprises interfere in trade union internal affairs. They further allege numerous instances of intimidation, harassment and physical assaults on trade union activists and members, anti-union dismissals, denial of facilities for workers' representatives, attempts to dissolve trade unions and violation of the right to collective bargaining.*

Interference by the authorities in trade union internal affairs

- 1340.** *As concerns the allegations of interference by the authorities in the internal affairs of trade unions, the Committee notes that the complainants submit that, on several occasions, from May to July 2001 and February to March 2004, the officials of the Security Service of Ukraine (SBU) frequently visited offices of several trade union organizations of the Independent Trade Union of Miners (NPGU) to inquire about the NPGU's activities and political opinions of its members. In some instances, especially in 2001, attempts were made to influence trade union leaders to change the leadership of the Confederation of Free Trade Unions of Ukraine (CFTUU). The Committee further notes that, allegedly, the SBU officials paid similar visits to the chairperson of the Independent Students' Trade Union in Donetsk. The Committee furthermore notes that Mr. Volynets, the CFTUU chairperson, requested the SBU to conduct an investigation into these events. The Committee notes that the Government confirms that Mr. Volynets had in fact requested an investigation into the abovementioned allegations. However, following an investigation conducted by the SBU, no violation of trade union rights was found. The Committee further notes the Government's indication that it cannot interfere with the work of the SBU.*
- 1341.** *The Committee notes that the Government has not denied that the SBU officials had, in fact, on several occasions, paid visits to several trade union officials. These actions of the SBU which, according to the Government, were outside its control, were considered by the SBU itself to be lawful. The Committee considers that the visits of the SBU's agents, which were conducted without any justification given, had the effect of pressuring trade unionists. The Committee recalls that the rights of workers' organizations can only be exercised in a climate that is free from pressure of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, para. 47]. Moreover, the Committee considers that, the bodies responsible for the investigation of allegations of violation of trade union rights, should enjoy independence from the authorities against which the allegations were submitted. The Committee requests the Government to take the necessary measures so as to ensure that any further allegations of trade union intimidation or harassment by the SBU are investigated by an independent body having the confidence of the parties concerned and that the SBU will refrain in future from any anti-union discrimination activities.*
- 1342.** *The Committee further notes a copy of Interim Report No. 5535 of the Temporary Commission of Inquiry of Verkhovna Rada of Ukraine on issues related to establishing of*

evidence of foreign interference into financing of the election campaign in Ukraine through non-governmental organizations operating on grants from foreign States, transmitted to the Committee by the complainants and which treats free trade unions as political organizations carrying out the order of foreign agents. The Government did not provide any comment in this respect. The Committee requests the Government to indicate whether any measure had been taken in respect of trade union organizations as a result of this report.

- 1343.** The Committee further notes the complainants' allegation of the interference by the officials of the Ministry of Labour and Social Affairs in the activities of the All-Ukrainian Trade Union of State Agencies' Employees affiliated to the Federation of Trade Unions of Ukraine (FPU). According to the complainants, pressure was exercised on members of the union to change their union membership and to join the Trade Union of the Social Sphere, an organization established by the Ministry. The complainants indicated that several appeals were made by the union to the Government to take measures against the interference in trade union activities and attached a copy of one of such letters addressed to the President of Ukraine. The Committee notes that the Government indicates that the decision to leave the Trade Union of Workers of State Agencies and set up an independent trade union of workers of the social sector was taken by a number of primary trade union organizations as early as the beginning of 2002. In no way did the Ministry interfere or pressure workers during the process of setting up the union. Moreover, the Government indicates that no complaints from trade union members of violations of their right to freedom of association were received. To date, member organizations of this union have been set up in 19 of 27 regions of Ukraine. In view of this contradictory information concerning the allegations of interference in the internal affairs of the All-Ukrainian Trade Union of State Agencies' Employees, the Committee requests the Government to institute an independent investigation into the above allegations and to keep it informed in this respect.
- 1344.** The Committee notes the complainants' allegation that on 12 November 2002, documents of several NPGU primary trade union organizations in Western Donbass were seized. According to the complainants, trade union premises were entered without a search warrant, outside of working hours and, in some cases, forcing the doors. Although the actions of the police and of the city prosecutor were later found to be illegal, the union was not compensated for the material damage and several documents were not returned as they were said to have been lost by the authorities. The Committee notes that the Government submits that the office of the Prosecutor-General is responsible for the supervision of searches carried out by state agencies and that the Government cannot interfere in its work. The Committee recalls that the entry and search by police of trade union premises without a judicial warrant constitutes a serious and unjustifiable interference in trade union activities [see *Digest*, op. cit., paras. 176 and 177]. Given that the Government has not contradicted the complainants' statement that the actions of the police were found to be unlawful, the Committee requests the Government to ensure that those trade unions of the Western Donbass Association of the NPGU which suffered material losses due to the illegal search are compensated without delay.

Interference by the employers in trade union internal affairs

- 1345.** The Committee further notes that the complainants allege numerous instances of anti-union campaigns instigated by the employers of various enterprises. In some cases, they were sanctioned by the authorities. According to the complainants, such campaigns against the NPGU, which included intimidation, threats of dismissal and attempts to discredit trade union leaders, took place from June to July 2001 at the "Postnikovskio", "Pervomai", "Vinintzkouo", "Shahtersko-glubokoe", "Duvannaya" and "Zolotoye"

mines, as well as at the state-owned “Test Donetskuglestroy” Ltd. The Committee notes the Government’s indication that several allegations contained in the complaint required a closer on-site investigation and that a special commission had been set up by the Ministry of Fuel and Energy in order to examine the allegations. The Government assures that it will inform the Committee about the results and conclusions of the commission’s work, as well as about the measures taken with regard to any violation of trade union rights that may have taken place. The Committee trusts that the commission to investigate the alleged violations of trade union rights will be independent and requests the Government to keep it informed on the results of the work of the commission.

- 1346.** *The Committee further notes the complainants’ allegation on systematic persecution of the NPGU members by the management of the “Krivorozhsky” iron ore plant at the “Gvardeyskaya”, “Oktyabrskaya” and “Imeni Lenina” mines. In particular, the complainants allege that at the “Gvardeyskaya” mine, the human resource manager promotes, among newly recruited workers, another trade union active at the enterprise and threatens the NPGU members with transfers and obstacles to promotion. One worker was also offered a pay rise, conditional upon withdrawal from his NPGU membership. At the “Oktyabrskaya” mine, on 6 February 2004, the director of the plant allegedly conducted a meeting with the heads of production shops and ordered them to take measures to destroy the NPGU by taking such measures as dismissals of trade union members. According to the complainants, one month after the meeting, nearly 300 workers had left the union. On 11 February 2004, trade union members submitted a complaint to the office of the city prosecutor, who concluded that there was no violation of trade union rights. In March 2004, the administration of the same company allegedly began a campaign against the NPGU at the “Imeni Lenina” mine, and heads of production shops were instructed to destroy the union by a specific date. Since then, the NPGU members have been intimidated and ordered to join another trade union active at the enterprise. The Committee notes the following information provided by the Government: (1) two primary trade unions are active at the plant in question – the Union of Workers of the Metallurgical and Minerals Industries (PTMGP) and the NPGU; (2) an on-site investigation had established that the management of the “Krivorozhsky” plant was not obstructing lawful activities of the NPGU at the “V. I. Lenin”, “Gvardeyskaya” and “Oktyabrskaya” mines. This union was authorized to represent and defend the rights and interests of its members and was granted, free of charge, premises, and communication and transport facilities. The management provided these facilities to both unions on exactly the same conditions; and (3) all problematic issues that had arisen at the mine were settled at a meeting of representatives of the provincial state administration, the board of the “Krivorozhsky” plant and both trade unions on 2 April 2004. Minutes of the meeting establishing this fact were signed by Mr. Alekseenko, the president of the NPGU. Mr. Volynets was appropriately informed in this respect. The Committee requests the Government to provide a copy of these minutes.*
- 1347.** *The Committee notes the complainants’ allegations concerning trade unions in the railway sector. In particular, the complainants allege an anti-union campaign at the Melitopol locomotive depot, which started in October 2003 when a representative of the Association of Free Trade Unions of the Railway Workers (OVPZU) was not allowed to attend a workers’ meeting to explain the role of trade unions. Some workers were subjected to intimidation by the enterprise administration and were forced to leave the union. Moreover, the complainants indicate that the depot administration requested the prosecutor’s office to investigate whether the trade union’s legalization was carried out in accordance with the law and whether the union could carry out its activities. The investigation was referred to the transport militia. The complainants also alleged that there was an anti-trade union campaign at the locomotive depot “Imeni Shevchenko” between December 2003 and February 2004. The Committee notes that with respect to the allegations of violations of trade union rights of the trade union organization at the*

Melitopol locomotive depot, the Government indicates that the primary organization of the Free Trade Union of Workers at the Melitopol locomotive depot was established on 21 March 2004 and legally registered on 6 September 2004. By the orders of the depot management dated 23 and 29 June 2004, the trade union was provided with premises and Mr. Kuzmenko, the chairperson of the union committee, granted one free day each month for performing his union duties. The Government further submits that the employer's representation to the office of the transport prosecutor was due to the information he had received from certain workers who complained that their trade union membership was changed against their will. The director of the Melitopol locomotive depot and the chairperson of the trade union committee requested therefore the office of the Zaporozhie transport prosecutor to investigate these cases. The Committee takes note of this information. As the Government has not provided any information in respect of the anti-union campaign at the "Imeni Shevchenko" locomotive depot, the Committee requests the Government to conduct an independent inquiry into these allegations and keep it informed in this respect.

- 1348.** *The Committee also notes the allegations of an anti-union campaign in the education sector. The complainants state that in March 2004, after two primary trade unions of the Free Trade Union of Education and Science (FTUES) were established in the Mena district of the Chernigov region, the district state administration along with the school principals, launched an anti-union campaign under the pretext that free trade unions were political organizations prohibited from carrying out activities in educational institutions. The head of the district Board of Education obliged school principals to demand the members of the CFTUU-affiliated trade union organizations to provide written statements on their reasons for belonging to trade unions. The complainants attached copies of several letters that had been sent to the relevant authorities informing them of the situation and requesting them to take the necessary measures against the interference in internal affairs of the union.*
- 1349.** *According to the complainants, pressure had also been put on teachers who were members of the FTUES in the Gorodnia district of the Chernigov region and in Kirovograd. Moreover, the complainants alleged that the management of the State Agrarian technical secondary school of Alexandria city did not recognize the CFTUU-affiliated trade union set up by the employees of the school. According to the complainants, the management of the college humiliates the members of the union in every possible way. While the members of the trade union applied to the state inspectorate of the Ministry of Education in connection with the violations of the legislation of Ukraine, no response was provided to the union.*
- 1350.** *The Committee notes the Government's indication that the Chernigov provincial association of the Trade Union of Education and Science Workers of Ukraine affiliates 971 primary union organizations and represents 44,111 workers. Instances of individual members leaving the union and joining the CFTUU have taken place in the Gorodnia district, followed by further instances in the Mena District. Thus, organizations affiliated to the FTUES have been set up at the Oktyabrskaya school and the Mena high school. The Government considers that the head of the Education Department of Mena district state administration acted in line with section 42 of the Law on Trade Unions when he required written requests to be submitted by workers for the deductions of their union membership fees. As no such application had been received and the collective agreement did not include any provision to this effect, the union members paid their fees directly to the appropriate trade union body. A similar situation has arisen in educational institutions in the Gorodnia district. In accordance with section 20 of the constitution of the Trade Union of Education and Science, issues regarding exclusion the trade union are settled at the meetings, in the presence of the trade union member in question. The Government further states that, as concerns the allegations made in respect of the member organizations of the*

FTUES in the cities of Kirovograd and Alexandria, the Ministry of Education and Science had issued a directive to all bodies within its departments regarding unconditional compliance with the standards of the Law on Trade Unions and non-interference in trade union affairs. The Committee notes this information.

- 1351.** *The Committee notes that, according to the complainants, at the “Orzhitsky” sugar refinery plant, 115 workers left the union under pressure from the employer. As no information was provided by the Government in respect of this allegation, the Committee requests the Government to conduct an independent investigation into this allegation and to keep it informed of the outcome.*
- 1352.** *The Committee notes that the complainants alleged that during 2003, the management of the “Alchevsky” metallurgical enterprise refused to recognize the Independent Trade Union Metallurgists of Ukraine (NPMU). The employer put pressure on its members by making them choose between the trade union and their job. Only a few workers remained members of the union. According to the Government, the NPMU was established at the enterprise in 1997. However, in 2003, 59 workers left the union of their own free will. Despite the fact that there are only seven workers who are members of this union (out of a total of 21,000 workers), the union participated in the preparation of a draft collective agreement for the year 2004. Mr. Kalyuzhny, chairperson of the trade union committee of the independent union, was one of the signatories of that draft agreement. Moreover, the Lugansk provincials state administration reported no instances of pressure put on members of the independent union. The Committee takes note of this information.*
- 1353.** *The Committee further notes that, according to the complainants, an anti-union campaign against the trade union of McDonald’s was organized by the management of McDonald’s Ukraine Ltd. in July 2004. The administration had tried to dissuade workers from becoming trade union members by intimidating them. The deputy chairperson of the organization was not certified (his qualification was not confirmed), although during his almost four years of employment he had been regularly promoted. According to the Government, the state labour inspectorate of the City of Kiev did not establish the existence of any documents to confirm that a trade union organization had been set up and legally registered at the establishment in question. The Committee notes from the Government’s reply that it limited its inquiry to the verification of a registered union in McDonald’s in Kiev, but that apparently no investigation was carried out to examine whether the management carried out anti-union acts and whether these acts may have resulted in the non-establishment of a union. The Committee recalls that the right of workers to establish and join organizations of their own choosing cannot be said to exist unless such freedom is fully established and respected in law and in fact [see *Digest*, op. cit., para. 271]. The Committee therefore requests the Government to carry out an independent investigation into the allegations of an anti-union campaign carried out by the management of McDonald’s and, if it is found that workers were indeed harassed and intimidated in an attempt to dissuade them from becoming members of a union, to take suitable measures to redress the situation and to ensure that workers may effectively exercise their fundamental right to organize. It requests the Government to keep it informed in this respect.*
- 1354.** *The Committee notes the complainants’ allegation that at the “Svesky Nasosny Zavod” enterprise, the management had created a union with which it had concluded a collective agreement in January 2003. No information was provided by the Government in this respect. Recalling that creation of puppet unions is contrary to Article 2 of Convention No. 98, which provides that workers’ and employers’ organizations shall enjoy adequate protection against any acts of interference by each other or each others’ agents in their establishment, functioning or administrative and further recalling the importance of the independence of the parties in collective bargaining, and that negotiations should not be*

*conducted on behalf of employees or their organizations by bargaining representatives appointed by or under the domination of employers or their organizations [see **Digest**, op. cit., paras. 760 and 771], the Committee requests the Government to conduct an independent inquiry into the above allegations and to keep it informed in this respect.*

1355. *Finally, the Committee notes that the complainants allege that in November 2003, at the “Gruzavtoservice” enterprise, the management of the company organized a trade union meeting to elect trade union officers. The Government does not reply to this allegation. The Committee recalls that Article 2 of Convention No. 98 establishes the total independence of workers’ organizations from employers in exercising their activities and that these organizations should enjoy adequate protection against any acts of interference by employers in their establishment, functioning or administration [see **Digest**, op. cit., para. 759]. The Committee therefore requests the Government to conduct an independent inquiry into the above allegations and to keep it informed in this respect.*

Dismissals

1356. *The Committee notes that the complainants allege the following cases of dismissals:*

- *at the “Knyagynskaya” mine, one member of the trade union, Mr. Yshenko, was unlawfully dismissed. The court hearing concerning his reinstatement has been delayed for ten months already due to the failure of the management to send its representative to the court;*
- *at the State Agrarian technical secondary school of Alexandria City, the deputy chairperson was laid off;*
- *at the “Promproduct” company, three trade union members were dismissed. A petition concerning illegal termination of employment contracts was sent on 31 January 2003 to the prosecutor’s office, but he found no violation of the labour legislation. The case is presently before the courts;*
- *at the “Tomashpilsakhar” enterprise, the chairperson of the union was suspended from his work; and*
- *at the “Gruzavtoservice” enterprise, the head of the FPU-affiliated trade union organization and two members of the union’s committee were dismissed in September 2003, less than a month after their election.*

1357. *The Committee notes the following information provided by the Government in respect of the cases of dismissals at the “Promproduct” and the “Gruzavtoservice” enterprises. As concerns the first enterprise, the Government confirms the dismissal of three workers – Mr. Komissarov, Mr. Karpov and Mr. Dubovoy. It states, however, that during the investigation, it was established that they had been dismissed on the basis of section 40.3 of the Labour Code – that is, for systematic failure, without valid reason, to carry out the duties assigned to them by a collective labour agreement or internal work regulations (in this particular case, for damaging production machinery). Disciplinary measures had previously been taken against these workers in accordance with sections 147-149 of the Labour Code. Therefore, no violation of labour legislation had been established in connection with these dismissals. Moreover, the office of the prosecutor of the Moskovsky district of Kharkov, investigated the allegations of wrongful dismissal of these workers in March 2003 but did not find any violation of the legislation in force. Following an appeal lodged by the dismissed workers, on 12 March 2004, the court of the Moskovsky district refused to reinstate Mr. Dubovoy. The case involving Mr. Karpov was not examined due to his non-appearance in court, while the substance of the case involving Mr. Komissarov has*

not been examined. As concerns the dismissal at the “Gruzavtoservice” enterprise, the Government indicated that an inspection revealed that the chairperson of the trade union organization, Ms. Gerasyuto, was wrongfully dismissed. She was later reinstated in accordance with a court decision of 19 March 2004; however, with the consent of all parties, she was relieved from her position by Decree No. 98-k of 22 March 2004.

- 1358.** *Furthermore, the Committee notes that the Government refers to the case of dismissal of Mr. Dzyubko, the chairperson of the free trade union organization at the “Imeni Shevchenko” locomotive depot. The Government submits that he was dismissed on 16 January 2004 for absenteeism, on the basis of section 40.4 of the Labour Code. Mr. Dzyubko contested his dismissal in court, but the Smelyansk city court found, in its decision of 5 March 2004, that the dismissal was legal. The Cherkass provincial court confirmed the ruling of the lower court. The Government did not reply to the other allegations of anti-union dismissals.*
- 1359.** *The Committee recalls that the dismissal or suspension of workers on the grounds of membership of an organization or trade union activities violates the principles of freedom of association [see **Digest**, op. cit., para. 702]. The Committee requests the Government to conduct independent inquiries into the allegations of anti-union dismissals at the “Knyagynskaya” mine, the State Agrarian technical secondary school of Alexandria City and the “Tomashpilsakhar” enterprise, and keep it informed in this respect. The Committee expects that the case concerning Mr. Komissarov, the chairperson of the union at the “Promproduct” enterprise will be examined without delay and requests the Government to keep it informed in this respect. As concerns the dismissal of Mr. Dzyubko, the Committee requests the Government to indicate whether the relevant procedures for dismissal of a trade union leader provided for in the Labour Code were followed in this particular case.*

Physical assaults

- 1360.** *The Committee notes that the complainants allege several instances of physical assaults on trade unionists. The Committee notes the case of Mr. Shtulman, the chairperson of the NPGU primary trade union, who suffered several injuries after he was forced into a car on 1 July 2001 and threatened at gunpoint to make him cease his trade union activities. According to the complainants, no investigation was ever conducted. The Committee also notes the case of Mr. Fomenko, a legal assistant to the primary trade union of the CFTUU at the “Azovstal” enterprise, who suffered an assault and had to be put on life support for eight days in January 2004. The Committee further notes the allegation that Mr. Kalyuzhny, the chairperson of the Independent Trade Union of metallurgists of Ukraine at the “Alchevsky” metallurgical enterprise, was severely beaten and forced to resign from his trade union post. Finally, the Committee notes the kidnapping of Mr. Volynets’ son, who was beaten up and hospitalized with concussion and a haemorrhage in March 2003.*

- 1361.** *The Committee observes that the Government provides no information on the allegations concerning Mr. Shtulman, Mr. Fomenko and Mr. Kalyuzhny. As concerns the assault of Mr. A. Volynets, the Committee notes the Government’s statement that a criminal investigation was instituted. The Committee emphasizes that freedom of association can only be exercised in conditions in which personal safety are fully respected and guaranteed. The Committee therefore requests the Government to institute immediately an independent judicial inquiry into the allegations of physical assaults on Mr. Shtulman, Mr. Fomenko and Mr. Kalyuzhny with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. The Committee requests the Government to keep it informed of any development regarding the*

investigations into these cases, as well as the criminal investigation regarding the abduction of, and physical assaults on, Mr. Volynets' son.

Facilities for workers' representatives

1362. *The Committee notes that the complainants allege that employers of the following enterprises refused to provide trade unions and their representatives with facilities:*

- *the “Krasnolimanskaya” mine, where during 2001-02, the management refused access to the trade union chairperson;*
- *the “Partizanskaya” mine, where the management ordered the primary NPGU to free its office space;*
- *the “Krivoy Rog Steal” enterprise, where the management refused to provide the primary NPGU trade union with office space;*
- *the “Orzhitsky” sugar refinery plant where, since June 2001, the union has been deprived of its office space, check-off facilities were suspended and the union chairperson was not allowed to enter the plant without the management of the plant being present;*
- *the “Tomashpilsakhar” enterprise where, since December 2002, check-off facilities were suspended;*
- *the “Svesky Nasosny Zavod” enterprise, where the union chairperson was denied access to the workplace;*
- *the “Brodecke” enterprise and “Bordecky” sugar refinery plant where, during 2002-03, the employer was not transferring the already deducted workers' membership dues to the FPU-affiliated trade unions;*
- *the “Microprylad” Ltd. Enterprise where, in May 2003 following an order by the director, the telephone lines used by the Trade Union of Machinery and Apparatus Building Workers (PRMPU) were disconnected and the transfer of trade union dues was also suspended; and*
- *the “Gruzavtoservice” enterprise, where trade union dues were systematically withheld and used at the employer's discretion.*

1363. *As regards the “Krasnolimanskaya” mine, the Committee notes that the difficulties encountered by the trade union chairperson took place in 2001-02 and that since then the Government brought to the attention of the mine management that, in accordance with the legislation in force, an employer shall not set conditions for trade union activities at an enterprise. As regards the allegations with respect to the “Partizanskaya” mine, the Committee notes that the Government denies that this issue was ever raised. In view of the contradictory information in respect of the “Partizanskaya” mine, the Committee requests the Government to inform it whether the NPGU trade union at this mine was provided with office space. Similarly, in the absence of a reply from the Government concerning the allegations relating to the trade union at the “Krivoy Rog Steal” enterprise and the “Orzhitsky” sugar refinery plant, the Committee requests the Government to indicate whether trade unions at these enterprises were provided with office space.*

1364. *As concerns the alleged suspension of check-off facilities at the “Orzhitsky” sugar refinery plant and the “Gruzavtoservice” enterprise, the Committee notes the Government's*

indication that a check-off system could be established at the enterprise only if workers provided an employer with written requests in this respect. At the “Orzhitsky” sugar refinery plant and at the “Gruzavtoservice” enterprise, no such requests were received. As concerns the denial of access to the workplace to the trade union chairperson of the “Orzhitsky” sugar refinery plant, the Government indicates that the chairperson of the union was granted access to the enterprise on 24 occasions between 1 January and 31 August 2004. The Committee notes that no information was provided by the Government with respect to the allegations of suspension of check-off facilities at the “Tomashpilsakhar” enterprise and of violation of the right of the union chairperson to access the workplace at the “Svesky Nasosny Zavod” enterprise. The Committee therefore requests the Government to provide information in this respect. The Committee further notes the Government’s assurances that the allegations concerning the “Brokecke” enterprise and “Bordecky” sugar refinery plant will be thoroughly examined. The Committee therefore requests the Government to indicate whether trade union dues deducted from workers’ wages during 2002-03 were duly paid to the FPU-affiliated trade unions at these enterprises. The Committee notes the Government’s indication that at the “Microprylad” Ltd. enterprise, all outstanding trade union dues have been transferred. However, the Committee notes that no information was provided by the Government on whether the telephone lines were reconnected at the PRMPU’s office and requests the Government to provide information in this respect.

Trade union registration

- 1365.** *The Committee further notes the complainants’ allegation concerning several instances of revocation of trade union registration. In particular, the complainants state that in February 2004, the commercial court of Donetsk ruled in favour of the lawsuit brought by the management of the “Krasnolimanskaya” mine to cancel the trade union’s registration. The complainants point out, however, that the commercial court does not have the competence to revoke trade union registration or legalization. No information was provided by the Government in this respect.*
- 1366.** *The complainants further allege that in January 2004, the management of the locomotive depot “Imeni Shevchenko” asked the court to revoke registration of the primary trade union of the complainants’ organization. The Committee notes the Government’s reply according to which the union registration was carried out in violation of section 11 of the Law on Trade Unions (concerning determination of trade union status). The management of the locomotive depot therefore appealed to the Smelyansk city court and the Cherkass economic court to have the registration of the free trade union organization at the depot revoked.*
- 1367.** *The Committee further notes that the registration of the trade union at the “Azovstal” enterprise was revoked because the trade union used the company’s name in its own name. As a result, the organization was dissolved.*
- 1368.** *The Committee notes the revocation of registration of the All-Ukrainian Trade Union of Football Players. However, neither the complainants nor the Government explained the reasons behind the prosecutor’s office application to the court requesting revocation of the union’s registration.*

- 1369.** *The Committee notes that the complainants allege that in December 2002, the Lvov region prosecutor lodged a complaint to the commercial court against the establishment of the Federation of Free Trade Unions of Lvov Railways and requested that its statutes be declared null and void. After a year of trials, in 2004, the case is still under examination. The Committee notes that the Government indicates that the state registration of that federation was declared invalid by a decision of 22 May 2003 of the Lvov provincial economic court following a demand by the Lvov provincial prosecutor. However, this decision was overturned by a ruling of 17 March 2004 of the Upper Economic Court of Ukraine, and the case was referred to the Court of First Instance for a second examination.*
- 1370.** *The Committee notes the complainants' allegation that in Kirovograd, as of 29 September 2004, ten out of 84 FTUES primary trade unions have been liquidated. According to the Government, the allegations that member organizations of the FTUES in the cities of Kirovograd and Alexandria were dissolved have been investigated by the Kirovograd provincial state administration and have found no confirmation. The Committee takes note of this information.*
- 1371.** *The Committee recalls that the dissolution of trade union organizations is a measure which should only occur in extremely serious cases. Given that no information was provided by the Government in respect of the revocation of the registration of the NPGU primary organization at the "Krasnolimanskaya" mine, the Committee requests the Government to provide information in this respect. As concerns the revocation of the registration of the trade union at the locomotive depot "Imeni Shevchenko" and of the All-Ukrainian Trade Union of Football Players, the Committee requests the Government and the complainants to provide further information concerning the reasons for dissolution so that it may examine this question in full knowledge of the facts. As concerns the trade union at the "Azovstal" enterprise, in view of the serious consequences which cancellation of trade union registration involves for the occupational representation of workers, the Committee considers that the use of the company's name in the title of the trade union should not result in the cancellation of trade union registration. The Committee therefore requests the Government to take the necessary measures so as to ensure that this trade union is registered. The Committee further requests the Government to keep it informed of the court decision as concerns the registration of the Federation of Free Trade Unions of Lvov Railways and to provide a copy of the judgement.*

Collective bargaining

- 1372.** *The Committee notes the alleged violations of collective agreements by the management of the "Partizanskaya" mine ("Antratsit" coal company) and of the "Stakhanova" mine ("Krasnoarmeyskugol" enterprise), which did not transfer money for the cultural and recreational activities of the NPGU primary trade unions, as provided for in the respective collective agreements. As of 1 January 2005, and as concerns the latter enterprise, the arrears amounted to 234,952 UAH (US\$44,000). The Committee notes that a special commission has been set up within the Ministry of Fuel and Energy in order to examine these allegations. Recalling that agreements should be binding on the parties [see *Digest*, op. cit., para. 818], the Committee requests the Government to keep it informed of the conclusions reached by the commission.*

- 1373.** *The Committee further notes that the complainants allege that the administration of the Maritime Commercial Port of Ilyichevsk refuses to bargain collectively with the Independent Trade Union of Workers of the Maritime Commercial Port of Ilyichevsk. No information was provided by the Government in this respect. The Committee recalls that it had previously examined the allegations of violation of the right to collective bargaining at the maritime commercial port of Ilyichevsk in Case No. 2018. In its last examination of this case, the Committee noted the Government's communication of 4 September 2003, by which it had indicated that the administration of the port and the Independent Trade Union of Workers of the Maritime Commercial Port of Ilyichevsk had concluded a new collective agreement [see 332nd Report, para. 170]. In view of the allegations by the complainants to the contrary, the Committee requests the Government to provide its observations in this respect.*
- 1374.** *The Committee observes that this case concerns numerous complaints of alleged anti-union discrimination and interference in trade union internal affairs at a number of enterprises and that such acts have apparently affected both main trade union centrals, the FPU and the CFTUU. The Committee expresses its concern over the number of complaints concerning the non-application of Conventions Nos. 87 and 98 in practice. Recalling that, where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see Digest, op. cit., para. 754], the Committee trusts that the Government will rapidly take the necessary measures to investigate the remaining allegations and to ensure that any effects of anti-union discrimination and interference are appropriately and adequately remedied.*
- 1375.** *The Committee notes the recent communication of the CFTUU and requests the Government to provide its observations on the allegations of violation of trade union rights at the "Ordzhonikidze" and "Novodonetskaya" mines, "Meridian" international school, "Ilich" metallurgical enterprise, "Krasnoarmeyskiy dinasovoy zavod" enterprise and "Krasnolimanskaya" coal company.*
- 1376.** *Finally, the Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, on the questions at issue.*

The Committee's recommendations

- 1377.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee recalls that the rights of workers' organizations can only be exercised in a climate that is free from pressure of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected. The Committee further considers that bodies responsible for investigation of allegations of violation of trade union rights should enjoy independence from the authorities against which the allegations were submitted. The Committee therefore requests the Government to take the necessary measures so as to ensure that any further allegations of trade union intimidation or harassment by the SBU are investigated by an independent body having the confidence of the parties concerned and that the SBU will refrain in future from any anti-union discrimination activities.*

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- (b) *The Committee requests the Government to indicate whether any measures have been taken in respect of trade union organizations as a result of Interim Report No. 5535 of the Temporary Commission of Inquiry of Verkhovna Rada of Ukraine on issues related to establishing of evidence of foreign interference into financing of the election campaign in Ukraine through non-governmental organizations operating on grants of foreign States, which treats free trade unions as political organizations carrying out the order of foreign agents.*
 - (c) *The Committee requests the Government to institute an independent investigation into the allegations of interference in the internal affairs of the All-Ukrainian Trade Union of State Agencies' Employees and to keep it informed in this respect.*
 - (d) *The Committee requests the Government to ensure that those trade unions of the Western Donbass Association of the NPGU which suffered material damage due to the illegal search are compensated without delay.*
 - (e) *The Committee trusts that the commission mandated to investigate the alleged violations of trade union rights at the "Postnikovskio", "Pervomai", "Vinintzkouo", "Shahtersko-glubokoe", "Duvannaya" and "Zolotoye" mines, as well as at the "Test Donetskuglestroy" Ltd. Enterprise will be independent. It further requests the Government to keep it informed on the results of the work of the commission.*
 - (f) *The Committee requests the Government to conduct an independent inquiry into the allegations of the anti-union campaign which allegedly took place at the "Imeni Shevchenko" locomotive depot and to keep it informed in this respect.*
 - (g) *The Committee requests the Government to provide a copy of the minutes of the meeting of 2 April 2004, during which, according to the Government, all problematic issues that had arisen at the "Krivorozhsky" plant were settled by the representatives of the provincial state administration, the management of the plant and trade unions.*
 - (h) *The Committee requests the Government to conduct an independent investigation into the allegation that at the "Orzhitsky" sugar refinery plant, 115 workers left the union under pressure by the employer and to keep it informed of the outcome.*
 - (i) *The Committee requests the Government to carry out an independent investigation into the allegations of an anti-union campaign carried out by the management of McDonald's and, if it is found that workers were indeed harassed and intimidated in an attempt to dissuade them from becoming members of a union, to take suitable measures to redress the situation and to ensure that workers may effectively exercise their fundamental right to organize. It requests the Government to keep it informed in this respect.*

- (j) *The Committee requests the Government to conduct an independent inquiry into the allegation of creation by the management of the “Svesky Nasosny Zavod” enterprise of a puppet union controlled by it and to keep it informed in this respect.*
- (k) *The Committee requests the Government to conduct an independent inquiry into the allegation of interference by the management of the “Gruzavtoservice” enterprise in the election of trade union officers and to keep it informed in this respect.*
- (l) *The Committee requests the Government to conduct independent inquiries into the allegations of anti-union dismissals at the “Knyagynskaya” mine, the State Agrarian technical secondary school of Alexandria City and the “Tomashpilsakhar” enterprise, and to keep it informed in this respect. The Committee expects that the case concerning Mr. Komissarov, the chairperson of the union at the “Promproduct” enterprise, will be examined without delay and requests the Government to keep it informed in this respect. Furthermore, the Committee requests the Government to indicate whether, in the case of dismissal of Mr. Dzyubko, the relevant procedures for dismissal of a trade union leader provided for in the Labour Code were followed.*
- (m) *The Committee requests the Government to institute immediately an independent judicial inquiry into the allegations of physical assaults on Mr. Shtulman, Mr. Fomenko and Mr. Kalyuzhny with a view to fully clarifying facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. The Committee requests the Government to keep it informed of any development regarding these cases, as well as the criminal investigation regarding the abduction and physical assaults on Mr. Volynets’ son.*
- (n) *As concerns the allegations of denial of certain facilities to trade unions, the Committee requests the Government to:*
- inform the Committee whether the primary trade unions of the complainants’ organizations at the “Partizanskaya” mine, the “Krivoy Rog Steal” enterprise and the “Orzhitsky” sugar refinery plant were provided with office space;*
 - reply to the allegation of suspension of check-off facilities at the “Tomashpilsakhar” enterprise;*
 - reply to the allegation of violation of the right of the trade union representative to access the workplace at the “Svesky Nasosny Zavod” enterprise;*
 - to indicate whether trade union dues deducted from workers’ wages during 2002-03 were duly paid to the FPU-affiliated trade unions;*
 - to indicate whether the telephone lines were reconnected in the office of the trade union organization at the “Microprylad” Ltd. Enterprise.*

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- (o) *With regard to the alleged instances of revocation of trade union registration:*
- *the Committee requests the Government to provide information in respect of the revocation of registration of the NPGU primary organization at the “Krasnolimanskaya” mine;*
 - *the Committee requests the Government and the complainants to provide further information concerning the reasons for the dissolution of the trade union at the locomotive depot “Imeni Shevchenko” and the All-Ukrainian Trade Union of Football Players;*
 - *the Committee requests the Government to take the necessary measures so as to ensure that the trade union at the “Azovstal” enterprise is re-registered;*
 - *the Committee requests the Government to keep it informed of the court decision as concerns the registration of the Federation of Free Trade Unions of Lvov Railways and to provide a copy of the judgement.*
- (p) *Recalling that collective agreements should be binding on the parties, the Committee requests the Government to keep it informed of the conclusions reached by the commission set up to examine the allegations of violations of trade union rights by the management of the “Partizanskaya” mine (“Antratsit” coal company) and of the “Stakhanova” mine (“Krasnoarmeyskugol” enterprise).*
- (q) *The Committee requests the Government to reply to the complainants’ allegation that the administration of the maritime commercial port of Ilyichevsk refuses to bargain collectively with the Independent Trade Union of Workers of the Maritime Commercial Port of Ilyichevsk.*
- (r) *Recalling that, where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention, the Committee trusts that the Government will rapidly take the necessary measures to investigate the remaining allegations and to ensure that any effects of anti-union discrimination and interference are appropriately and adequately remedied.*
- (s) *The Committee requests the Government to provide its observations on the allegations of violation of trade union rights at the “Ordzhonikidze” and “Novodonetskaya” mines, “Meridian” international school, “Ilyich” metallurgical enterprise, “Krasnoarmeyskiy dinasovoy zavod” enterprise and “Krasnolimanskaya” coal company.*

- (t) *The Committee requests the Government to solicit information from the employers' organizations concerned, with a view to having at its disposal their views, as well as those of the enterprises concerned, on the questions at issue.*

CASE NO. 2269

DEFINITIVE REPORT

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

- Inter-Union Workers' Assembly and the National Confederation of Workers (PIT-CNT) and
- the Confederation of Civil Service Trade Unions (COFE)

Allegations: Discount of sums from two days' wages from the salaries of trade union members Ms. Leonor Quefan and Ms. Anahí Oldán for having participated in trade union activities, as well as the launching of disciplinary procedures against workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works

1378. The Committee examined this case at its June 2004 meeting and presented an interim report to the Governing Body [see 334th Report, paras. 763-796, approved by the Governing Body at its 290th Session (June 2004)].

1379. The Government sent new observations in communications dated 28 December 2004 and 11 January 2005.

1380. Uruguay has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. Previous examination of the case

1381. In its examination of the case in May-June 2004, the Committee made the following recommendation [see 334th Report, para. 796, approved by the Governing Body at its 290th Session (June 2004)].

With regard to the alleged acts of anti-union discrimination relating to the salary reductions imposed on union officials Ms. Leonor Quefan and Ms. Anahí Oldán, and the disciplinary measures taken against workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works, after its assembly had resolved to undertake industrial action, the Committee, observing that the allegations refer to events which occurred in the central public administration more than eight months ago, regrets the absence of observations from the Government and requests it to send its observations in this respect as soon as possible.

B. The Government's new observations

- 1382.** In its communications dated 28 December 2004 and 11 January 2005, the Government states in relation to the disciplinary measures taken against the civil servant, Ms. Leonor Quefan, that on 25 and 26 March 1999, the trade union organizations "Departmental Association of Public Employees" (ADEOM) and "Confederation of Civil Service Trade Unions" (COFE) organized a "Latin American Confederation of State Employees (CLATE) Southern Cone Regional Seminar on Social Security" in Montevideo. The Government states that Ms. Leonor Quefan attended the abovementioned seminar as the representative of the Association of Civil Servants of the Ministry of Industry and Energy (AFMIE) which informed the director-general of the secretariat of this fact through a note. The Government adds that, although the General Directorate did not recognize such an activity as being covered by trade union immunity (protection of trade unions), the civil servant did not sign in at her place of work on those days (25 and 26 March 1999). This meant that the Human Resources Department recorded the fact that she had been absent from work on those days and the consequent salary reductions were imposed. The Government confirms that the civil servant believed her attendance at the abovementioned seminar constituted an activity covered by trade union immunity and therefore lodged an appeal to have the decision reversed and an administrative appeal. In a ruling dated 19 July 1999, the director-general of the secretariat rejected the appeal for reversal. This ruling was confirmed on 5 August by the Ministry of Industry, Energy and Mines which rejected the administrative appeal. Both rulings were based on the opinion issued by the Legal Counsel Department, one of the recitals of which goes on to say: "compliance with legislation, and especially trade union immunity, has been a constant concern for this Ministry, as can be seen by the various precedents cited by the civil servant herself, but attendance of a seminar, in this particular case regarding social security, does not, in the eyes of this Ministry, constitute a trade union activity, rather her participation should be viewed as having been undertaken in a personal capacity, and she should therefore have followed the regulations set out in Law No. 16.104 of 23 January 1990, regarding leave for civil servants".
- 1383.** The Government, however, declares that on 3 April 2002, the Administrative Court ruled in favour of the request submitted by the abovementioned trade union member and revoked the administrative act in question. As a consequence of the abovementioned ruling of the Administrative Court, the Ministry issued a ruling dated 26 September 2002 modifying that dated 3 December 1999 in that the civil servant was paid the sums discounted from her wages corresponding to 25 and 26 March 1999.
- 1384.** The Government states that in relation to the case of Ms. Anahí Oldán, a civil servant working for the Official Service for Broadcasting, Radio, Television and Public Performances (SODRE) (Ministry of Education and Culture) that, on 20 January 2003, members of the executive board of the Association of Civil Servants of the Official Service for Broadcasting, Radio, Television and Public Performances (AFUSODRE) informed the Executive Committee of SODRE that the Social Forum would be held in the Republic of Brazil from 22 to 28 January and that the civil servant Ms. Anahí Oldán had been appointed to attend and, as a consequence, a request was made for the corresponding trade union leave. On 12 March 2003, the Executive Committee of SODRE checked on the civil servant's work attendance record for 22 to 29 January and imposed a salary reduction in accordance with the advice given by its legal counsel department. Once the civil servant had been notified on 21 March, she lodged an appeal for reversal and an administrative appeal on 2 April 2003. On 6 August, the Executive Committee issued a ruling on the appeal for reversal, revoking the decision to impose a salary reduction concerning her absence owing to her presence at the Social Forum. Notification of this decision took place on 19 August 2003. The Government adds that there was no need to make any repayment

to the abovementioned civil servant given that no salary reduction was imposed following the adoption of the first administrative ruling.

- 1385.** As to the launching of an administrative investigation within the Transport Directorate concerning workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works and the refusal of a group of civil servants to cooperate with regard to proceedings initiated by the governing body of Professional Cargo Transport, the Government states that this issue was dealt with during a meeting of the Deputy Minister for Transport and Public Works and various trade union delegates, as well as two signatories of the complaint sent to the ILO.

D. The Committee's conclusions

1386. *The Committee observes that the pending issues refer to the alleged salary reduction affecting two days for the carrying out of trade union activities by trade unionists, Ms. Leonor Quefan and Ms. Anahí Oldán, as well as the launching of disciplinary procedures against workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works.*

1387. *The Committee notes with interest that the Government states that the salary reductions imposed on the trade unionist, Ms. Leonor Quefan, were repaid following a ruling by the judicial authority as a result of an appeal, presented by the abovementioned trade unionist, against the administrative rulings which gave rise to the reductions. The Committee also observes that no reduction was implemented either regarding the salary or the benefits of trade unionist, Ms. Anahí Oldán, as the Executive Committee of SODRE ruled in favour of the administrative appeal lodged by the abovementioned trade unionist against the ruling imposing a salary reduction concerning two working days.*

1388. *As to the allegation that disciplinary measures were taken against workers affiliated to the Association of Workers of the National Transport Directorate of the Ministry of Transport and Public Works after its assembly had resolved to undertake industrial action, the Committee notes that the Government states that this issue was dealt with during a meeting involving the Deputy Minister for Transport and Public Works and various trade union delegates, as well as two signatories of the complaint sent to the ILO.*

The Committee's recommendation

1389. *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.*

CASE NO. 2249

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

**Complaint against the Government of Venezuela
presented by**
— the National Union of Oil, Gas, Petrochemical and Refinery
Workers (UNAPETROL) and
— the National Single Federation of Public Employees (FEDEUNEP)

Allegations: Murder of a trade unionist; refusal to register a trade union; hostile statements by the authorities against the Workers' Confederation of Venezuela (CTV); detention order against the CTV president; promotion of a parallel confederation by the authorities; obstruction of collective bargaining in the oil industry; detention orders and criminal proceedings against trade union officials; dismissal of more than 19,000 workers because of their trade union activities; non-compliance with collective agreements; interference by the authorities and by the Petróleos de Venezuela S.A. (PDVSA) enterprise, and anti-union acts; delays in proceedings concerning violations of trade union rights; negotiation with minority public employee organizations in disregard of the most representative ones; and action by the authorities to divide trade unions

1390. The Committee examined this case at its May-June 2004 session and submitted an interim report to the Governing Body [see 334th Report, paras. 827-876, approved by the Governing Body at its 290th Session (June 2004)].
1391. The National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) sent new allegations in communications dated 20 April, 1 June, 7 September and 22 December 2004 and 15 February 2005. The National Single Federation of Public Employees (FEDEUNEP) sent new allegations in a communication dated 1 November 2004.
1392. The Government sent its observations in communications dated 26 May, 4, 14, 15, 16, 17 June, 18 October, 5 and 16 November 2004, and 11 February, and 2 and 3 March 2005.
1393. Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

1394. When it examined the case at its session in May-June 2004, the Committee on Freedom of Association formulated the following recommendations [see 334th Report, para. 876, approved by the Governing Body at its 290th Session (June 2004)]:

- (a) With respect to the warrant for the arrest of Mr. Ortega, the Committee strongly urges the Government to take steps to vacate the detention order against Mr. Ortega and to guarantee that he may return to the country so as to be able to perform the trade union functions corresponding to his post of president, without being subject to reprisals.
- (b) With respect to the failure to recognize the executive committee of the CTV, including its president, Mr. Ortega, the Committee observes that this question was already examined in another case [see Case No. 2067, 330th Report, para. 173], repeats its previous observations and recommendations formulated within the framework of Case No. 2067, and therefore once again urges the Government to recognize the executive committee of the CTV.
- (c) With respect to the promotion of the establishment of a workers' confederation supportive of the party of the President of the Republic and the hostile statements towards the CTV, the Committee requests the Government to abstain from making statements in the CTV's regard which could express hostility towards that trade union, as well as to abstain from promoting the establishment of other trade unions or confederations.
- (d) As regards the alleged obstruction by the labour inspectorate of the draft fourth collective agreement submitted by FEDEUNEP, imposing demands that go beyond the law or are impossible to fulfil in practice within the prescribed deadline and subsequently rejecting the draft, as well as acceptance of a new draft (which was converted into a collective agreement) originating from six of the 17 FEDEUNEP leaders who formed a federation (FENTRASEP) approved by the government authorities and the Ministry of Labour, the Committee requests the Government to provide information on whether FEDEUNEP has lodged any judicial appeal against the collective agreement concluded between the public administration and FENTRASEP.
- (e) The Committee observes that the Government has not sent the observations and information requested regarding the other recommendations made in the context of the previous examination of the case and therefore reiterates those recommendations and requests the Government to send its observations and information without delay. These recommendations relate to the following issues:
 - information on whether other workers were injured in the march that took place on 1 May 2003, as asserted by the ICFTU, and if so, what legal action was taken;
 - the alleged acts of violence by the military on 17 January 2003 against a group of workers from the Panamco de Venezuela S.A. enterprise, leaders of the Beverage Industry Union of the State of Carabobo; the need to institute an independent investigation without delay into the instances of detention and torture claimed by the CTV to have been suffered by workers Faustino Villamediana, Jorge Gregorio Flores Gallardo, Jhonathan Magdaleno Rivas, Juan Carlos Zavala and Ramón Díaz;
 - the Ministry of Labour's refusal to register UNAPETROL and the Ministry's request to the state enterprise PDVSA to describe the duties performed by the promoters of UNAPETROL;
 - the dismissal of more than 18,000 workers from PDVSA and its subsidiaries, including the members of UNAPETROL, since the start of the "national civic work stoppage" in December 2002; the result of the legal action taken by the dismissed workers and negotiations with the most representative trade union confederations in order to find a solution; the observations on the alleged failure to observe legal standards and the standards of the collective agreement concerning the dismissal procedure; the examination, together with the trade unions, of the evictions affecting hundreds of former workers of PDVSA and its subsidiaries in the State of

- Falcón and in the San Tomé and Anaco oilfields with a view to finding a solution to the problem;
- information on the supposed offers of dialogue in the petroleum sector to which the Government referred, as well as the corresponding evidence;
 - the alleged anti-union reprisal in the form of PDVSA's written request to its subsidiaries and a Cypriot company not to hire the dismissed workers, the need to institute an independent investigation into this matter without delay and, if the allegations are found to be true, ensure that the workers affected are paid appropriate compensation;
 - the detention orders of 26 February 2003 issued against the UNAPETROL president and labour management secretary, Mr. Horacio Medina and Mr. Edgar Quijano, respectively, and as regards similar actions taken with respect to other UNAPETROL members (Juan Fernandez, Lino Carrillo, Mireya Ripanti de Amaya, Gonzalo Feijoo and Juan Luis Santana, former company directors);
 - the alleged systematic harassment of oil workers by the PDVSA loss prevention and control management and by a new pro-government workers' organization called the Association of Oil Workers (ASOPETROLEROS);
 - allegations presented by UNAPETROL on 17 February 2004 relating to the mass dismissals at the PDVSA oil company and its subsidiaries, the violation of the trade union immunity of Mr. Diesbalo Osbaro Espinoza Ortega, general secretary of the Union of Workers, Oil Employees and Associated of the State of Carabobo (SOEPC), and the persecution of UNAPETROL officials in respect of whom arrest warrants had been issued;
 - the alleged initiation of disciplinary proceedings against Mr. Gustavo Silva, SINTRAFORP general secretary.
- (f) The Committee requests the complainant organizations to send their comments on the Government's declarations concerning the dismissal of FEDEUNEP official Cecilia Palma.
- (g) The Committee requests the Government to send without delay its observations concerning the additional information sent by UNAPETROL with the support of CTV in a communication dated 20 April 2004.
- (h) The Committee would underline that it remains seriously concerned about the situation of workers' and employers' organizations in Venezuela and once again urges the Government to implement all its recommendations without delay.
- (i) The Committee will examine the communication dated 26 May 2004, received while it was meeting, and which refers to the assassination of the trade unionist Mr. Numar Ricardo Herrera when it next examines the case.

B. New allegations

1395. In its communications dated 20 April, 1 June, 7 September and 22 December 2004 and 15 February 2005, UNAPETROL gives a broad picture of the disputes that have arisen since 2002 over the appointment of the board of directors of the PDVSA petroleum company and of managers who had neither the qualifications nor the professional background to hold such positions, and over the demotion or dismissal of managers for political reasons. UNAPETROL was established in April 2002 and from May onwards there was a steady increase in violations of the principle of the merit system of advancement, reports were fabricated against managers and workers, the oil industry became politicized, corruption became common practice, workers' rights were ignored, etc. The collective action that was then undertaken resulted in the dismissal of 18,756 workers at PDVSA – over 23,000 if the dismissals at PDVSA's subsidiaries are included. The Ministry of Labour cited the existence of a social interest in the case of the dismissals at PDVSA and its subsidiary PEQUIVEN and did not apply normal legal process in the

event of mass dismissals. In 2003 hundreds of workers were evicted illegally, violently and without any judicial order from the homes that they had been given by the enterprise; the workers were also deprived of medical and health services and their children were no longer able to go to school. UNAPETROL describes the situation in the states of Anzoategui, Monagas, Bovinas Apure, Carabobo, Fallón and Zulia owing to the negligence of the authorities, as well as instances involving government party circles, armed paramilitary forces and the national police force who, with the connivance of PDVSA, were responsible for injuring dozens of workers and for having others detained and charged with criminal activities. A worker, José Manuel Vilas Liñeira, was treacherously shot to death by a person wearing a military police uniform who disappeared. UNAPETROL adds that the Executive has not responded to the request for an interview that it made to the Minister of Labour in a letter dated 30 March 2004, as a follow-up to the Committee on Freedom of Association's recommendation that together with the trade union organizations it examine the eviction of hundreds of workers, the dismissals and the recognition of UNAPETROL.

- 1396.** With regard to the dismissals of members of UNAPETROL, the First Administrative Disputes Court issued a preventive ruling for protection of constitutional rights on 12 June 2003 recognizing the existence of UNAPETROL and the immunity of its members (both members and militants) from dismissal. The Ministry of Labour challenged the judges and accused them on 21 June 2003 of an "irrecusable error". Moreover, at the request of PDVSA, the Administrative Policy Branch of the Supreme Court of Justice ordered the abovementioned First Court to send it the report on immunity from dismissal of the founders and members of the trade union and, on 4 May 2004, revoked the First Court's decision (by one vote). In November 2003 the magistrates of the First Court were removed from office by the Committee on Proceedings of the judiciary for handing down a ruling which did not please the Government.
- 1397.** Regarding the dismissals, UNAPETROL draws attention to the hold-up for more than a year of the appeals lodged by workers in the petroleum sector, including both the administrative proceedings before the labour inspectorate and the complaints lodged with the courts. UNAPETROL states that on 15 February 2005 more than 80 per cent of the legal proceedings initiated in the wake of the dismissal of over 18,000 PDVSA workers were still at the preliminary stage owing to the failure of the authorities to act.
- 1398.** In September 2004 the Government, through the labour inspectorates, initiated the proceedings that had been started the previous year by the members of UNAPETROL, but without due preparation and, more seriously, on a massive scale, opening up a large number of cases simultaneously so that sometimes, in connivance with the courts and inspectorates, proceedings concerning the same worker were set to take place at the same time on the same day both at the headquarters of the labour inspectorate and in court. Consequently, the worker found himself unable to defend himself, since it is impossible to be in two places at the same time. In these circumstances, the proceedings scheduled to be conducted en masse by the labour inspectorates at the same time and on the same day are null and void, given that it is physically and humanly impossible not only for the labour inspector to be present at each and every one simultaneously, but also for the enormous number of public servants and equipment needed to hold all the proceedings at the same time to be mobilized for the purpose.
- 1399.** UNAPETROL adds that Horacio Medina was summoned by the Office of the Attorney General, which on 15 July 2004 charged him with the alleged commission of six crimes during the course of the national civic work stoppage that began in December 2002. He was thus charged with civil rebellion, incitement to commit a crime, criminal conspiracy, incitement to civil disobedience, unauthorized interruption of the gas supply (Chambers 144, 284, 287, 286 and 361 of the Penal Code) and unauthorized disclosure of electronic

data (section 11 of the Electronic Information Crimes Act). The investigation was initiated in 2003 following a complaint by the president of PDVSA himself. These crimes were allegedly committed during the national civic work stoppage that started in December 2002. UNAPETROL alleges that Horacio Medina insisted that the events described by PDVSA as “sabotage” were not a result of the work stoppage of December 2002 but of the malpractice and negligence of those who were responsible for the operational control of the oil industry (PDVSA and its subsidiaries) and who prevented the return to work of 18,000 oil workers, who were then dismissed en masse for exercising their right to strike. The main culprit was therefore the president of PDVSA.

- 1400.** The press department of the Office of the Attorney General issued a communiqué on 21 December 2004 stating that the Public Ministry had charged Juan Antonio Fernández, Horacio Francisco Medina and Mireya Ripanti de Amaya with the alleged crimes referred to above and was requesting their detention.
- 1401.** The president of UNAPETROL, Horacio Medina, and the Secretary for Labour Relations, Edgar Quijano, whose detention had been requested by the Office of the Attorney General, were summoned to appear before the labour inspectorate on 22 December 2004 in connection with their dismissal. Since a detention order had been ordered against them, they were obviously unable to respond to the summons. On 22 December 2004 the judicial authority also issued a detention order against Edgar Quijano, Gonzalo Feijoo, Juan Santana, Edgar Paredes and Lino Carrillo.
- 1402.** UNAPETROL asserts that the Government has not complied with the recommendations of the Committee on Freedom of Association concerning the allegations still pending, and that the Supreme Court of Justice is disregarding the Constitution and displaying its subservience to the guidelines of the Executive. In other words, there is no rule of law.
- 1403.** FEDEUNEP states that, as required by law, it sent to the Ministry of Labour three copies of the draft collective agreement and minutes of its Assembly, which approved the draft along with all the documents conferring legal authority on the executive committee to represent public employees, including the document of certification by the National Electoral Council. It also sent the Ministry the public notice that appeared in a national newspaper, the decision of the National Electoral Council, the union’s by-laws, signed testimonials of support and a detailed list of affiliated trade unions, all of which was designed to demonstrate that its members had been duly consulted on the draft. The organization states that its highest decision-making body is the National General Council, constituted by its affiliates which are first-level trade unions. FEDEUNEP points out that, at a time when assemblies are being held in every workplace, the request of the labour inspector is, to begin with, an interference in trade union activities, because it is the Ministry’s responsibility to ensure that the organization’s by-laws are complied with, as happened in the past when the highest decision-making body was convened. The Labour Inspectorate cannot make demands as it pleases outside those stipulated in the Labour Act, nor can it invent trade union approval procedures that are not provided for in the by-laws.
- 1404.** FEDEUNEP states that, since it had sent to the administration the ruling of the National Electoral Council granting it legal personality as the legitimate winner of the electoral process, and in so far as no appeal had been lodged against this ruling of the electoral authority, the labour inspectorate had no authority to consider a draft convention submitted by persons who were not in a position to demonstrate by the outcome of elections that they represented FEDEUNEP, especially as they were only six of the organization’s 17 officials. The Government’s partiality vis-à-vis a sector of the trade union movement is demonstrated by the fact that, in its response to the complaints it mentions only in one paragraph the signatures of the workers and trade unions that supported the draft convention presented by those who had appropriated FEDEUNEP’s name, whereas it does

not mention that the Federation attached a much larger number of signatures. Moreover, the proceedings of the General Council show that the Federation's draft was endorsed by over 59 organizations, far more than the number of union officials that endorsed the other draft.

- 1405.** Regarding the request for trade union immunity submitted to the First Administrative Disputes Court, FEDEUNEP states that the Court issued a preventive order to halt any further discussion of the agreement that the labour inspectorate had embarked upon quite irregularly with those persons who had appropriated the name and logo of the Federation without its authorization. FEDEUNEP emphasizes that its lawsuit was brought against the labour administration for having rejected the collective agreement submitted by the Federation and, above all, for entering into discussions with persons who had no legal or legitimate representation of FEDEUNEP, and not against "six dissident officials".
- 1406.** FEDEUNEP emphasizes the falseness of the Government's argument that on 23 October 2002 the Ministry of Labour did not know who was the legal representative of FEDEUNEP, since on 6 August 2002 all the documents from the National Electoral Council showing who exercised the representation of FEDEUNEP were sent to the Ministry of Labour where they were duly sealed and registered.
- 1407.** FEDEUNEP states that the Government asserts that it appealed against the decision of the First Administrative Disputes Court, which proves that the lawsuit was directed against the labour administration and was not merely an intra-union dispute directed against those who had appropriated the name and logo of the federation without authorization; in Venezuela trade union lawsuits can only be contested by those against whom they are directed. As to the intra-union dispute, that had been brought before FEDEUNEP's disciplinary court and ruled upon by the National General Council, which in accordance with the by-laws, ordered the expulsion of those who had appropriated the logo and name of FEDEUNEP.
- 1408.** FEDEUNEP adds that the labour inspectorate accepted and entered into discussions with a group that possessed not a single official document demonstrating that they in any way represented the Federation as they claimed.
- 1409.** Regarding the alleged withdrawal of the case brought before the First Administrative Disputes Court, FEDEUNEP asserts that that was the only logical and practical thing to do since, once the appropriation of functions had been proved, the substance of the ruling would have repercussions both for the dissident officials and for the labour inspectorate itself. That was why, in record time, the same group of people formed a new federation (FENTRASEP) which the Ministry of Labour likewise officially registered in record time, just so that it could introduce the same agreement on which discussion had been halted by the preventive order, but on behalf of FENTRASEP; in fact, although the organization had been established only recently, the draft collective agreement logically bore the number IV, given that FEDEUNEP was the only federation to have signed the previous ones.
- 1410.** Regarding the case concerning trade union official Cecilia Palma, FEDEUNEP expresses its surprise that the Government should have endorsed her dismissal and recognized it as valid since, legally speaking, before a union official can be removed the employer must request authority to do so from the labour inspectorate itself. The court report concerning the official contains statements by a number of other officials to the effect that, on the day the events invented and distorted by political adversaries were supposed to have taken place, Cecilia Palma, along with all her co-workers, was at the headquarters of the National Nutrition Institute. More serious still, it is strange that the Government should have concealed from the Committee on Freedom of Association the fact that, following her appeal for constitutional immunity, Ms. Palma had benefited from a preventive order

issued by the First Administrative Disputes Court (prior to its closure) ordering that she should be reinstated in her job. However, it had proven impossible to enforce this order, which took precedence over any other.

C. The Government's reply

- 1411.** In its communications dated 26 May, 4, 14, 15, 16 and 17 June, 18 October, 5 and 16 November 2004 and 11 February and 2 and 3 March 2005, the Government states that Numar Ricardo Herrera was not a union official but merely a member of the Construction Workers' Federation. In spite of his unfortunate death, therefore, it would be wrong to consider him a union official or to claim that a union official had been murdered. The police and the Office of the Attorney General took swift action to determine responsibilities and to apprehend the person who has now been charged in court and arrested. The guilty party was accused of qualified homicide, illegal possession of a firearm, causing bodily harm and intimidation. As to the broad allegation referring to "other injured persons", Felix Longart suffered less serious injuries and is not a member of a trade union. It has been proved that the murder of Numar Ricardo Herrera stemmed from personal reasons that had nothing to do with the CTV march. The Government refers to the sentencing of Manuel Arias Moreno on 30 July 2004 for committing a homicide for frivolous reasons, for causing less serious qualified injuries and for illegal possession of military weapons.
- 1412.** With regard to the alleged failure to recognize the Workers' Confederation of Venezuela (CTV), the Government states that it is not the Executive's responsibility, through the Ministry of Labour, which handles the registration of trade union organizations, to determine who are the officials of workers' organizations.
- 1413.** In the light of the foregoing, the Government asserts that the congress of the CTV decided to hold elections in the Confederation in October 1999. Because of delays and constant and sustained violations of its own by-laws, the executive committee of the CTV was not only discredited in the eyes of its own members who were demanding that the rank-and-file workers be allowed to participate, but also found itself in a situation of overt illegality as regards both the date of its internal elections and the order for their organization by the National Electoral Council. In the case of the CTV's executive committee, three of the six current union members challenged the results of the election. In the ensuing inter-union dispute, the president and other leading members of the electoral committee resigned over the scale of the irregularities, and the results of the elections were never actually passed on to the CTV. A Mr. Carlos proclaimed himself the winner because of the views he represented within two minority currents, without the number of votes obtained by each being determined. This position was endorsed by the public recognition given to him by FEDECAMARAS, backed by a massive publicity campaign whose financing is unknown. Because of the obvious irregularities, a public campaign was organized to deny the National Electoral Council any competence to validate the election results previously submitted to it by the Confederation, i.e. to deny it the role which the members of the CTV themselves had ordered at the congress held in 1999, pursuant to article 117 of its by-laws. The Government asserts that the Ministry of Labour and the Executive in general have maintained the position of respecting the competence of the national public authority, particularly when the issue concerns another (electoral) authority that has powers similar to those of a tribunal or a specialized electoral body. The electoral authority, as a public body, is separate from the Executive, autonomous and independent. The Ministry of Labour has repeatedly called on the National Electoral Council to rule on this point, without ever receiving any communication or formal reply from it on the subject. Similarly, the Executive has from time to time had to take judicial action to resolve this kind of situation, but, because the decisions taken are incidental, they do not resolve the underlying problem and do not provide any permanent solution. The persons who claim to preside over the

CTV legally have also failed to communicate the identity of its representatives officially to the public registrar of trade union organizations through the appropriate electoral channels. Although all union organizations are required by law to submit their economic balance sheet and a list of their members every year, the records of the CTV deposited with the public registry of trade unions have failed to meet this requirement ever since 2001. A detailed report on this situation has already been submitted to the Committee on the Application of Standards at the 90th Session of the International Labour Conference and was also communicated to the Committee on Freedom of Association in connection with Case No. 2067, but no detailed examination has been carried out of the legal and formal aspects of the case, which have to be considered in the light of the principle of legality embodied in Article 8.1 of Convention No. 87. In any case, the Government confirms the statements made at the 90th, and more recently the 92nd, Session of the International Labour Conference.

- 1414.** Because the National Electoral Council has not ruled on the question of the CTV's executive committee, the Supreme Court of Justice has repeatedly had to make its own rulings without knowing who is currently acting in the name of that Confederation. Ruling on a lawsuit on the subject brought by the Ministry of Labour, the Supreme Court of Justice, Electoral Chamber, accordingly confirmed in May 2003 that it could not recognize the CTV's executive committee in the name of a lower court, since by law any such dispute came within the competence of the National Electoral Council. On 18 December 2003 the same Electoral Chamber of the Supreme Court of Justice decided (ruling attached) to decline to consider the request submitted by the so-called representatives of the CTV that it recognize the executive committee elected on 25 October 2001 and the legitimacy of its elected representatives. The Electoral Chamber stated that it was not in a position at that time to endorse the latter's claim by means of a mere declaration, given that, so long as a ruling was still pending on the election results, which had been submitted to the National Electoral Council in accordance with article 56 of the special by-law on the renewal of the executive committee, the ruling could be challenged in that jurisdictional body. Consequently, as there was another legal process (viz. a possible challenge to the ruling of the National Electoral Council) whereby the complainant could obtain full satisfaction in respect of the present request, in accordance with the terms *in fine* of section 16 of the Civil Proceedings Code, the CTV's request that the matter be resolved by means of a mere declaration was inadmissible.
- 1415.** On 22 April 2004, when the Electoral Chamber subsequently received a request from the CTV, which *inter alia* sought that it be declared the most representative trade union organization of Venezuelan workers – since new organizations had come into existence that had absorbed a large number of its members whose membership of the CTV had consequently ceased it reiterated its position on the subject.
- 1416.** As a result, those currently acting in the name of the CTV's executive committee have not received any judicial recognition despite the specific petition to that effect that is before the Supreme Court of Justice, given the reasonable doubt as to whether or not it is the most representative organization. This lack of recognition cannot be attributed solely to the Executive, because of all the formal limitations that have been mentioned but, additionally and specifically, must be ascribed to the Electoral Chamber of the Supreme Court of Justice.
- 1417.** In Case No. 2067, the Government asked the Committee on Freedom of Association to request from the complainants (CTV) the results of the trade union elections of 2001 so that they could be included once and for all in the public registry of trade union organizations which the Government is required by law to keep. This has still not yet been done by the duly empowered body of the said Confederation, as already indicated, even after the request that was made to the Committee on Freedom of Association.

- 1418.** Similarly, on the occasion of the accreditation of the Workers' delegation to the 91st Session of the International Labour Conference, the Executive recognized Manuel Cova and other persons as de facto members of the executive committee of the CTV, along with their technical advisers, as had been done when the negotiating table agreement and the agreement between representatives of the Government and the Opposition had been signed under the auspices of the United Nations Development Programme, the Carter Center and the Organization of American States on 29 May 2002. A similar approach was adopted recently for the holding of consultations and meetings to determine the composition of the Workers' delegation to the 92nd Session of the International Labour Conference.
- 1419.** All these initiatives have been designed to comply with the recommendations of the ILO, despite the fact that contrary judicial rulings are still outstanding against those who claim to be acting in a capacity that is recognized neither by the CTV's by-laws nor by national and even international laws and regulations.
- 1420.** It must be made quite clear that the mobility and free and plural growth of the trade union organizations does not plead in favour of strengthening the CTV. This is a well-known fact, as can be seen from recent analyses published in the most respected and recognized organs of the Venezuelan press (press cuttings attached) and from the statistics published by the Ministry of Labour on the occasion of the signing of the national collective agreements in 2003 and up to April 2004.
- 1421.** The Government is obliged to recognize, and has permitted, the free organization of workers and employers at all levels and in all sectors, whether in the form of first-level trade unions, federations or confederations. Not only has the previous, harmful policy of favouritism been done away with, but it can be claimed today that the prevailing climate is one of recognition of the plurality of social partners rather than one of trade union monopoly (single national and international representation). Today, the CUTV, CODESA, CGT, UNT and CTV in which social-democrat, anarchist, social-Christian, communist, bolivarian, nationalist, trotskyist, socialist, capitalist, neo-liberal, etc. elements coexist, operate side by side.
- 1422.** With regard to the Government's alleged refusal to recognize the CTV, such recognition of the CTV's executive committee is dependent on a free and voluntary decision of its members, who are required to communicate to the competent authority (National Inspectorate) the data relating to their election (and confirmed, of course, by an internal electoral body) with an indication of which post corresponds to each union official. The Ministry of Labour is doing what it can to ensure that those who claim to be members of the CTV's executive committee send the relevant official documentation to the public registrar of trade union organizations. That alone will lead to legal recognition, subject to any rulings and decisions that might be handed down by other public authorities in proceedings currently under way in the Electoral Court or other judicial bodies.
- 1423.** The Government states that on 17 June 2004 the Supreme Court of Justice, Social Appeals Chamber, issued a ruling in respect of the request submitted by Leon Arismendi, Jesús Urbieta, Alfredo Padilla and Gerardo Ali Povedá, acting on their own behalf and on behalf of the CTV, to the effect that the said Court confirm in an official declaration that the CTV is the most representative organization of Venezuelan workers and that the fact is recognized by the Venezuelan authorities. It requested further that the declaration recognize the executive committee as the winner of the elections held on 25 October 2001. In its ruling the Supreme Court of Justice stated that, inasmuch as an inter-union dispute exists between the CTV and the National Union of Workers (UNT) as to which is the most representative confederation (even though they are third-level trade union organizations),

their representativeness can only be determined by means of a trade union referendum in the terms laid down in the Labour Act.

- 1424.** In another petition submitted by representatives of the CTV for the Supreme Court of Justice to recognize the executive committee that won the elections held on 25 October 2001, the relevant ruling ratified the judgements handed down by the Court's Electoral Chamber on 27 May 2003, January and 22 April 2004, especially since recognition of the said electoral process was still pending before the National Electoral Council, in accordance with article 56 of the special statute relating to the renewal of the union's executive committee, and such recognition could be challenged before that jurisdictional body. According to the Electoral Chamber, the electoral administrative supervisory body, i.e. the National Electoral Council, has not yet recognized the electoral process that allegedly resulted in the current membership of the CTV's executive committee. Consequently, bearing in mind that a third complainant in the present case (previously identified) has requested that it be denied that capacity, the legitimacy of the executive committee – and therefore of those who, on its behalf, authorized the complainants' attorneys to request a mere official declaration – is questionable.
- 1425.** The Supreme Court of Justice, Social Appeals Chamber, clearly cast doubt on the capacity and legitimacy of the CTV's executive committee in a case voluntarily brought before it by the committee. In view of the repeated pronouncements of the various Chambers of the Supreme Court of Justice concerning the recognition of the executive committee that won the elections on 25 October 2001, the Government has no alternative but to continue recognizing the CTV's executive committee de facto. The Venezuelan Government, like all public and private institutions and persons, is bound to abide by the decisions, rulings and pronouncements of the jurisdictional bodies, and particularly those handed down by the Supreme Court of Justice. The positions adopted by the Government in previous months must accordingly be adjusted in the light of judicial pronouncements that question the capacity and legitimacy of the CTV's executive committee and declare that the electoral process did not reach any formal conclusion.
- 1426.** The Government points out that the would-be representatives of THE CTV joined the Coordinadora Democrática in the electoral process that culminated in the impeachment referendum held on 15 August 2004, in which the people of Venezuela were asked to decide whether or not they wished the current President of the Republic to remain in power (article 72 of the Constitution). As a member of the opposition coalition known as Coordinadora Democrática, the CTV took an active role in demanding the impeachment of the President of the Republic, *inter alia* by facilitating the preparation of an alternative programme of government (Country Consensus Plan). The official results of the impeachment referendum held on 15 August 2004 and endorsed by the Organization of American States and the Carter Center gave 59.25 per cent of the vote in favour of the President's remaining in power against 40.75 per cent in favour of his impeachment – almost 20 per cent more votes in support of the current Government. However, adopting the opposition line propounded by the Coordinadora Democrática and instead of recognizing the Government as having been confirmed in power, according to the official results published by the National Electoral Council and ratified and endorsed by the OEA and the Carter Center, the CTV joined in accusing the Government of "electronic fraud" so as to be able to continue destabilizing the democratic institutions. The CTV continued to refuse to recognize the Government, as it has been doing systematically ever since 1999.
- 1427.** With regard to the request that the Government recognize the executive committee of the CTV so that a genuine social dialogue can be held in the country, it must be observed that, notwithstanding the impossibility of recognizing it formally because of the repeated rulings of the Supreme Court of Justice, there has been a disinterested appeal for dialogue with the various social partners. That appeal gave rise to a great deal of optimism after the

15 August 2004 referendum had confirmed the President in his mandate. In spite of that, the CTV claimed that the results published by the National Electoral Council were fraudulent and that therefore it was impossible to recognize the national Government of President Hugo Chavez Frias.

- 1428.** The Government draws attention to the fact that there has been a widespread change in trade union affiliation, with an apparent transfer of the established membership of the CTV towards the UNT, thereby accentuating a process that began in 2003. Both the national and the regional press has noted this phenomenon. According to its spokespersons, the CTV has now decided to bring forward the elections to its executive committee in the regional federations so as to coincide with the elections in the first-line trade unions. This is consistent with the legal implications of the ruling handed down by the Social Appeals Chamber of the Supreme Court of Justice on 17 June 2004.
- 1429.** With regard to the non-recognition of UNAPETROL the Government observes that the promoters of the planned trade union organization include representatives of the employer (in this case PDVSA). These were the employer's spokespersons vis-à-vis the workers and third parties, represented the enterprise and took part in enterprise decisions, thus entering into certain commitments on its behalf. A number of well-established facts point clearly in this direction, even within the ILO itself. The Committee's report recognizes that the purity principle has been infringed and that it is dealing here with former managers and former directors of PDVSA. It should be borne in mind that a manager or director of an industry like the petroleum industry can hardly be assimilated to an operator or a subordinate and must therefore be considered as representing the employer. To this must be added two fundamental facts. The first is that Administrative Decision No. 2003-027 handed down by the National Inspectorate of the Private Sector on 3 July 2003 and Ministry of Labour Resolution No. 2932 of 16 October 2003, which was recognized by the Committee itself as not being contrary to the principles of Conventions Nos. 87 and 98, established that over 30 PDVSA directors and managers appeared as founders of the planned UNAPETROL, one of them being Horacio Medina, former strategies manager for the state petroleum company. The other fact, likewise reflected in the ruling of the National Inspectorate and of the Ministry of Labour, is that the signature of Edgar Quijano, who claims to be UNAPETROL's records secretary, appears in the registration document of the 21 October 2000 collective agreement that PDVSA, Petroleum and Gas, signed with the trade union organizations FEDEPETROL and FETRAHIDROCARBUROS, which at the time were affiliated to the CTV. Mr. Quijano was a labour relations manager for PDVSA. The ruling is categorical in drawing attention expressly to Chamber 148 of the rules and regulations made under the Labour Act: "Prohibition of mixed trade unions (purity principle). No trade union organization may be established that claims to represent jointly the interests of the workers and the employers. Management employees may not establish workers' trade unions or be affiliated to them". As to the request for annulment of Ministry of Labour Resolution No. 2932 confirming the non-registration of the planned trade union organization UNAPETROL on account of infringements of the principle of trade union purity, this is still before the Supreme Court of Justice, Administrative Policy Chamber. However, the complainants have not submitted any evidence warranting its consideration by the Chamber, and so it is waiting for the deadline to lapse so that it can take a decision.
- 1430.** With regard to the unauthorized and illegal lockout that was ordered by the employers, the report of the Committee on Freedom of Association recognizes that the work stoppage in December 2002 and January 2003 was designed to protest against the Government's economic policy and to bring about the impeachment of the President of the Republic. The work stoppage took the form of a general strike. Some of the instigators of the general strike, which coincided with the public appeal made by the then FEDECAMARAS (the employers' federation), were former directors and managers in the petroleum sector. It is therefore clear that the action was not decided by the workers of the enterprise, who by

hypothesis would be opposed to a lockout ordered by their former chiefs, managers and directors, as the Committee fully realizes and as was mentioned briefly in its March 2004 report. In other words, the movement was instigated by the major private employers in conjunction with the management of the state enterprise, as part of a broad political plan to destabilize democracy in open defiance of a Government that the majority of the Venezuelan population had freely chosen. By recognizing that the aim of the movement was indeed to bring about a general strike, the Committee showed that in the minds of its instigators it was what is called a “political strike”. Any general strike, especially when it is an indefinite strike financed and supported by the employers (or by part of the employers’ sector), is designed to overthrow the constituted Government rather than simply to satisfy workers’ demands – in this instance the overthrow of a democratically elected Government and, paradoxically, one that only a few months before had been the object of a *coup d'état* directed by the very same instigators of the general strike. In the case of a political strike, the normal legal guarantees no longer apply, i.e. as its leaders claimed, there was no cause for submitting a list of grievances, there was no need to base it on labour issues or occupational demands, it did not call for the constitution of a tripartite conciliation board, and there was no reason to give the prior notice required by law (in Venezuela the required notice is 120 days from the moment a list of grievances is submitted to the labour administration). Moreover, in those petroleum sector activities that are deemed by the country’s laws and regulations to be essential public services, any interruption in supply must be accompanied by the organization of essential minimum services. This means that certain tasks and functions have to be carried out so as not to endanger the life, health or safety of the population. The regulations issued under the Labour Act refer expressly to the requirement as to essential minimum services and specifies how they are to be organized voluntarily by the parties concerned or through a preventive order issued by the administrative and judicial authorities.

- 1431.** The political objective of the indefinite work stoppage placed it outside the normal laws and regulations governing the right to strike, which means at the very least that it was illegal. Article 97 of the Constitution of the Republic stipulates that the right to strike shall be exercised “within the framework of the law”. However, the leaders and promoters of the work stoppage considered it unnecessary to comply with the law and instead issued a call for civil disobedience thus taking a serious step into the unknown from the standpoint of legal and constitutional guarantees – as indeed proved to be the case. It is obvious and elementary for anyone living in Venezuela, and especially those directly involved in labour and trade union affairs, that the lack of any list of demands means that there is no justification for invoking any protection against alleged measures of anti-union discrimination on the part of an employer, pursuant to Chambers 458 and 506 of the Labour Act. In other words, given the absence in practice of any labour dispute justifying a possible call to strike, there can be no protection whatsoever against measures of anti-union discrimination, and any action (reconsideration) taken by the employer is a matter of discretion and not imperative. The former oil sector officials’ and managers’ call to civil disobedience on the basis of their erroneous and liberal interpretation of article 350 of the Constitution resulted in their involving a large number of people without their being able to benefit from even the most elementary guarantees provided by the law. Consequently, nobody can blame the errors, the ignorance, the inexperience and the negligence of people who failed to foresee the juridical implications of their actions on an employer seeking to re-establish an essential public service or on the State as a whole in its efforts to secure the general interest, especially as their position as directors and trusted employees places them in a particularly weak situation from the standpoint of a stable working environment.
- 1432.** The Government states that the relevant jurisdictional bodies declared the work stoppage in the petroleum sector to be unconstitutional and illegal and refers to the ruling handed down by the Supreme Court of Justice, Constitutional Branch, on 19 December 2002 in the case opposing Felix Rodriguez (PDVSA) and “Gente del Petróleo” (oil sector people). In

view of the implications of the indefinite work stoppage for the Venezuelan population as a whole, whose life, health and security were thus put at risk, and after a number of appeals for a return to work had been made by the representatives of the enterprise through the official media and national radio and television channels, the Supreme Court of Justice, Constitutional Chamber, on 19 December 2001, issued a ruling establishing the rights of the entire Venezuelan population. The Government summarizes the arguments of the plaintiffs acting on behalf of PDVSA as follows:

- Paralysing the operations of PDVSA would produce a situation of social chaos that would constitute a threat to public order and to industrial peace, which is one of its conditions, and the work stoppage called by Gente del Petróleo was not based on any labour demands.
- PDVSA, a state company, is the victim of violations of its constitutional rights: closure of its offices and plants, paralysis of production and export of petroleum and petroleum products and of the merchant navy, etc.
- PDVSA has been deprived of its constitutional right to engage in the economic activity of its choice, to use and dispose of its assets as it deems fit, to the protection of its plants and property, to the physical integrity of its employees, to their ability to comply with their right and duties as workers and to receive a salary, and to the stability of the labour sector, as guaranteed by articles 91, 93, 112 and 115 of the Constitution in force, in violation of Chambers 4 and 19 of the Petroleum Act which, in addition to declaring the activities carried out by that company to be of public utility and social interest, requires that they be carried out efficiently and uninterruptedly.
- The paralysis of or reduction in the production of petroleum and petroleum products resulting from the actions or omissions directed and coordinated by the members of the offending association have affected the quality of life of the entire Venezuelan people, inter alia by restricting the production of aeronautical fuel, gasoline and diesel oil, as well as their transport from the production plants or refineries to the commercial supply centres; such actions constitute a clear and flagrant violation of the right of unimpeded movement throughout the national territory and the right to leave and transport goods into and out of the country.
- The work stoppage organized by the members of the said association has endangered the physical integrity and property of all the inhabitants of the country and restricted the exercise of their various rights, and has prevented every one of them from fulfilling their constitutional duties.
- Access to services, and specifically medical and hospital services, has been threatened or restricted by the shortage of gasoline for ambulances and the reduction in supply or unavailability of petroleum produced for health or medical purposes, as has the right to economic freedom of all private and public service enterprises involved in the petroleum or petrochemical sector and to a stable working environment for all workers.
- This situation entails a major risk of restricting the rights of the workers at PDVSA and the proper functioning of the public finances of the State of Venezuela with respect to the payment of taxes, as well as a serious threat to the rights of the creditors of the petroleum enterprise, to the distribution of food and to the effective provision of medical services and electricity.
- The fuel shortage at the international airport of Maiquetía prevented the normal operation of national and international airlines, the supply of fuel from the plants at

Carenero, Guatire and Cotia La Mar was suspended, and 90 per cent of the service stations in the states of Aragua, Guarico, Apure and Carabobo were closed.

- All work at the Yagua plant and the Barquisimeto plant, which is the supplier for the states of Yaracuy, Lora and Cojedes, was suspended; work was suspended at the Guaraguao plant, affecting the states of Anzoátegui, Nueva Esparta and part of Sucre, at the Maturín plant, leading to the closure of the service stations in the states of Monagas, Delta Amacuro and Sucre, and at the San Tomé plant, which disrupted the transport of food and industrial products in the region; deliveries from the Puerto Ordaz and Ciudad Bolívar plants and from the Baja Grande plant, which supplies the east coast of Maracaibo Lake, and from the San Lorenzo plant, operating at only 50 per cent of capacity, were minimal, thereby disrupting the entire supply of oil to the states of Zulia, Trujillo and part of Lara and Falcón; and all operations were suspended at the El Vigía plant, which affected the states of Mérida, Táchira and Apure.
- The paralysis of the oil tanker “Pilín Leon” and of 13 other tankers from the PDV Marina fleet, combined with the presence of 11 boats belonging to international shipowners and anchored off various petroleum ports in the country prevented not only the supply of fuel to the domestic market but also the sale of crude oil and petroleum products for export, as well as preventing six tankers belonging to third parties from docking at PDVSA piers where it was deemed that there was no skilled personnel available.
- The total production of crude oil dropped by 68 per cent or more because of the halting of production, storage restrictions, the paralysis of 29 compression units at Maracaibo Lake and the cessation of activities at the Lacustre de La Salina terminal following the departure of the staff for reasons of security; there has also been a total work stoppage in some instances and the only partial operation of the refineries in El Palito, Puerto La Cruz and Paraguaná and in the petrochemical plants in Tablazo, Morón and José, as well as instances of staff having to work 48 hours non-stop.

- 1433.** The Government states that the ruling handed down by the Supreme Court of Justice, Constitutional Chamber, also illustrates the articulation of two complementary scenarios with, on the one hand, the Gente del Petróleo operating at the party-political level under the name of Coordinadora Democrática or Venezuela Initiative (outside the country) and, on the other, UNAPETROL supposedly operating at the trade union level but with a strictly political agenda. The Supreme Court of Justice declared that the activities of the former managers of PDVSA, who were in league with Gente del Petróleo and whose members included Horacio Medina, violated the International Convention on Economic, Social and Cultural Rights, to the detriment of the Venezuelan population.
- 1434.** The Supreme Court of Justice, Constitutional Chamber, issued a preventive order citing persons unknown and requiring all authorities and individuals directly concerned with the restoration of the economic and industrial activity of PDVSA to abide by all decrees and resolutions handed down by the competent bodies whose purpose was to bring about a return to normal operations of the oil industry, and specifically Presidential Decree No. 2172, the resolution adopted by the Ministry of Energy and Mines and the joint resolution adopted by the Ministries of Defence and of Energy and Mines, it being understood that disregard of the said order would be considered contempt of court pursuant to Chambers 29 and 31 of the Constitutional Rights and Guarantees Immunity Act.
- 1435.** The Government also attached a ruling by the Supreme Court of Justice, Constitutional Chamber, concerning the correct interpretation of article 350 of the Constitution of the Republic. On 22 January 2003 the Court stated expressly that the right of rebellion and

civil disobedience could not be invoked to justify paralysing the petroleum industry or to bring about the destabilization of the public authorities, democratic institutions and constitutional order as a whole. The country's highest court accordingly ruled as follows:

- An attempt has been made to use this provision to justify the “right of resistance” or “right of rebellion” against a Government accused of violating human rights or the democratic regime, whereas the mere fact of its placement in the Constitution shows that this was not the intention of the constitutive body.
- The right to restore democracy (defence of the constitutional regime) contemplated in article 333 is a legitimate mechanism of civil disobedience that entails resistance to a non-constitutional regime that has usurped power.
- Apart from the hypothesis described above the only constitutional interpretation that is acceptable of the provision referred to in this decision is the possibility of disregarding the law and engaging in civil disobedience when, after all judicial appeals and mechanisms provided for to justify a specific grievance in respect of “any regime, legislation or authority” have been exhausted, it is not possible in practice to execute the substance of a favourable decision. In such cases, any person who deliberately and consciously acts in such a way as to prevent the implementation in practice of an order issued against him, in defiance of the judicial authority that issued the favourable ruling, is liable to set in motion machinery to punish disobedience, which can be considered legitimate if – and only if, as indicated above – the machinery and bodies provided for under the Constitution as guarantors of the state of law in the country have been exhausted and, despite being unconstitutional, the offence persists.

1436. The Government observes that the foregoing decision was confirmed by the Supreme Court of Justice, Constitutional Chamber, on 13 February 2003; a ruling along similar lines was issued by the same jurisdictional body on 3 September 2003.

1437. The Government also encloses the ruling of the Supreme Court of Justice, Constitutional Chamber, relating to the sabotage that took place in the enterprise that provides PDVSA with computer services. As part of the sabotage and disruption of normal operations in the petroleum and gas industry, from 2 December 2002 onwards the company responsible for providing computer services (INTESA) also took part in the paralysis of activities called for by the former directors and managers of the petroleum sector and by FEDECAMARAS. On 6 May 2004 the Supreme Court of Justice, Constitutional Chamber, accordingly ordered INTESA to reinstall all the computer services that had existed prior to the suspension of the services it provided and to hand over all the equipment, data banks, manuals, documents, plans, information on the situation on the computer system on 2 December 2002, diagrams, keys, studies, files and programmes belonging to PDVSA that it possessed or to which it had access prior to the suspension of services. The preventive order issued by the Court on 5 June 2003 was thereby vacated. The Government states that INTESA was a joint commercial venture between PDVSA and the North American transnational enterprise SAID, which is engaged in computerized intelligence work and controlled the databases of the principal national industry. Because it affects the sovereignty and security of the nation, the work that this North American company had previously carried out came under the definitive control of the State of Venezuela, pursuant to articles 302 and 303 of the Constitution. As can be seen from the complaint lodged by PDVSA itself and from the position adopted by the Office of the Attorney General and Ombudsman, the sabotage in which both SAID and INTESA were involved through their participation in the work stoppage on 2 December 2002 caused a major disruption in the normal conduct of its operations. These disruptions caused damage to the computer and electronic systems of the administration of human resources and payroll

systems, including the medical histories of the workers, employers, managers and directors of the enterprise.

- 1438.** In the circumstances it is only fair to describe the steps that were taken in terms of human resources at a time when the continuity of the country's essential public services, on which over 50 per cent of the national revenue depends, were being destabilized and disrupted. The disciplinary measures that led to the dismissal of the former managers and directors of PDVSA who participated in the illegal paralysis of this essential service, with the support of transnational data-processing enterprises such as SAID, inevitably entailed a margin of error; this was corrected in the course of the following months when over 1,000 cases of dismissal were reconsidered and suspended, specifically those concerning people who had been on holiday, on sick leave, etc. who played no active and direct role in the destabilization of the country's principal industry.
- 1439.** The Government further points out that, pursuant to the order issued by the Supreme Court of Justice, Constitutional Chamber, on 19 December 2002, the Ministry of Labour passed on to the Court a request for the suspension of the mass dismissals submitted by former managers and directors of INTEVEP, a subsidiary company of PDVSA. A decision to suspend mass dismissals is a discretionary measure within the competence of the Minister of Labour and can only be implemented where it is a matter of the social interest and where labour relations have reached a certain point. Accordingly, on 17 November 2003 Ministerial Resolution No. 3002 declared the request submitted by the complainants null and void inasmuch as, although it was recognized that labour relations had reached the point stipulated by law, certain rulings of the Supreme Court of Justice indicated that, far from being in the general interest, the work stoppage at PDVSA had harmed the well-being of the population and compromised and violated grossly their economic, social and cultural rights, quite apart from the many other negative effects already mentioned. An exceptional measure based on the general interest could hardly be deemed appropriate when the poorest and most vulnerable segments of society had been exposed by a heartless management with no sense of social responsibility to extreme shortages and hardships affecting their most basic interests. The Ministerial Resolution reproduces the considerations and the previously mentioned preventive order issued by the Supreme Court of Justice, Constitutional Chamber, on 19 December 2002.
- 1440.** After relating in detail the events that occurred prior to and after the *coup d'état* of April 2002 and the implication of the presidents of the CTV and FEDECAMARAS, in similar terms to those used in its earlier replies to the Committee, and indicating that in a spirit of reconciliation and goodwill the President of the Republic had allowed Carlos Ortega not to be charged with criminal activities even though his participation in the *coup d'état* was common knowledge, the Government states that:

- A mistaken interpretation of the situation led the CTV, FEDECAMARAS, Gente del Petróleo and all the elements involved in the so-called "Coordinadora Democrática" to embark on 2 December 2002 upon a work stoppage that lasted over 62 days and caused hundreds of thousands of dismissals and irretrievable losses amounting to over US\$10 billion, deaths, etc. The Coordinadora Democrática, speaking through its spokespersons the presidents of the CTV and FEDECAMARAS, Carlos Ortega and Carlos Fernández, used the media every day to report on the progress made and the steps that needed to be taken to overthrow the President of the Republic. Indications were given of how many litres of gasoline were needed to paralyse the transport system, the energy supply to rural populations, the gas supply, etc. This information was transmitted directly through public demonstrations justifying the use of violence against institutions that the majority of the population had democratically chosen, as a result of which it was necessary to close and block avenues, streets and workplaces

that had refused to join the work stoppage. The result of all this was an acute national crisis, as noted by the Committee on Freedom of Association.

- After 62 days of a fruitless work stoppage, the originator and principal instigator of the work stoppage, along with groups of employers who paradoxically had dismissed vast numbers of humble working men and women, declared that he was not responsible for what had happened. “The work stoppage got out of hand” was all he managed to say at a press conference and in front of an angry crowd complaining about the paralysis of essential public services, which had been shut down by the employers, bosses and by a whole group of managers and directors of PDVSA acting against the interests of the majority of the country.
- The action taken by Carlos Ortega has nothing to do with the protection of workers’ rights and with the sphere of concern of the Committee on Freedom of Association. It is blatantly obvious that such action is protected neither by national nor by international law, which in fact condemns it and refers to the need to determine responsibilities in matters of human rights. The political activities of Carlos Ortega are thus altogether in the spirit and conduct of the April 2002 *coup* and can in no way be described as trade union activities. Several representative trade union organizations in the world have so declared, thereby distancing themselves from the anti-democratic conduct of Carlos Ortega.
- Because of the negative implications for the general and collective interest of the permanent, constant and public incitement to take action against the democratic institutions, the Office of the Attorney General accused Carlos Ortega of criminal conspiracy, incitement to commit a crime, treason, creating havoc and civil rebellion. These accusations were brought before the competent jurisdictional bodies, and Judicial Circumscription Control Court No. 49 of the metropolitan area of Caracas issued a detention order against Carlos Ortega.
- Far from declaring his innocence and defending himself against these accusations, Carlos Ortega, as is often the case with leaders of the more violent opposition with links to monopolistic and anti-democratic sectors, asked for political asylum and left the country as an exile. This occurred in March 2003 when the Government of Costa Rica agreed to grant him asylum and the Venezuelan Government, out of respect for its commitments under international law, granted Carlos Ortega a safe conduct for that purpose in the same month of March.
- As to the claims that there was no due process, the Venezuelan Government believes that they are just an excuse designed to establish the impunity and absence of responsibility of those concerned, despite the chaos and damage they caused and the loss of credibility of people who for 62 days threatened to extend the violent work stoppage to essential services and yet, in public, were not capable of recognizing that they were the instigators of such actions. Quite apart from being groundless, irresponsible and totally lacking in credibility, the complaint that a fair trial and due process could not be guaranteed corresponds more to the attitude of somebody who does not want to accept the administration of justice and harks back to the “full-stop laws” which did so much to foster impunity for widespread violations of human rights such as those provoked by Carlos Ortega during the work stoppage that began on 2 December 2002.
- Despite the political asylum he was granted, and which was respected by the Governments of Costa Rica and Venezuela in reciprocal compliance with their international commitments, Carlos Ortega continued to incite the population to resort to violence and to overthrow the legitimately and democratically elected Government of Venezuela.

- In February 2004, for instance, Carlos Ortega used the Venezuelan and Costa Rican media to assert, without rhyme or reason, that on the very day of the protest movement the President of the Republic would himself provoke a *coup d'état* so as to be able to dispense with democratic institutions.
- Not only did the President of the Republic not undertake any kind of *coup* against the existing regime or attack the democratic institutions but, in fact, it was he who initiated and proposed the idea of a referendum and its inclusion in the constitutional text approved by the people in 1999. Moreover, it should be pointed out that the President of the Republic accepted the results given by the National Electoral Council when the request was made for a referendum on his impeachment.
- In March, Carlos Ortega travelled to Miami, Florida, United States, where with a group of anti-Cuban militants he participated in demonstrations and asserted that he was going to travel to Venezuela “to work secretly to help members of the Government leave the country”. Also in March 2004 Carlos Rodriguez, a former general who participated as a dissident in the April 2002 *coup d'état* and who, in Plaza Altamira, along with Carlos Ortega and Carlos Fernandez called on the military forces to rebel in October 2002, likewise stated in Miami that he was going to enter the country secretly to set up “battalions” or “freedom commandos”. These declarations gave rise to a new incident with the Government of Costa Rica, which was aware that the situation might clash with or run counter to its international commitments with respect to the right to asylum. In any case, these events paint a portrait of a Carlos Ortega who has no respect for the basic standards of democratic coexistence and who is in contempt of national and international rules and regulations.
- On 5 August 2004 a number of articles appearing in the press and confirmed by the CTV stated that Carlos Ortega had secretly returned to Venezuela.
- On Thursday, 12 August 2004, Carlos Ortega was seen in Caracas taking part in the closing meeting of the electoral campaign for the impeachment of the President of the Republic, Hugo Chavez Frias. He was guarded by police officials linked to the *coup d'état* of April 2002, and disguised with a fake moustache, hat and dark glasses. The television cameras filmed him as he attempted to get up onto the platform which had been set up as part of a campaign for support. On 13 August 2004 the Minister of Foreign Affairs of Costa Rica cancelled the asylum that Carlos Ortega had been granted from the beginning of March 2003. According to information provided by the jurisdictional bodies and the Office of the Attorney General, the warrant for the arrest of Carlos Ortega that had been issued at the beginning of 2003 was still valid. This information was supplied by Control Judges Nos. 34 and 49 of Caracas and by sources close to the Sixth National Attorney, Luisa Diaz. According to court circles, the collaboration of Interpol has accordingly been requested.

1441. With regard to the references to a denial of justice at the expense of members of UNAPETROL, paradoxically enough the complainants claim that they are being denied justice when in fact they are being urged to take their case to the proper bodies for resolving the dispute. For example, although José Benigno Rojas and Luis Abelardo Velasquez, National Attorneys Nos. 1 and 49 of Caracas, addressed to Control Court No. 40 of Caracas a request for a detention order against the persons cited by UNAPETROL, neither of them responded to the various summonses sent to them by the Office of the Attorney General, pursuant to the legal requirements of sections 250, 251 and 252 of the Penal Code. The Attorney General thereby complied with the principle of effective judicial guidance, otherwise known as jurisdictional guarantee. The process ensures that the parties involved can exercise their right of defence, and therefore the idea of circumventing the law by claiming a denial of justice, is both rash and unrealistic.

- 1442.** The self-styled representatives of the planned UNAPETROL and senior officials and executives of PDVSA are at this moment fugitives of justice and will be charged by the Attorney General when they decide to submit themselves to a court of law or, alternatively, when they are apprehended for the alleged commission of unlawful acts such as civil rebellion, direct or specific instigation to commit a crime, incitement to civil disobedience and defence of criminal activities, criminal conspiracy, unauthorized interruption of the supply of gas (Chambers 144, 284, 286, 287 and 344 of the Penal Code) and espionage involving computer technology (section 11 of the Special Computer Crimes Act). All the alleged crimes come under the provisions of section 87 of the Penal Code and relate to the disruption of the petroleum industry investigated by the Office of the Attorney General in which the persons cited were allegedly involved. It was they who caused the illegal paralysis of Venezuela's petroleum industry in December 2002 and January 2003. The charges levelled against them by the Office of the Attorney General are based on 120 inspections which it conducted into petroleum plants in 13 states and which found evidence of environmental damage, damage to computer systems, mechanical damage (blocked valves, punctured pipelines) and damage to assets, all of which provoked great alarm among the population and losses to the economy amounting to millions of dollars, in addition to the disruption of exports of crude oil and petroleum products.
- 1443.** The Committee on Freedom of Association requested information on the judicial measures taken against the instigators and promoters of the paralysis of the essential public service responsible for the supply of petroleum, gasoline, gas, etc. and operated by the state company PDVSA, which is protected by the country's Constitution. In this respect, Chamber No. 7 of the State Appeals Court of Carabobo declared null and void a decision of Control Court III of Carabobo which had ordered the unconditional release of Pedro Chirivella, former manager of the Yagua plant, who was accused of computer crimes that were allegedly committed during the work stoppage in the petroleum sector in December 2002 and January 2003. The Office of the Attorney General accused the captain and six other crew members of a tanker belonging to PDV MARINA, a PDVSA subsidiary company Mauro Ventura Ferrairo Parada, César Augusto Morillo Ochoa, Gustavo Chang Lai, Jesús Alberto García, Gamaliel de Jesús León Martucchi, Jeancarlo Moreno Camino and Ramón Antonio Hernández Brito, of failing to supply or obstructing the supply of goods and products of public utility and of unlawful and qualified appropriation, as referred to in sections 470 and 344 of the Penal Code and Computer Technology Crimes Act. Charges were apparently also levelled against Rafael Beltran Marcano and Federico Urbina. According to available information, the investigation was initiated on 19 December 2002 as a result of the cessation of operations organized by crew members of the tanker, who decided to leave it anchored off the coast of the state of Vargas. The investigation found evidence of the loss of three radio transmitters, damage to computer equipment and the disappearance of 10 million bolivars and \$7,000, part of the petty cash of the tanker now sailing under the name of Joséfa Camejo.
- 1444.** The Ministerial Resolution of 17 November 2003 considered that the paralysis of the activities of PDVSA and its subsidiaries, which is public knowledge, lowered the standard of living of the community by preventing access to basic goods and services, inasmuch as the operation of the petroleum and petroleum products industry in general is considered to be of strategic importance, public utility and social interest, as well as being an essential public service as defined by articles 302 and 303 of the Constitution of Venezuela, sections 4, 5 and 19 of the legislative decrees on the petroleum sector and section 210 of the rules and regulations made under the Labour Act. In addition, the State incurred incalculable financial losses owing to the decrease in revenue, which in turn had a negative impact on investment and the provision of public services. This entailed deterioration in the quality of life of all Venezuelan citizens, including the shut-down of economic activities and enterprises, and had direct repercussions on unemployment for a large number of people. Furthermore, it is clear that the work stoppage was presented as a fait accompli, without

any use having been made of the existing disputes mechanism provided for in the Labour Act and the rules and regulations made under the Act. As already pointed out, this affected the continuous and uninterrupted provision of an essential public service, which means that the work stoppage was not only illegal but illicit. It should be borne in mind that an essential public service is one whose paralysis or interruption seriously endangers the life, health and safety of the population or part thereof, and it is public knowledge that this was precisely the case during the events of December 2002 and January 2003. Consequently the Ministry found that there was no justification in terms of social interest to suspend the mass dismissal of the workers of INTEVEP, a PDVSA subsidiary. On the contrary, it has been clearly shown that the paralysis of the oil industry in general by its workers, including those of INTEVEP, affected the quality of life of the entire Venezuelan population. It is therefore precisely the public interest, which the State is obliged to protect, that should be held against the workers of the aforementioned company for having failed in their social responsibility to cultivate peace and contribute to harmony, as required under article 132 of the Constitution.

- 1445.** The Government also refers to the resolutions of the Ministry of Labour dated 9 and 26 August 2004 in respect of earlier rulings along the same lines handed down by the Supreme Court of Justice in connection with PEQUIVEN and PDVSA, in which it observed that there were no grounds based on the general interest for suspending the mass dismissals. Appeals against these resolutions may be lodged with the Supreme Court of Justice.
- 1446.** On 29 April 2004 the Supreme Court of Justice, Administrative Policy Chamber, declared in a preventive order that protection for the former directors and managers in the petroleum sector was not applicable, and annulled a ruling of the First Administrative Disputes Court of 6 June 2003 in their favour. The decision of the Supreme Court of Justice reads as follows:

In the opinion of this Chamber, the First Administrative Disputes Court's ruling confused the preliminary, preventive, instrumental and homogeneous nature of the request for a preventive order with the preliminary and, in this case, conditional execution of the appeal for the decision to be declared null and void. This rendered that decision meaningless, since it had analysed the implications of the standards relating to the immunity and labour stability of the persons concerned, i.e. sections 427 and 450 of the Labour Act and had decided upon the substance of what would be the future ruling, without moreover ensuring an equal balance in the event that the plaintiff did not win the case. That being so, and following a detailed analysis of the matter transferred to it by the lower court, the Chamber concludes that, in its decision, the First Administrative Disputes Court ignored the fundamental principles underlying preventive proceedings – particularly where they relate to immunity – by issuing a ruling as to the substance. It thereby clearly prejudged the dispute and rendered the request for annulment meaningless by issuing an executory rather than a preventive decision which seriously compromised the public interest and transcended the interests of the parties concerned, in so far as there was a clear possibility of causing major damage to the economic resources of the Republic, all of which justifies the decision taken in respect of the transfer of this case to this Chamber.

Consequently, both in the light of the special constitutional and legal considerations put forward and with a view to correcting instances of injustice that are of such a magnitude that they transcend the mere subjective interests of the parties concerned and of the working community as a whole, affecting as they do the general interests of society; and considering the irregularity incurred by the First Administrative Disputes Court by ruling on the substance of the dispute when it issued its preventive decision in respect of the complainants' immunity, which affects not only the parties involved and their private interests but also the interests of the public in general, inasmuch as the case concerns an enterprise whose production and activities make a decisive contribution to the revenue whereby the higher public goals of the State can be sustained; and, finally, given that all the foregoing is highly detrimental to the normal conduct of the economic activities of the State of Venezuela, this Administrative Policy Chamber of the Supreme Court of Justice, exercising the powers conferred upon it by

section 42.29 of the Supreme Court of Justice Act, declares null and void the preventive decree handed down by the First Administrative Disputes Court on 12 June 2003, as well as the administrative ruling (unnumbered) of 2 December 2002 and administrative ruling no. 003-001 of 6 January 2003, both of which were issued by the director of the National Institute for Labour and Other Collective Labour Affairs in the Private Sector of the Ministry of Labour. It is so decided.

Consequently, and for the reasons given, this Administrative Policy Chamber of the Supreme Court of Justice, in respect of the case transferred to it and having annulled the preventive decree concerned, declares null and void all decisions and actions taken by the First Administrative Disputes Court in respect of the matter at hand. It is so decided.

1447. Similarly, the Supreme Court of Justice validated and endorsed the administrative ruling issued by the Ministry of Labour in respect of UNAPETROL, demonstrating the good faith and correct and transparent conduct of the public servants of the administration. In this respect, the Political Administrative Chamber stated the following:

- Both the decision of the Ministry of Labour and the decisions of the labour inspectorate show that due consideration was given to the request for registration of the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) and that therefore there is no evidence of any violation of the parties' rights from the administrative standpoint.
- Regarding the violations of the right to establish trade unions and the right to immunity from dismissal, which according to the plaintiffs undermine the principles of the right to work, this Chamber observes that, as determined under the previous point, the constitutional right to establish trade unions was not violated. It is clear from the records that UNAPETROL's request for registration was duly processed, but that none of the proceedings allowed the conclusion to be reached that it is impossible to establish a trade union organization, as laid down in the Constitution; there is therefore no evidence that article 95 of the Venezuelan Constitution has been violated.
- Moreover, with regard to the question of immunity from dismissal, the Venezuelan Constitution itself stipulates that workers are protected against all acts of discrimination and interference that are contrary to the exercise of that right and that the founders and members of the executive bodies of workers' organizations are entitled to immunity from dismissal for such time and under such conditions as are necessary for the exercise of their functions. Similarly, as regards labour stability, article 93 of the Constitution stipulates that it is guaranteed by law and that it is the legislation itself which guarantees such stability and provides for any kind of restrictions on unjustified dismissal.
- This raises the following question: if the issue here is one of labour stability based on immunity from dismissal, which the plaintiffs claim that the workers are entitled to and which in the view of the labour inspectorate no longer applies because the deadline has elapsed; and if the purpose of a preventive order of immunity is to ensure the provisional protection of the injured party, i.e. to maintain him in practice in the same situation he was in prior to the alleged violation of a constitutional right or guarantee, until such time as the principal case has been settled, inasmuch as a preventive order is designed to re-establish but not to establish a given state of affairs: is it possible to maintain a worker in the same situation when it is the very existence of that situation which is under discussion?

1448. In the light of the foregoing, the Government stresses that the labour administration acted in accordance with the law and, at all times, with a view to ensuring the protection of rights and guaranteeing the right of defence against any infringement whatsoever.

1449. The Government asserts that the disciplinary measures taken by PDVSA should not be reviewed under the anti-union discrimination procedure. As stated by the Supreme Court of Justice, Administrative Policy Chamber, this same body had already ruled on the matter in an earlier case brought by María Natividad Ramírez de Gutiérrez against PDVSA (Case

No. 2003-0318), in a decision handed down on 7 May 2003 in which it stated, in respect of a jurisdictional dispute between the labour inspectorates and the labour courts, as follows:

... the Chamber observes that the party concerned confused the terms of labour stability and immunity from dismissal by interpreting the provision laid down in section 32 of the Petroleum Act as establishing the immunity from dismissal of workers in the oil industry. That is not the opinion of this Chamber, inasmuch as it is apparent from a reading of the text that the Legislature intended the provision to provide not for immunity from dismissal but for labour stability. The application of this provision thus has different implications. It is clear from the foregoing that workers in the petroleum industry benefit from labour stability and may therefore apply to a labour stability judge to reassess a dismissal and to order a worker's reinstatement in his job and the payment of salaries due. But it does not imply that all workers are entitled to immunity from dismissal, as the party concerned stated in its decision, since this matter is dealt with in the Labour Act, which sets out the appropriate procedure. In the present case, there is no evidence that the situation comes under any such procedure that would justify the request submitted being heard by the labour inspectorate of the state of Táchira.

- 1450.** The foregoing was confirmed in a ruling handed down on 29 May 2003 which, though (unlike the previous case) it does not relate to the dismissal of the former directors and managers of PDVSA, does have direct relevance to their claim to a form of special immunity or protection that set them apart from the rest of the workers in the country. Based on a mistaken interpretation of section 32 of the Petroleum Act, a claim was made for immunity from dismissal or absolute labour stability, regarding which the Supreme Court of Justice, Social Chamber, declared that it was the general labour stability rules that should apply to workers in the petroleum sector, i.e. sections 112 et seq. of the Labour Act, which authorize the employer, in the event of a dismissal without cause, to offset his obligation to reinstate the worker by means of financial compensation. Finally, the Chamber warns that, inasmuch as the labour stability regulations apply to workers in the petroleum sector, both management staff and all workers and employees covered by section 112 of the Labour Act are excluded from those regulations.
- 1451.** The procedure for protecting workers against anti-union discrimination is embodied in sections 454 et seq. of the Labour Act; sections 458 and 506 apply only where a disputes procedure has been initiated. The Administrative Policy Chamber and Social Chamber of the Supreme Court of Justice consider that neither the concept of immunity from dismissal nor the special immunity conferred by section 32 of the Petroleum Act applies.
- 1452.** The Government repeats its assertion that the indefinite work stoppage was against the fundamental beliefs of the Committee on Freedom of Association. Referring to the principles of the Committee on Freedom of Association and of the Committee of Experts with respect to strikes, the Government states that the paralysis of the petroleum, gasoline and gas industry, which affected drilling, production, refining and distribution at both the national and the international level for over 62 consecutive days and involved former directors, managers and trusted employees (but not the workers), was not in conformity with the provisions governing the right to strike in the country's laws and regulations. The Government never suspended the exercise of the right to strike, but eight months earlier it had been overthrown for 48 hours when the country went through a period of political and economic turmoil similar to that which occurred in Chile under Salvador Allende. All this resulted in an acute national crisis involving the interruption of the electricity supply, the impossibility of earning the foreign currency that is essential for the food supply and production of essential goods for the population, a significant flight of capital abroad and the shut-down of the national banking sector. The paralysis of the petroleum sector contributed to the closure of small and medium enterprises and the dismissal of many workers, thereby increasing the level of unemployment. A work stoppage for purely political purposes by the management of the principal source of a country's foreign currency can hardly claim to be a trade union rights issue, since it conflicts with both the opinions and with the basic principles of the Committee on Freedom of Association. Any

recognition of such a situation would set a dangerous precedent that could be seen as condoning widespread violations of human rights and encouraging the impunity of the guilty parties.

- 1453.** With regard to the anti-union reprisals and harassment allegedly perpetrated by the loss prevention and control management of PDVSA and by the Association of Oil Workers (ASOPETROLEROS), in its March 2004 report the Committee on Freedom of Association asked the Government for information about the existence of “blacklists” or any other measures of reprisal against former managers and directors of PDVSA who had helped to organize the paralysis of a public service for 62 consecutive days, thereby causing an acute national crisis. The reprisals were allegedly ordered by the loss prevention and control management of PDVSA and by a non-governmental organization, ASOPETROLEROS. The Government has sent evidence that no complaints were lodged with the Office of the Attorney General regarding the complainants’ allegations. Similarly, no complaints have been lodged with either the labour administration or the jurisdictional bodies. The complaint is therefore groundless.
- 1454.** In its March 2004 report the Committee asked for information on the alleged widespread abuse and violations of human rights perpetrated by the Venezuelan authorities against the former managers and directors of PDVSA, who had brought about the illegal and indefinite suspension of an essential public service. It must straightforwardly be made clear that the housing from which these people were evicted is the property of PDVSA and serves as a base camp to facilitate the living conditions of those who are directly involved in petroleum operations. Consequently, there is no question of the former managers and directors having been evicted from their own homes, especially as most of them have several houses, naturally in well-to-do urban areas. In any case, the PDVSA’s housing was needed for the rest of its employees who stayed at work during the suspension of essential services. In many instances these were technicians and manual workers who continued working when their chiefs had unilaterally abandoned their posts. In such cases the enterprise acts in accordance with the deadlines and conditions provided for in the collective labour agreement, which can be assumed to offer the most favourable conditions for the workers, despite the fact that it was dealing with management staff and trusted employees – a clear gesture of goodwill on the part of the employer. The evictions were ordered by the relevant jurisdictional bodies and the involvement of the police was to ensure compliance with the law. Thus, the decision of the Higher Court for Civil, Mercantile, Transport, Labour and Minors’ Affairs of the judicial circumscription of the State of Falcón (Report No. 3413 of 28 January 2004), states:

The right of the complainants to occupy housing in Los Semerucos and Judibana, which is owned by the defendant (PDVSA), derives from their work contract; consequently, once the labour relationship is ended, they lose their right to occupy that housing and may be evicted in accordance with the procedure laid down in the collective agreement covering them. Only if the dismissal reassessment proceedings have been declared receivable are they entitled to return to their housing, following the employer’s agreement to their reinstatement, and subject to the latter’s right to make use of section 125 of the Labour Act, inasmuch as they would be considered temporary occupants and not covered by the rental arrangements provided for in section 5 of the legislative decree on housing and rentals. The complaint must therefore be declared irreceivable.

This ruling confirmed the ruling handed down on 14 May 2003 by the Fourth Court of First Instance for Civil, Mercantile, Agrarian, Transport and Labour Affairs of the judicial circumscriptions of the State of Falcón.

- 1455.** Regarding the holding of consultations with the representative workers’ organizations in the petroleum sector, from the very start of the illegal and indefinite paralysis of PDVSA and its subsidiaries, the employer concerned, in an attempt to restore normal operations in

essential public services and to ensure that the acute national crisis was rapidly resolved, entered into a broad alliance with its workers and operators to whom it gave management functions. Accordingly, the organized workers and their leaders, with a few exceptions, took steps to relieve the stranded boats, to free the ports, to step up production and to ensure that the maintenance, marketing and distribution activities continued. In most cases the computerized processes run by the former directors and managers and by the transnational enterprise SAID were handled manually, but they succeeded in restoring the essential public services. These workers, conscious of the role that they play in Venezuelan society, managed to get the country's main industry working again; in many cases workers in industries that were indirectly affected by the work stoppage (metalworkers, automobile workers, etc.) also joined in this effort. This is borne out by the declaration of the workers' federations and trade unions (though not those of the former directors and managers) to the 91st Session of the International Labour Conference, which the Committee mentions but does not analyse and which reads as follows:

The oil workers represented by FEDEPETROL, FETRAHIDROCARBUROS and SINUTRAPETROL, trade union organizations that legitimately exercise the representation of the contract workers employed by Petróleos de Venezuela and the contract enterprises, hereby inform the States Members of the International Labour Organization and all the workers of the world that in December 2002 the executive staff and senior management of PDVSA called a strike which the vast majority of the oil workers refused to join. The organizers of the work stoppage were the same people who on 11 April 2002 took part in an attempted *coup d'état* against the legitimate Government and sought to install a regime that was against the rights and interests of the Venezuelan workers. At no time was the work stoppage based on any economic or social demands, for the simple reason that the executive staff and senior management concerned are not concerned by the collective agreement inasmuch as they are not covered by it. The strike was designed to bring about the overthrow of the legitimately elected President of the Republic who had declared that any attempt to relieve him of his authority must be within the framework of the Constitution. The instigators of the work stoppage were the very people who for years, from the heights of their executive positions within the petroleum industry had made fun of the workers and disregarded their rights, while setting up a whole system of odious privileges for themselves that cut them off completely from the working classes employed under the collective agreement. During the course of the work stoppage, which lasted for some two months, the petroleum industry was submitted to extensive sabotage and other offences (currently being investigated by the Venezuelan police) by an association calling itself "Gente del Petróleo", which does not represent the workers and is composed exclusively of members of the executive staff and senior management. Conscious of our responsibilities, and as we have done in the past, we hereby reject the arguments put forward by that association. It is public knowledge, and needs no further proof, that the executive staff and senior management, taking part in a clearly politically motivated work stoppage, abandoned their posts voluntarily, as a result of which the Venezuelan Government applied the legal sanction of dismissal – a decision which it is not for us to judge. During the work stoppage in the petroleum sector there were no mass dismissals as it is claimed. What happened was that the senior management abandoned their work posts en masse (...).

- 1456.** This important declaration by the three workers' organizations that signed the collective agreement for the petroleum industry in 2002, as it did for the previous years, was not taken into consideration by the Committee on Freedom of Association. It should be noted that these representative organizations were democratically elected by the manual workers and operators who halted the turmoil organized by the executive staff and senior management. In this way a regular dialogue has been maintained with the petroleum workers and their traditional organizations, established over 40 years ago through democratic elections, which have played a fundamental role in the independence and emancipation of the Venezuelan people. Accordingly, a meeting (known as the El Palito Meeting and Declaration) was recently held to promote social dialogue among government representatives, representatives of the employers and these three organizations signatories to the collective agreement. The Government encloses the collective agreement (2005-07) between PDVSA and its workers which, it states, shows how the enterprise's policy of

dialogue in 2003 led to the signing of collective agreements in the subsidiaries of PDVSA Masina, PEQIVEN and SERVIFERTIL.

1457. In conclusion, the Government states that the Committee on Freedom of Association is examining, under the same heading, a case that concerns both employers or their representatives, on the one hand, and workers and their organizations, on the other. There is sufficient firm factual and juridical evidence that the membership of the planned UNAPETROL includes former directors and managers of PDVSA, who are members of the executive staff and senior personnel and who therefore cannot be assimilated to workers. The Government's request that this improper situation be clarified has not yet been answered:

- The persons who sought unlawfully to set up a mixed organization in violation of the “purity principle” also operated and continue to operate within a political association known as “Gente del Petróleo”, composed of former senior executives of PDVSA and affiliated to Coordinadora Democrática. One of the members of Gente del Petróleo, Horacio Medina, claims to be the president of UNAPETROL.
- According to the PDVSA trade union federations and organizations (FEDEPETROL, FETRAHIDROCARBUROS and SINUTRAPETROL), the members of the planned UNAPETROL had the status of employers. This is corroborated by the fact that the records and correspondence secretary of UNAPETROL, Edgar Quijano, signed the 2000-02 collective agreement for the petroleum industry on behalf of PDVSA.
- As part of a political plan to destabilize the state institutions and against the will of the majority of the Venezuelan people, Gente del Petróleo – along with FEDECAMARAS and part of the CTV – organized the paralysis of essential public services, including oil drilling and the exploitation, distribution and marketing of petroleum and petroleum products. The work stoppage, in defiance of labour laws and regulations, led to widespread violations of economic, social and cultural rights, as has been established by the Supreme Court of Justice, Constitutional Chamber.
- The work stoppage by the former directors and managers of PDVSA has been wrongly described as an attempted general strike. However, given its goals and objectives, the length of time it lasted and the fact that it undermined the rights of the workers of the country as well as those of the employers, to describe it in this way is contrary to the principles of the Committee on Freedom of Association as they relate to the right to strike. In other words, the work stoppage is outside the purview of ILO Convention No. 87.
- Gente del Petróleo justified their attempts to disrupt Venezuelan society by an incorrect interpretation of article 350 of the Constitution, as has been established by the Supreme Court of Justice; as a result, the former directors and managers are entitled to no protection whatsoever from legal guarantees against possible disciplinary measures taken by their employer who, as was indeed the case, was obliged to restore essential public services.
- Because they were not acting within the normal labour laws and regulations, the former directors and managers sought a ruling under the heading of protection against anti-union discrimination; this claim was rejected by the Administrative Policy Chamber and Social Chamber of the Supreme Court of Justice. The mistaken idea that the former directors and managers were entitled to some kind of special immunity under the Petroleum Act, and were therefore not subject to normal laws and regulations, is likewise inapplicable. Consequently, since there is no way that the disciplinary measures taken by the employer PDVSA can be assessed and reviewed by the labour inspectorates through the procedure for reinstatement and payment of

salaries due, the only possibility that remains is for the dispute to be brought before the regular labour courts under the heading of relative stability.

- So it was that disciplinary action was taken by the employer against a number of former managers, directors and employees because the illegal work stoppage at PDVSA had occurred simultaneously with the sabotage of the computer system run by INTESA, a transnational company (SAID in North America) that took part in the destabilization organized by Coordinadora Democrática through FEDECAMARAS and the CTV executive committee. The sabotage of computer equipment verified by the Supreme Court of Justice, Constitutional Chamber, by the Office of the Attorney General and by the Ombudsman, gave rise in some cases to the wrongful dismissal of people whose cases PDVSA subsequently reconsidered, as can be seen in more than 1,000 instances cited in the March 2004 report of the Committee.
- Along with the sabotage of the computer system, a large number of other actions (stranding of boats, damage to oil pumps, etc.) have given rise to investigations by the Office of the Attorney General and the imposition of penal sanctions. In some cases the investigations are still under way.
- The complaints of the former directors and managers alleging persecution, harassment or simply blacklists were never officially submitted to the competent state bodies, as is apparent from information supplied both by the Office of the Attorney General and the Ministry of Labour. That is why this case comprises both officially submitted complaints and complaints that have no basis whatsoever.
- In a preliminary ruling, the Supreme Court of Justice, Administrative Policy Chamber, initially declared that the labour administration's handling of UNAPETROL's request for registration was consistent with due legal process and that its sponsors' right to defence had been respected. Through the employers and through the Ministry of Energy and Mines the Government has, since the start of the illegal paralysis of petroleum activities, maintained a regular and active dialogue with the workers' trade unions in an effort to help PDVSA recover from the sabotage committed by Gente del Petróleo. Recently, the signatory organizations to the current petroleum collective agreement reached an agreement with the National Coordination Office of the National Union of Workers (UNT) in the El Palito refinery (state of Carabobo). In other words, a readiness to meet, to review labour policies and to discuss productivity in the petroleum industry does exist, in which the main protagonists are the traditional workers' trade union organizations.

1458. Finally, it is clear that the housing occupied by the former managers and directors of PDVSA belong to that company and are used by it as a base camp in accordance with the collective agreement. The evictions, which were by court order, gave rise to acts of violence on the part of the former directors and to occasional use of force by the police whose duty it was to ensure compliance with the law, again under the authority of the jurisdictional bodies.

1459. On 9 and 26 August 2004, the Ministry of Labour issued a declaration on the suspension of alleged mass dismissals from PEQUIVEN and PDVSA. The administrative decisions ruled that there were no grounds from the standpoint of the general interest for the proceedings not to go forward; they were based on an earlier ruling along similar lines concerning the former managers and directors of INTEVEP, issued on 17 November 2003 under Ministerial Resolution No. 3002 of which the Committee on Freedom of Association has already been informed. The decisions of the Minister of Labour are based on rulings by the Supreme Court of Justice, Constitutional Chamber. One of these rulings reads as follows:

In the light of the foregoing, the Court considers that the constitutional rights that the complainant claims have been violated by the association known as Gente del Petróleo, to the detriment of himself, of the state enterprise PDVSA and of all natural and juridical persons living or resident in the territory of the Republic as a result of the interruption and reduction of the economic and industrial activity of that company, are, in accordance with section 4 of Decree No. 1510 made under the Petroleum Act and published in Official Gazette No. 37323 of 13 November 2001, of public utility and in the general interest, viz. the right to life, to the protection of physical integrity and personal safety, to the protection of the family, to health services, to employment, to a salary, to labour stability, to a full education, to engage freely in the economic activity of one's choice, to private property and to quality goods and services, as provided for in the Constitution and in the International Covenant on Economic, Social and Cultural Rights, published in special Official Gazette No. 2146 of 28 January 1978.

1460. The Government refers to a number of decisions handed down by the administrative or judicial authority on specific instances of dismissal:

- Prior to the Minister of Labour's decisions of 12 July 2004, Horacio Medina (who claims to be president of UNAPETROL and a member of Gente del Petróleo which organized the work stoppage in the petroleum industry in December 2002 and January 2003) withdrew the request for a dismissal reassessment that he had submitted in December 2002 to Court V of First Instance of the metropolitan area of Caracas and abandoned his complaint. Similar action was taken by Edgar Quijano with the judicial authorities.
- Also prior to the Minister of Labour's ruling, the labour inspectorate of the district capital declared in August 2004 that 60 requests for reinstatement and payment of salaries due, submitted by persons who had been dismissed from PDVSA and its subsidiaries in respect of alleged anti-union practices or measures, were irreceivable.
- Similarly, since June 2004 the labour inspectorate of Puerto Cabello, State of Carabobo, has handed down over 60 decisions in favour of PDVSA with respect to a corresponding number of requests for a reassessment of offences, reinstatement and payment of salaries due, indicating that the paralysis of oil-refining activities and production of fertilizers constituted justifiable grounds for the dismissal of a group of workers, or that the dismissals were lawful and that no anti-union practices had occurred. One of the cases ruled upon by the labour inspectorate of Puerto Cabello include administrative Case No. 192-2003 corresponding to Diesbalo Espinoza which authorized his dismissal on evidence that there were justifiable grounds for doing so. The withdrawal of these complaints shows once again that the measures taken by the employer did not entail any anti-union discrimination, in the view of the complainants themselves.
- Since 16 August 2004 the lawyers or representatives of the former managers and directors of PDVSA and its subsidiaries have voluntarily abandoned or withdrawn 2,066 requests for reinstatement and payment of salaries due, submitted to the labour inspectorate of Maracaibo, State of Zulia and concerning the existence or not of anti-union practices on the part of the employer, particularly the practice covered by section 450 of the Labour Act. Most of the requests had been submitted several months after the deadline of 30 consecutive days for instituting proceedings such as these with the labour inspectorate. The withdrawal of these complaints shows once again that, in the view of the complainants themselves, the measures taken by the employer did not involve any anti-union discrimination.
- Another 3,980 cases that had been brought before the labour inspectorate in the city of Cabimas were voluntarily dropped or withdrawn by the lawyers of the former managers and directors of PDVSA and its subsidiaries, despite the fact that the political spokespersons of Gente del Petróleo were calling for the reinstatement of the

very people concerned. Most of the requests had been submitted several months after the deadline of 30 consecutive days for instituting proceedings such as these with the competent labour inspectorate. The withdrawal of these complaints shows once again that, in the view of the complainants themselves, the measures taken by the employer did not involve any anti-union discrimination.

- On 9 September 2004 the request for reinstatement and payment of salaries due submitted to the labour inspectorate of Mérida by José Gregorio Salas was declared irreceivable.
- On 4 October 2004 the labour inspectorate of Zona del Hierro, Puerto Ordaz, in the State of Bolívar, issued 26 administrative decisions declaring irreceivable a like number of requests for reinstatement and payment of salaries due that had been lodged several months after the deadline of 30 consecutive days for instituting proceedings with respect to anti-union practices or measures.
- The labour administration and the courts are continuing to examine and investigate the requests submitted by the directors and managers of PDVSA who were dismissed or removed from their posts because of the paralysis of essential services, or lockout, that lasted over 60 days.

1461. The Government observes that, following the lockout against PDVSA, which affected the entire Venezuelan population for over 60 consecutive days, appeals against the disciplinary measures adopted by the employer were lodged by the former managers and directors of PDVSA both with the judicial authorities and with the labour inspectorates. This doubled the number of proceedings and courts involved and, far from simplifying matters, made the swift administration of justice and the resolution of the legal disputes much more complicated. The Supreme Court of Justice, Administrative Policy Chamber, has accordingly pointed out that the judiciary has no jurisdiction to hear and rule on requests for dismissal reassessment, reinstatement and payment of salaries due brought by members of the staff who allege that they have been dismissed from INTEVEP, a PDVSA subsidiary, despite the fact that they are supposedly entitled to immunity from dismissal on account of their membership of UNAPETROL.

1462. The Chamber ruling reads as follows:

According to the relevant regulations (sections 449, 450 and 453 of the Labour Act), a worker who is entitled to trade union immunity can be dismissed only on justifiable grounds duly recognized by the labour inspectorate, in accordance with the procedure laid down in section 453. That being so, and inasmuch as it is apparent from a review of the proceedings that the complainant submitted his case to the labour inspectorate of the State of Miranda on 25 February 2003 with a request that his dismissal be reconsidered and his reinstatement ordered, with the payment of the corresponding salaries due, on the alleged grounds that he was immune from dismissal because at the time he enjoyed trade union immunity as a member of UNAPETROL, the Chamber declared that the judiciary had no jurisdiction to hear the case under section 449 of the Labour Act. Consequently, it will be for the labour inspectorate to determine whether or not the complainant is protected by trade union immunity and, if appropriate, to rule on the request for a reassessment of his dismissal and the payment of salaries due.

1463. The Government states that, so long as the request for the labour inspectorate to determine whether or not a worker enjoys immunity from dismissal is still pending, it would not be appropriate to continue investigating a case before the jurisdictional bodies. Furthermore, the highest court of the country draws attention to the lack of good faith of the complainant, who quite unnecessarily instituted a series of proceedings with several different judicial and administrative bodies. The Government submits a list of rulings – all of them for 2004 – handed down by the Supreme Court of Justice, Administrative Policy

Chamber, in respect of 28 workers, in which – save in one case where it indicates the competent judicial authority – the Chamber declares that the judiciary does not have the jurisdiction to hear and rule on the request for reassessment of dismissal, reinstatement and payment of salaries due brought against INTEVEP. It consequently confirms the decision on which its opinion was sought, whereby the court declared that it had no jurisdiction in matters of labour administration.

- 1464.** As the Committee on Freedom of Association has been informed previously, the former managers and directors of PDVSA and its subsidiaries claim to have a kind of immunity or special status that calls for a form of reassessment of the case by a state body before their labour relationship can be ended, thereby setting them apart from the general laws and regulations as regards the termination of a labour relationship. They base this claim on the Petroleum Act. On this point, the Administrative Policy and Labour Appeals Chambers of the Supreme Court of Justice have repeatedly handed down rulings, to which the Government has referred individually, to the effect that all workers in the petroleum sector, except for management staff, enjoy relative stability of employment, as do all Venezuelan workers, and that consequently their dismissal can only be challenged in the labour courts, pursuant to sections 112 et seq. of the Labour Act. As to the management staff, their posts are at the discretion of the employer and benefit from no form of stability, since they directly represent their employer and are identified with him.
- 1465.** With regard to the allegations concerning PANAMCO de Venezuela S.A., the Government regrets any form of violence, especially when it is liable to endanger and affect the exercise of human rights. In the present case, the Government has already informed the Committee that the action taken by the police was legitimized by the Consumer Protection Act, as well as by the hoarding of essential goods during the illegal lockout called by employers against the Venezuelan people in December 2002 and January 2003. The action taken was authorized by jurisdictional bodies and designed to meet the fundamental requirements of the population, since the fact that the goods concerned were essential goods meant that their unavailability or speculative prices could have a negative effect on the life and health of the people. According to available information, the violence that occurred in the vicinity of the enterprise in question was perpetrated by representatives of the employers and allied conservative political groups that participated actively in the national work stoppage. They even copied the Chilean Right prior to the *coup d'état* against President Salvador Allende, using women as shock troops against the forces of public order and disrupting the operation of the jurisdictional bodies. The legality of the action taken, both by the jurisdictional body and by the police in enforcing the law was not challenged in court by the employer concerned, which thereby recognized the legitimacy and signified its approval of the order. Regarding the Committee's request in respect of the event denounced by the complainants, the Government encloses documents showing that a complaint was indeed lodged at the 2nd and 11th Attorney General's offices in the judicial circumscription of the State of Carabobo by José Gallardo, Jhonathan Rivas, Juan Carlos Závala and Ramón Diaz. The persons concerned have been given a hearing and the case is at the investigation stage pending a final ruling.
- 1466.** With regard to the situation of Gustavo Silva, general secretary of the Vocational Training Workers' Trade Union (SINTRAFORP), the National Educational Training Institute (INCE) reported on 28 May 2004 that Mr. Silva still works for INCE, that there is no disciplinary action whatsoever pending against him in connection with his status as a public servant, that proceedings have been under way ever since 2002 for a reassessment of his dismissal for having promoted the paralysis of an essential public service and that no decision has yet been taken. Consequently, as already stated, Mr. Silva continues to occupy his post as normal, by order of the court. The Government sent a copy of the administrative ruling issued by the National Inspectorate for Collective Labour Affairs in the Public

Sector (Report No. 2002-042 of 27 May 2002). This administrative ruling was not challenged in the administrative disputes court and is therefore final for all legal purposes.

- 1467.** With regard to the complaint concerning the dismissal from the National Nutrition Institute (INN) of Cecilia Palma, the Government repeats that the proper disciplinary procedure was followed, as a result of which a duly motivated administrative ruling of 6 November 2002 stripped Ms. Palma of her status of Lawyer 1 on the grounds specified in section 62.2 of the Administrative Careers Act. Ms. Palma accordingly lodged an appeal for this administrative decision to be annulled by an administrative disputes court and for a preventive order. Finally, the Seventh Higher Administrative Disputes Court concluded on 1 September 2003 that Cecilia de Lourdes Palma Maita had been guilty of a very serious lack of integrity vis-à-vis both the Institute and her fellow workers. This had placed her in an irregular situation in which she took advantage of the difficult times through which the country was passing at the time, and her behaviour was therefore unpardonable. The presiding judge stated that the fault incurred by the complainant could not be remedied, since her actions had caused real harm to the Institute. As can be seen, the court declared the request to have the decision annulled to be irreceivable, thereby confirming that the administrative decision could in no way be construed as a politically motivated reprisal for the events of 11, 12 and 13 April 2002 or as a violation of Ms. Palma's trade union activities, but constituted a sanction for behaviour punishable under the internal rules and regulations by the corresponding disciplinary measure.
- 1468.** As to the allegations concerning FEDEUNEP, the Government states that, with regard to the inter-union dispute between FEDEUNEP and FENTRASEP over the framework collective agreement for public servants in the service of the ministries and national autonomous institutes, the Ministry of Labour had made certain observations on the draft agreements of both trade union parties. For its part, FEDEUNEP failed to correct the legal errors and shortcomings of its draft contract. No challenge or appeal was lodged against the decision that put an end to the legal proceedings initiated by FEDEUNEP in the First Administrative Disputes Court against alleged violations of the laws and regulations by the labour administration; the decision therefore became final, thereby endorsing the attitude of the public servants in the service of the Ministry of Labour with respect to the obligations inherent in the right to bargain freely and collectively. For its part, the draft presented by FENTRASEP was duly amended and corrected.
- 1469.** Following the defeat of FEDEUNEP in court, the framework collective agreement for public servants in the service of the ministries and national autonomous institutes was signed by FENTRASEP and the Executive. The collective agreement was officially registered on 27 August 2003. Since then there has been no challenge whatsoever against the legally registered agreement either in the First Administrative Disputes Court or in the Supreme Court of Justice.
- 1470.** The framework collective agreement for public servants, which is now in force and which directly benefits almost 600,000 people, made FENTRASEP the most representative workers' organization in the country and the National Union of Workers (UNT) into the majority trade union confederation. This development has been strengthened by the fact that in March 2004 FENTRASEP, through its manual workers' branch, subsequently signed a new framework collective agreement for manual workers in the ministries and national autonomous institutes, thus increasing the number of beneficiaries by a further 250,000 people.

D. The Committee's conclusions

General conclusions

- 1471.** In general terms, the Committee notes with grave concern that the Government has not implemented its recommendations concerning a number of important issues that constitute very serious violations of trade union rights. The Committee notes specifically that the Government has not taken steps to vacate the detention order against Carlos Ortega, president of the CTV, and to guarantee that he may return to the country so as to be able to perform the trade union functions corresponding to his post of president without being subject to reprisals; on the contrary, the Committee has learnt that Mr. Ortega did return to the country and that he has been detained. The Government has also failed to provide any information on the initiation of the direct contacts with UNAPETROL called for by the Committee in order to resolve the matter of its registration, nor on whether it has begun negotiations with the most representative trade union organizations and confederations so as to find a solution to the mass dismissals from PDVSA and its subsidiaries (over 23,000 workers, according to UNAPETROL) following the national civic work stoppage, especially as regards the founders and members of UNAPETROL (a nascent trade union). The Government has likewise failed to respond to the Committee's recommendation that it examine, together with the trade unions, the evictions affecting hundreds of former workers of PDVSA and its subsidiaries with a view to finding a solution to the problem; UNAPETROL asserts that the Government has not complied with the Committee's recommendations.
- 1472.** The Committee observes further that some of the issues raised point to institutional shortcomings in the administration of justice that are highly prejudicial to trade union organizations and their officials and that UNAPETROL alleges that the Supreme Court of Justice is subordinated to the policies of the Executive and that there is no rule of law in the country. The Committee stresses that there has been a delay of almost four years in the National Electoral Council's proceedings in respect of the executive committee of the CTV, and of three years in most of the judicial proceedings relating to the dismissal of over 23,000 workers from PDVSA and its subsidiaries according to the complaints' latest allegations. Furthermore, without endorsing the rulings of the Supreme Court of Justice and other judicial bodies regarding their interpretation of the internal standards and procedures that apply to these dismissals, the Committee observes that the Supreme Court of Justice upheld the appeal lodged by PDVSA and ordered all those involved to comply with the decrees and resolutions concerning the operation of the oil industry, i.e. that the workers return to work or be held in contempt of court, apparently without even hearing the trade union organizations. Given the excessive delay in administering justice in this and in other cases examined in the present report, the Committee recalls that justice delayed is justice denied and considers that this state of affairs not only is liable to undermine seriously the trust of trade union organizations and their members in the justice system, but also prevents the organizations and their members from exercising their rights effectively.

Measures restricting trade unionists' freedom

- 1473.** First of all, the Committee wishes to recall its recommendations on these allegations:

- with respect to the warrant for the arrest of Mr. Ortega, the Committee strongly urged the Government to take steps to vacate the detention order against Mr. Ortega, and to guarantee that he may return to the country so as to be able to perform the trade union functions corresponding to his post of president, without being subject to reprisals;

- with respect to the detention orders against the UNAPETROL president and labour manager secretary (Horacio Medina and Edgar Quijano, respectively) issued by a Criminal Control Court on 26 February 2003 at the request of the Office of the Attorney General of the Republic of Venezuela, for alleged acts of sabotage and damage to installations belonging to Petróleos de Venezuela S.A. (discontinuation of electricity and gas supplies), as well as alleged political offences, and as regards similar actions perpetrated with other members of UNAPETROL (Juan Fernández Lino Carrillo, Mireya Ripanti de Amaya, Gonzalo Feijoo and Juan Luis Santana, former company directors), the Committee had urged the Government to send its observations on the subject as a matter of urgency.

1474. The Committee notes that UNAPETROL confirms in its latest allegations that the judicial authority ordered the detention of Edgar Quijano, Gonzalo Feijoo, Iván Santana, Edgar Paredes, Lino Carrillo, Horacio Medina, Iván Antonio Fernández and Mireya Ripanti for alleged criminal acts in connection with the national civic work stoppage that began in December 2002.

1475. The Committee notes that, according to the Government, the persons who called the work stoppage did not submit a list of demands, did not call the work stoppage on occupational grounds and did not give due notice; the work stoppage affected essential public services such as oil supplies, and no minimum service was organized (by law such services must be organized voluntarily by the parties concerned or, as a precautionary measure, by the administrative and judicial authorities); the political objective of the work stoppage (the overthrow of the President of the Republic) placed it outside the province of the judiciary; because there was no list of demands, there was no case for providing protection against alleged acts of anti-union discrimination; the organizers' call on citizens to disobey the law by virtue of article 350 of the Constitution was based on an erroneous and loose interpretation, as was subsequently determined by the Supreme Court of Justice; the Supreme Court of Justice declared the paralysis of the oil industry unconstitutional and illegal and, as a precautionary measure, ordered all those involved to ensure the operation of industry or be held in contempt of court, and found evidence of sabotage of the computers of INTESA (a supplier of services to PDVSA); in compliance with the decisions of the Supreme Court of Justice, the Ministry of Labour ruled that the request for suspension of the mass dismissals submitted by former managers and directors of INTEVEP (a subsidiary company of PDVSA) in PEQUIVEN and in PDVSA, had no social justification; the national civic work stoppage resulted in hundreds of thousands of dismissals and in damages amounting to over \$10 billion. It is the Government's view that the paralysis of PDVSA's activities conflicts with the Committee on Freedom of Association's rulings on strikes; furthermore, as the Supreme Court of Justice established, the work stoppage resulted in widespread violations of economic, social and cultural rights, the shutting down of the banking sector, the suspension of the electricity supply, etc.

1476. The Committee notes that, according to the Government, Carlos Ortega, president of the CTV, made statements justifying violence against democratic institutions; the judicial authority ordered the detention of Carlos Ortega for criminal conspiracy, incitement to commit a crime, treason, criminal damage and civil rebellion, following charges brought by the Office of the Attorney General; subsequently, Carlos Ortega applied to the Government of Costa Rica for asylum and the Government of Venezuela gave him a safe passage out of the country; however, after having engaged in political activities in this and in another country, he was seen in Caracas on 12 August 2004 at a political electoral rally on the referendum to impeach the President of the Republic. The Government adds that the criminal charges and detention order against him are still in effect.

1477. Regarding the warrant for the arrest of the persons cited by UNAPETROL, the Committee notes that, according to the Government, they were issued by the Office of the Attorney

General for alleged civil rebellion, direct and specific incitement to commit a crime, incitement to disobey the law, criminal conspiracy, unlawful discontinuation of the gas supply and computer espionage; the accusations lodged by the Office of the Attorney General are based on 120 inspections carried out in the oil industry in 13 states of the country, where evidence was found of environmental and mechanical damage, as well as damage to computer systems and other assets, thereby causing losses amounting to millions of dollars and disrupting the supply of oil. The persons concerned did not obey the summonses issued by the Office of the Attorney General and are consequently deemed to be fugitives from justice. The Committee notes the Government's statements regarding the judicial measures taken in connection with the work stoppage at PDVSA and concerning persons not cited in the allegations.

- 1478.** *As to the heart of the matter, the Committee notes the Government's opinion regarding the strictly political objective of the national work stoppage, as well as the Supreme Court of Justice's ruling that the work stoppage was illegal and the Government's position that the Committee did not apply to this case its own principles with respect to the right to strike, and specifically as they relate to essential services and a state of acute national crisis. The Committee recognizes that the case is complex (in that the national work stoppage was observed by both workers' and employers' organizations) and difficult, and therefore joins the Government in regretting certain excesses and criminal activities that occurred during the work stoppage and the major collateral restrictions it caused in the exercise of other fundamental rights. However, the Committee cannot overlook the fact that: (1) on certain days, 1.5 million people took part in the demonstrations that marked the work stoppage by the employers and the general strike called by the CTV, FEDECAMARAS, political parties and a number of NGOs, and therefore it must reject the view of certain trade union organizations in the petroleum sector, as reported by the Government, to the effect that "what happened was that the senior management abandoned their posts en masse", and the Government's statement that the strike at PDVSA was called not by the workers of PDVSA but by former managers, since the Government itself has confirmed that there were thousands of dismissals; (2) it is not certain, as the Government claims, that this movement had nothing to do with professional and trade union issues or with the protest against the Government's economic and social policy (even though the principal demand was the departure of the President of the Republic, which possibility is provided for in the Constitution by means of a referendum on impeachment but was not at the time governed by legislation, so that it would not seem in itself to be an unlawful demand); (3) the fact is that the work stoppage took place at a time when the country's principal workers' confederation (representing 68.73 per cent of the workers in 2001) was being refused recognition and there was a breakdown in social dialogue between the Government and this organization (CTV) and with FEDECAMARAS, there were no consultations with these organizations and, by and large, there was profound disagreement over the Government's economic and social policy; for its part, UNAPETROL has emphasized the strictly trade union demands that were being made prior to the work stoppage. Moreover, the work stoppage was on the whole peaceful, considering the magnitude of the movement, and the fact that the number of people said by the Government to have been charged with criminal offences was very small. As to the Government's statement that the Committee has not abided by its own principles in this case, and more specifically that the 62 days that the work stoppage lasted and the implications it had on the economy and the well-being of the population were very serious, the Committee stresses that, although it is recognized that a stoppage in services or undertakings such as transport companies, railways, telecommunications or electricity might disturb the normal life of the community, it can hardly be admitted that the stoppage of such services could cause a state of acute national emergency. The Committee therefore considers that measures taken to mobilize workers at the time of disputes in services of this kind are such as to restrict the workers' right to strike as a means of defending their occupational and economic interests [see **Digest of decisions and principles of the Freedom of Association Committee**, 4th edition, 1996,*

para. 530]. The Committee considers that this principle also applies in the petroleum sector. The Committee emphasizes that the Government has not provided information indicating that the state of economic emergency was ordered when extraordinary economic circumstances emerged, such that seriously affected the economic life of the nation, as required by article 338 of the Constitution. Similarly, the Committee has considered that the petroleum sector does not constitute an essential service in the strict sense of the term in which strikes may be prohibited [see *Digest*, op. cit., para. 545]. Finally, the Committee recalls that a certain minimum service may be requested in the event of strikes whose scope and duration would cause an acute national crisis, but in this case the trade union organizations should be able to participate, along with employers and the public authorities, in defining the minimum service [see *Digest*, op. cit., para. 557]. The Committee observes that the authorities did not take steps to ensure a minimum service with the participation of the workers' and employers' organizations. Bearing these principles in mind, the Committee considers that the union officials who organized the work stoppage and the workers who took part in it should not be subjected to reprisals such as detention or dismissal, unless their direct individual involvement in the crimes referred to by the Government (sabotage of computer systems, damage to property, etc.), can be proved. The Committee has so far received no such evidence.

- 1479.** In these circumstances, the Committee calls on the Government to take steps to have Carlos Ortega, president of the CTV, released from detention and to vacate the detention orders against the officials and members of UNAPETROL, Horacio Medina, Edgar Quijano, Iván Fernández, Mireya Ripanti, Gonzalo Feijoo, Juan Luis Santana and Lino Castillo. The Committee requests the Government to keep it informed of developments in this respect.

Allegations relating to the dismissal of more than 23,000 workers because of their participation in a national civic work stoppage

- 1480.** With regard to the alleged dismissal of 18,000 workers from PDVSA and its subsidiaries, including the members of UNAPETROL, since the start of the national civic work stoppage in December 2002, in its previous recommendations the Committee had regretted these hasty and disproportionate mass dismissals affecting 18,000 workers and pointed out that mass sanctions on account of trade union activities lent themselves to abuse and undermined labour relations. It requested the Government to inform it of the result of the legal action taken by the dismissed workers and to enter into negotiations with the most representative trade union confederations in order to find a solution to the mass dismissals from PDVSA and its subsidiaries as a result of the national civic work stoppage, specifically with regard to the members of UNAPETROL to whom, moreover, should be applied to article 94 of the Constitution which stipulates that the founders and executive committee members of trade union organizations benefit from immunity from dismissal during such time and in such terms as is required for the exercise of their functions. The Committee requested the Government to keep it informed of developments in this respect and to send its observations on the alleged non-compliance with legal standards and with the collective agreement as they relate to the dismissal procedure. (Allegations submitted by UNAPETROL on 17 February 2004 with respect to mass dismissals from PDVSA and its subsidiaries, and the infringement of the trade union immunity of Diesbalo Osbardo Espinoza, general secretary of the Union of Manual Workers, Oil Employees and Allied Workers of the State of Carabobo (SOEPC) were also pending.)

- 1481.** The Committee takes note of the new allegations of UNAPETROL to the effect that, because of the national civic work stoppage, PDVSA dismissed 18,756 workers (over 23,000 if the dismissals from PDVSA's subsidiaries are included) and that the Government has not complied with the recommendations of the Committee in its previous examination

of the case. The Committee observes that, according to UNAPETROL, over 80 per cent of the administrative proceedings initiated since the dismissals are still at the preliminary stage.

- 1482.** The Committee notes the Government's statement that, on 29 April 2004, the Supreme Court of Justice, Administrative Policy Chamber, declared null and void the preventive order handed down by the First Administrative Disputes Court on 12 June 2003 and decreeing that the founders and members of UNAPETROL (former directors and managers) were immune from dismissal. The Government also states that the same Court considered that the disciplinary measures adopted by PDVSA should not be reviewed under the procedure relating to anti-union discrimination and, more specifically, that the legal provision authorizing an employer to compensate a worker who has been dismissed without just cause financially instead of reinstating him in his previous post (relative stability rules and regulations) should apply to workers in the petroleum sector. The Government points out that, if the disputes procedure as governed by the Labour Act had been set in motion, the procedure relating to anti-union discrimination provided for in that Act would have been applicable, but that that had not been the case. The Government observes that, since there was therefore no possibility of the disciplinary measures adopted by the employer, PDVSA, being reassessed and reviewed by the labour inspectorate through the procedure relating to reinstatement and payment of salaries due, the only remaining option was for the disputed facts to be brought before the regular labour courts under the heading of relative stability.
- 1483.** The Committee notes that the Government states in respect of the dismissal procedures, that: (1) Horacio Medina, self-proclaimed president of UNAPETROL, and Edgar Quijano abandoned the dismissal reassessment procedure before the judicial authority; (2) in August 2004 the labour inspectorate of the Capital district drew up 60 reports declaring null and void the requests for reinstatement and payment of outstanding salaries submitted by former employees of PDVSA and its subsidiaries for alleged anti-union practices or measures; (3) since June 2004 the labour inspectorate of Puerto Cabello, state of Carabobo, has handed down over 60 decisions in favour of PDVSA in respect of a corresponding number of cases of reassessment of offences and reinstatement and payment of salaries due, indicating in respect of one group of workers that they had been dismissed on justifiable grounds and that no anti-union practices had been employed. One of these cases was administrative Case No. 192-2003 concerning Diesbalo Espinoza in which his dismissal was authorized in the light of evidence that there had been just cause for doing so; (4) as from 16 August 2004 the lawyers or representatives of the former managers and directors of PDVSA and its subsidiaries voluntarily abandoned or withdrew 2,066 requests for reinstatement and payment of salaries due submitted to the labour inspectorate of Maracaibo, state of Zulia, and relating to the existence or not of anti-union practices on the part of the employer; most of the requests had been submitted several months after the 30-day deadline; (5) 3,980 other cases that had been brought before the labour inspectorate in the city of Cabimas were voluntarily dropped or withdrawn by the lawyers of the former managers and directors of PDVSA and its subsidiaries; (6) on 9 September 2004 the request for reinstatement and payment of salaries due submitted to the labour inspectorate of Merida by José Gregorio Salas was declared irreceivable; (7) on 4 October 2004 the labour inspectorate of Zona del Hierro, Puerto Ordaz, in the state of Bolívar, issued 26 administrative decisions declaring irreceivable a like number of requests for reinstatement and payment of salaries due that had been lodged several months after the 30-day deadline; (8) the labour administration and the courts are continuing to examine and investigate the requests submitted by the directors and managers of PDVSA who were dismissed or removed from their posts because of the paralysis of essential services. The Government states that, so long as a request for the labour inspectorate to determine whether or not a worker enjoys immunity from dismissal is still pending, it would not be appropriate, as pointed out by the Supreme Court of

Justice, to continue investigating a case that is before the jurisdictional bodies; in the specific case of the former directors and managers of PDVSA (members and founders of UNAPETROL) and of the other PDVSA workers (other than the board of directors whose mandate is at the discretion of the employer), the Supreme Court of Justice has stated that any appeal against dismissal must be brought before the labour courts. The Committee notes that, according to the Government, only 6,195 of the over 23,000 alleged cases of dismissal have been resolved.

1484. *The Committee has taken note of the rulings handed down by the Supreme Court of Justice and the decisions of the administrative authorities with respect to the dismissals from PDVSA. Nevertheless, bearing in mind its conclusions that the national civic work stoppage was linked to the exercise of professional and trade union rights, the Committee deplores the mass anti-union dismissals that took place in the state enterprise PDVSA and its subsidiaries, and notes that only some 25 per cent of the cases of dismissal have been resolved – and that those have only been resolved because they were dropped by the workers (6,048 cases) or were declared irreceivable or settled in favour of the enterprise (147 cases), many of them because the deadline had expired. The Committee considers that the delay of the courts in resolving the immense majority of the 23,000 dismissals (according to UNAPETROL) is tantamount to a denial of justice and does not in any way exclude the possibility that the cases were dropped precisely because of the excessive delay. The Committee once again urges the Government in the strongest terms to enter into negotiations with the most representative trade union confederations in order to find a solution to the remaining instances of dismissal at PDVSA and its subsidiaries on account of the organization of or participation in a strike during the national civic work stoppage. The Committee considers that the founders and members of UNAPETROL should in any case be reinstated in their jobs, since in addition to participating in a civic work stoppage they were dismissed while they were undergoing training.*

Non-recognition of the executive committee of the CTV

1485. *With regard to the non-recognition of the executive committee of the CTV, the Committee again takes note of the Government's statements concerning the existence of an inter-union dispute during the electoral process, of the occurrence of irregularities and of the failure to comply with legal provisions. The Committee notes that the Government declares that it recognizes the executive committee de facto. However, the Committee observes that the implications of this recognition are very limited. The Committee takes note of the Government's statement that de jure recognition of the CTV is dependent upon submission to the Ministry of Labour of the official documentation required under the law (membership of the executive committee, etc.). The Committee takes note of the rulings handed down by the Supreme Court of Justice – and referred to by the Government – in respect of the CTV and its executive committee, which indicate that trade union election issues are dealt with by the National Electoral Council and, in the last instance, by the Electoral Chamber of the Supreme Court of Justice, and that it therefore refuses to rule on the matter of the most representative organization. The Committee regrets the enormous delay in the proceedings relating to the challenge to the trade union elections of 2001. The Committee moreover observes that the National Electoral Council is not a judicial body and that a decision taken by that body has no legitimacy from the standpoint of the principles of freedom of association. In a number of previous cases, including a recent similar case [see 336th Report, para. 864], the Committee has objected to the role assigned by the Constitution and legislation to the National Electoral Council in organizing and supervising trade union elections, including the power to suspend elections; it has considered that the organization of elections should be exclusively a matter for the organizations concerned, in accordance with Article 3 of Convention No. 87, and that the power to suspend elections should be given only to an independent judiciary, which alone can provide sufficient guarantees of the right to defence and due*

process; the Committee also noted the delays by the National Electoral Council and by the Electoral Chamber of the Supreme Court of Justice, which gave its ruling on the CNE decision, but without giving any ruling on the substance of the appellant's arguments. The Committee deeply regrets the interference of the National Electoral Council in the elections of the executive committee of the CTV and calls on the Government to ensure that in future the public authorities do not interfere in trade union elections and that only an independent judicial authority is involved in any annulment.

- 1486.** *The Committee observes that years have passed since the election of the executive committee in 2001 and that the Government encloses articles indicating that the executive committee plans to hold new elections shortly, which is most likely since its mandate is due to expire in a few months. The Committee calls on the Government to recognize the present executive committee for all purposes unless a ruling is handed down by an independent judicial authority that conducts a full inquiry into the holding of the previous election and concludes that it was not conducted in broad compliance with the law.*

Allegations regarding the refusal to register UNAPETROL and the eviction of hundreds of its members from their homes

- 1487.** *With regard to the allegation concerning the Ministry of Labour's refusal to register the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) despite the fact that the relevant documentation was submitted on 3 July 2002, and regarding the Ministry's request to the state enterprise PDVSA to describe the duties performed by the promoters of UNAPETROL, in its previous examination of the case the Committee had deplored the fact that the Ministry of Labour had informed PDVSA of the names of the UNAPETROL members in order to determine who belonged to the management staff and who did not, as well as the fact that the administrative process had been delayed for so many months, partly because of a judicial appeal by UNAPETROL but largely owing to delays in administrative proceedings and because it had not been clearly stated what specific steps should be taken by UNAPETROL in order to be registered (for example, suggesting that the representative role of the managers be eliminated or, conversely, that that of the non-managers be eliminated). The Committee had firmly expected that in future the procedure for trade union registration would be more rapid and more transparent and requested the Government to inform it of the steps that it planned to take in that respect and initiate direct contact with the members of UNAPETROL in order to find a solution to the problem of registering the union.*

- 1488.** *The Committee takes note of the fact that in its latest replies the Government repeats its earlier statements, refers to the Committee's conclusion that the resolution of the Ministry of Labour of 16 October 2003 is not contrary to the principles embodied in Conventions Nos. 87 and 98 and stresses that more than 30 directors and managers of PDVSA appear as founders of UNAPETROL, including Horacio Medina (former PDVSA strategies manager) and Edgar Quijano (signatory of the collective agreement as representative of PDVSA), who thus appear as employee and employer at the same time. The Government attaches a ruling of the Supreme Court of Justice, Administrative Policy Chamber, of 29 April 2004, to the effect that there is no evidence that any of the Ministry of Labour's proceedings violated the defendants' administrative rights when they sought registration; the Court indicates further that none of the administrative decisions (with respect to the request for registration) take any conclusive stand regarding the impossibility of freely establishing the trade union confederation concerned, thereby respecting due process.*

- 1489.** *The Committee regrets that, contrary to its earlier recommendation in which it had expected that in future the procedure for trade union registration would be more rapid and more transparent and had requested the Government to inform it of the steps that it planned to take in that respect and initiate direct contacts with the members of UNAPETROL in order to find a solution to the problem of registering the union, the Government has not complied with that recommendation despite the fact that UNAPETROL has written to it recalling the Committee's conclusions. The Committee regrets that since 2002 UNAPETROL has still not been registered and that the Government states that "the requests made by the Government to the effect that this undue accumulation of management staff and workers be clarified have not yet been complied with". The Committee points out in this connection that, according to UNAPETROL, the First Administrative Disputes Court issued a preventive order on protection of constitutional rights recognizing the existence of UNAPETROL on 12 June 2003 and that on 4 May 2004 the Administrative Chamber of the Supreme Court of Justice annulled that decision, and that some of the magistrates of the First Court which handed down the decision in favour of UNAPETROL were removed. The Government has not commented on this last allegation.*
- 1490.** *In these circumstances, the Committee takes note of the Government's statement that the appeal against the decision of the Minister of Labour denying UNAPETROL registration is currently before the Administrative Policy Chamber of the Supreme Court of Justice and requests the Government to send it the text of the ruling handed down. In the meantime, and in order to avoid the issue of the registration of UNAPETROL being held up still further by possible appeals or judicial delay, the Committee once again calls on the Government to initiate direct contacts with the members of UNAPETROL so as to find a solution to the matter of its registration and determine how the legal shortcomings referred to by the Government can be corrected.*
- 1491.** *With regard to the alleged eviction from their homes of hundreds of former workers of PDVSA and its subsidiaries in a number of states of the country, without any judicial order and with the use of the police, with violence and with the involvement of paramilitary groups, the Committee takes note of the Government's statements to the effect that: (1) the housing was the property of PDVSA under the housing arrangements set out in the labour contract; (2) the evictions were carried out under judicial authorization and the police were used to ensure compliance with the law; (3) the evictions gave rise to acts of violence on the part of the former directors and, at the request of the employer, to the use of the police to ensure compliance with the law, again with a court mandate; (4) the action taken by the enterprise was in line with the deadlines and conditions laid down in the collective agreement; (5) the housing was required for the staff that continued to work during the suspension of the essential services. The Committee notes that the Government does not deny that there were hundreds of evictions of workers of PDVSA and its subsidiaries or that the said workers had participated in the strike at PDVSA during the work stoppage ("abandonment of their post", according to the enterprise). The Committee takes note of the ruling of January 2004 sent to it by the Government, concerning the housing estates of Semerucos La Judibana, state of Falcón, to the effect that only if the appeals against dismissals are declared receivable will the workers be entitled to return to the housing following the employer's acceptance of their reinstatement. The Committee draws attention to the fact that this ruling of January 2004 was issued two years after the strike and national civic work stoppage that began in December 2002 and that it implies that, although no decision has been taken on the legality or illegality of the dismissals, the eviction of the workers from the housing they occupied in accordance with their work contract is considered legitimate. The Committee regrets the acts of violence perpetrated against workers, the excessive delay in the administration of justice with regard to the dismissals and the fact that PDVSA's view of the just and legal nature of the dismissals, before the court proceedings have been completed, should have prevailed over the right of*

workers to keep their housing thus causing irreparable harm to the workers and their families. Finally, the Committee regrets that the Government should have totally disregarded its recommendation that it examine the situation with the workers of PDVSA and its subsidiaries with a view to finding a solution to the problem of the eviction of hundreds of workers, thus abandoning the workers and their families to their fate.

Allegations regarding harassment and discrimination by PDVSA

- 1492.** *The Committee recalls its earlier recommendations with regard to the alleged anti-union reprisals whereby PDVSA asked its subsidiaries and a Cypriot enterprise not to hire the dismissed workers, to the need to initiate an independent investigation into the matter without delay and, if the allegations are found to be true, for the workers concerned to be adequately compensated, and to the alleged systematic harassment of the oil workers by the enterprise and by a new workers' organization supporting the Government. The Committee takes note that the Governments asserts that no such complaints were ever lodged with the competent state body and considers that they are groundless. The Committee draws attention to the fact that the allegation regarding the written request by PDVSA for its subsidiaries and a Cypriot enterprise not to hire the dismissed workers is quite precise. The Committee reminds the Government of its earlier request that it initiate an investigation without delay and requests that a proper hearing be given to the complainant organizations in the present case as well as to PDVSA and its subsidiaries and that, if the allegations are found to be true, all such anti-union practices be stopped.*

Allegations regarding acts of violence against trade unionists

- 1493.** *With regard to the alleged acts of violence during the 1 May 2003 march in which several workers were injured and the alleged murder of trade unionist Numar Ricardo Herrera, the Committee notes that the Government states that: (1) Mr. Herrera was a member of the Construction Workers' Federation; (2) the perpetrator of the crime was sentenced for homicide on frivolous grounds, causing less serious bodily harm and illegal possession of military weapons; (3) it has been proven that the reasons behind the homicide were personal and unrelated to the CTV march; (4) Felix Longart suffered less serious injuries and was not a member of a trade union. The Committee deeply regrets the murder of trade unionist Numar Ricardo Herrera and the injuries sustained by Felix Longart during the 1 May 2003 march and stresses that freedom of association can only be exercised in a climate in which fundamental human rights, and particularly those relating to life and personal safety, are fully respected and guaranteed.*
- 1494.** *With regard to the alleged acts of violence by the military on 17 January 2003 against a group of workers from the Panamco de Venezuela S.A. enterprise, leaders of the Beverage Industry Union of the State of Carabobo, who were protesting against the raiding of the enterprise and the confiscation of its assets, which was a threat to their source of work, the Committee had in its previous examination of the case regretted the acts of violence that took place during the raid on Panamco and had urged the Government to institute an independent investigation without delay into the instances of detention and torture claimed by the CTV to have been suffered by workers Faustino Villamediana, José Gallardo, Jhonathan Rivas, Juan Carlos Zavala and Ramón Díaz; the Committee had also called on the Government to keep it informed of developments.*

1495. *The Committee takes note of the Government's statements that: (1) the action taken by the police was legitimized by the Consumer Protection Act, as well as by the hoarding of essential goods during the illegal standstill called by employers against the Venezuelan people in December 2002 and January 2003; (2) the action they took was authorized by jurisdictional bodies and designed to meet the fundamental needs of the population, since the fact that the goods concerned were essential goods meant that their unavailability or speculative prices could have a negative effect on the life and health of the population; (3) the violence that occurred in the vicinity of the enterprise in question was perpetrated by representatives of the employers and allied conservative political groups who participated actively in the national work stoppage; (4) the legality of the steps taken by the jurisdictional body and by the police in compliance with the law was not challenged in the courts by the enterprise; (5) the complaints submitted by José Gallardo, Jhonathan Rivas, Juan Carlos Zavala and Ramón Díaz are currently under investigation. The Government does not refer to Faustino Villamediana. While regretting that the proceedings currently pending at the Office of the Attorney General with respect to four workers have not yet been concluded despite the fact that the events go back to December 2002 or January 2003, the Committee firmly hopes that the authorities will rapidly conclude the investigations and requests the Government to keep it informed of any decision that is taken. Regarding the alleged physical mistreatment and torture of trade unionists, the Committee has in the past recalled that governments should give precise instructions and apply effective sanctions where cases of ill-treatment are found, so as to ensure that no detainee is subjected to such treatment, and has emphasized the importance that should be attached to the principle laid down in the International Covenant on Civil and Political Rights according to which all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person [see Digest, op. cit., para. 59].*

Allegations regarding acts of anti-union discrimination against two union officials and their detention and torture

- 1496.** *With regard to the alleged institution of disciplinary measures against Gustavo Silva, general secretary of SINAFORP, the Committee takes note of the Government's statements that: (1) Gustavo Silva is currently employed at the National Educational Training Institute (INCE); (2) there are no disciplinary procedures under way against him, but dismissal evaluation proceedings are being conducted by the labour inspectorate on the grounds that he helped to organize a strike in an essential public service which had been declared illegal by the National Labour Collective Affairs Inspectorate in May 2002, and have not been challenged in the courts. The Committee draws attention to the slowness of the dismissal reassessment proceedings against trade unionist Gustavo Silva and stresses that justice delayed is justice denied and that the delay in this particular case is bound to have an intimidating effect on this union official. The Committee points out that INCE is not an essential service in the strict sense of the term and that consequently the right to strike should not be declared illegal, and that in any case such a decision should not be taken by the Executive but by an independent authority. The Committee requests the Government to send it the decision adopted by the labour inspectorate regarding the reassessment of the dismissal of trade unionist Gustavo Silva.*
- 1497.** *With regard to the dismissal of FEDEUNEP official Cecilia Palma, the Committee takes note of the Government's assertion that, in a ruling of 1 September 2003, the judicial authority (Seventh Higher Administrative Disputes Court) revoked the decision of 3 July 2003 ordering the reinstatement of Cecilia Palma, confirmed the administrative ruling of 6 November 2002 and concluded that she had been guilty of a very serious lack of integrity vis-à-vis both the Institute and her fellow workers and that her behaviour had caused considerable harm to the National Nutrition Institute. The Committee requests the*

Government to inform it whether trade unionist Cecilia Palma has appealed against this ruling and, if so, to keep it informed of the outcome of her appeal.

Allegations regarding violations of the right to bargain collectively

1498. *With regard to the allegations that the labour inspectorate obstructed the draft fourth collective agreement submitted by FEDEUNEP by making demands that went far beyond the requirements of the law or were virtually impossible to fulfil in practice within the prescribed deadline, and subsequently rejecting the project, as well as by accepting a new draft (which became a collective agreement) submitted by six of the 17 officials of (FEDEUNEP) who established a federation (FENTRASEP) that was officially endorsed by the Ministry of Labour, the Committee had requested the Government to inform it whether FEDEUNEP had lodged any appeal against the collective agreement signed between the public administration and FENTRASEP. The Committee takes note of the new observations presented by FEDEUNEP and by the Government. The Committee considers that FEDEUNEP has produced arguments of some weight in support of its right to conclude the collective agreement. The Committee notes, however, that the Government emphasizes the fact that FEDEUNEP challenged neither the decision of the First Administrative Court as an infringement of the law by the labour administration nor the official registration of the collective agreement signed by FENTRASEP. In these circumstances and in view of the fact that this collective agreement has been in effect for almost two years, a recommendation that the collective bargaining process be resumed would not seem appropriate.*

The Committee's recommendations

1499. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *In general terms, the Committee notes with grave concern that the Government has not implemented its recommendations concerning a number of important issues that constitute very serious violations of trade union rights.*
- (b) *The Committee calls on the Government to take steps to have Carlos Ortega, president of THE CTV, released from detention and to vacate the detention orders against the officials and members of UNAPETROL, Horacio Medina, Edgar Quijano, Iván Fernández, Mireya Ripanti, Gonzalo Feijoo, Juan Luís Santana and Lino Castillo, and to keep it informed of developments in this respect.*
- (c) *The Committee deplores the mass anti-union dismissals that occurred at the PDVSA state enterprise and its subsidiaries and notes that only some 25 per cent of the cases of dismissal have been resolved and that, of those, 6,048 were resolved by the workers withdrawing their application and 147 were declared irreceivable or settled in favour of PDVSA, often on the grounds that the deadline had expired. The Committee considers that the delay of the courts in resolving the immense majority of the 23,000 dismissals (according to UNAPETROL) is tantamount to a denial of justice and does not in any way exclude the possibility that the cases were dropped precisely because of the excessive delay. The Committee once again urges the Government in the*

strongest of terms to enter into negotiations with the most representative trade union confederations in order to find a solution to the remaining instances of dismissal at PDVSA and its subsidiaries on account of the organization of or participation in a strike during the national civic work stoppage. The Committee considers that the founders and members of UNAPETROL should in any case be reinstated in their jobs, since in addition to participating in a civic work stoppage they were dismissed while they were undergoing training.

- (d) *The Committee deeply regrets the enormous delay in the proceedings relating to the challenge to the trade union elections of 2001, as well as the interference of the National Electoral Council in the elections of the executive committee of the CTV, and calls on the Government to ensure that in future the public authorities do not interfere in trade union elections and that only an independent judicial authority is involved in any annulment. The Committee calls on the Government to recognize the present executive committee for all purposes unless a ruling is handed down by an independent judicial authority that conducts a full inquiry into the holding of the previous election and concludes that it was not conducted in broad compliance with the law.*
- (e) *The Committee takes note of the Government's statement that the appeal against the decision of the Minister of Labour denying UNAPETROL registration is currently before the Administrative Policy Chamber of the Supreme Court of Justice and requests the Government to send it the text of the ruling handed down. In the meantime, and in order to avoid the issue of the registration of UNAPETROL being held up still further by possible appeals or judicial delay, the Committee once again calls on the Government to initiate direct contacts with the members of UNAPETROL, so as to find a solution to the matter of its registration and determine how the legal shortcomings referred to by the Government can be corrected.*
- (f) *With regard to the alleged eviction from their homes of hundreds of former workers of PDVSA and its subsidiaries in a number of states of the country, the Committee regrets the acts of violence perpetrated against workers, the excessive delay in the administration of justice with regard to the dismissals and the fact that PDVSA's view of the just and legal nature of the dismissals, before the court proceedings have been completed, should have prevailed over the right of workers to keep their housing, thus causing irreparable harm to the workers and their families. Finally, the Committee regrets that the Government should have totally disregarded its recommendation that it examined the situation with the workers of PDVSA and its subsidiaries with a view to finding a solution to the problem of the eviction of hundreds of workers, thus abandoning the workers and their families to their fate.*

- (g) *With regard to the alleged written request sent by PDVSA for its subsidiaries and a Cypriot enterprise not to hire the dismissed workers, the Committee reminds the Government of its earlier request that it initiate an investigation without delay and requests that a proper hearing be given to the complainant organizations in the present case as well as to PDVSA and its subsidiaries and that, if the allegations are found to be true, that all such anti-union practices be stopped.*
- (h) *With regard to the alleged acts of violence, arrests and torture by the military on 17 January 2003 against a group of workers from the Panamco de Venezuela S.A. enterprise, leaders of the Beverage Industry Union of the state of Carabobo, who were protesting against the raiding of the enterprise and the confiscation of its assets, which was a threat to their source of work, the Committee notes that the complaints submitted by José Gallardo, Jhonathan Rivas, Juan Carlos Zavala and Ramón Díaz are currently under investigation and stresses that the allegations concern the detention and torture of these workers and of Faustino Villamediana. While regretting that the proceedings currently pending at the Office of the Attorney General with respect to four workers have not yet been concluded despite the fact that the events go back to December 2002 or January 2003, the Committee firmly hopes that the authorities will rapidly conclude the investigations and requests the Government to keep it informed of any decision that is taken.*
- (i) *The Committee requests the Government to send it the decision adopted by the labour inspectorate regarding the reassessment of the dismissal of trade unionist Gustavo Silva.*
- (j) *With regard to the dismissal of FEDEUNEP official Cecilia Palma, the Committee requests the Government to inform it whether this trade unionist has appealed against the ruling of 1 September 2003 and, if so, to keep it informed of the outcome of her appeal.*
- (k) *In general terms, the Committee regrets the excessive delay in the administration of justice demonstrated by several aspects of this case and stresses that justice delayed is justice denied, and that this situation impedes the effective exercise of the rights of trade union organizations and their members.*

CASE NO. 2254

INTERIM REPORT

**Complaint against the Government of Venezuela
presented by**
— the International Organisation of Employers (IOE) and
**— the Venezuelan Federation of Chambers of Commerce
and Manufacturers' Associations (FEDECAMARAS)**

Allegations: The complainant organizations have presented the following allegations: the marginalization and exclusion of employers' associations in the decision-making process, excluding them from social dialogue, tripartism and the holding of consultations in general (particularly in relation to the very important legislation that directly affects employers), thereby not complying with the very recommendations of the Committee on Freedom of Association; action and interference by the Government to encourage the development of and to promote a new employers' organization in the agricultural and livestock sector to the detriment of FEDENAGA, the most representative organization in the sector; the arrest of Carlos Fernández on 19 February 2003 in retaliation for his activities as president of FEDECAMARAS, without a legal warrant and without the guarantees of due process; according to the complainant organizations he was badly treated and insulted by violent groups headed by a government deputy; the physical, economic and moral harassment, including threats and attacks, of the Venezuelan employers and their officials by the authorities or people close to the Government (various cases are listed); the operations of violent paramilitary groups with governmental support, with actions against the facilities of an employers' organization and against protest actions by FEDECAMARAS; the creation of an atmosphere hostile to employers in order to allow the authorities (and on occasion to encourage them) to dispossess and occupy farms in full production, in violation of the Constitution and legislation and without following legal procedures; the complainant organizations refer to 180 cases of illegal invasions of productive land and indicate that most of these cases have not been resolved by the relevant authorities; the application of an exchange control system decided unilaterally by the authorities, discriminating against companies belonging to FEDECAMARAS in administrative authorization for the purchase of foreign currencies, in retaliation for participation by this employers' confederation in national civic work stoppages

1500. The Committee examined this case at its June 2004 meeting and submitted an interim report to the Governing Body [see 334th Report, paras. 877-1089, approved by the Governing Body at its 290th Session (June 2004)].

1501. Subsequently, the Government sent new observations in its communications of 22 and 25 February 2005.

1502. Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

1503. At its May-June 2004 meeting, the Committee on Freedom of Association made the following recommendations [see 334th Report, paras. 1053-1089, approved by the Governing Body at its 290th Session (June 2004)]:

- (a) In a general way, the Committee wishes to underline the seriousness of the allegations and it regrets that, in spite of the fact that the complaints were presented in March 2003, the Government's reply, dated 9 March 2004, does not give specific replies to a large number of the allegations.
- (b) Taking into account the nature of the allegations presented and the Government's reply, the Committee expresses generally its serious concern about the poor situation of the rights of employers' organizations, their representatives and their members. The Committee draws the Government's attention to the fact that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations; the Committee also underlines that freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, due process and the protection of premises and property belonging to workers' and employers' organizations, are fully respected and guaranteed. The Committee urges the Government to fully guarantee these principles in the future.
- (c) The Committee regrets that the Government has not convened the National Tripartite Commission for a number of years and that it usually does not carry out bipartite or tripartite consultations with FEDECAMARAS regarding policy-making or legislation that has a fundamental effect on its interests in labour, social or economic matters, thereby violating the basic rights of this employers' confederation; the Committee urges the Government to stop marginalizing and excluding FEDECAMARAS from social dialogue and, in future, to fully apply the ILO Constitution and the principles therein on consultation and tripartism. The Committee also urges the Government, without delay, to convene periodically the National Tripartite Commission and to examine in this context, together with the social partners, laws and orders adopted without tripartite consultation.
- (d) In the current critical situation facing the country and noting that there has for years existed a permanent conflict between the Government, on the one hand, and FEDECAMARAS and the CTV, on the other, the Committee offers the Government the services of the ILO to provide the State and society with its experience so that the authorities and the social partners may regain trust and, in a climate of mutual respect, establish a system of labour relations based on the principles of the ILO Constitution and of its fundamental Conventions, as well as the full recognition, in all its consequences, of the most representative confederations and all organizations and significant trends in the labour world.
- (e) The Committee urges the Government to reinstate FEDENAGA to the Agricultural and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENAGA.
- (f) The Committee considers that the arrest of Carlos Fernández, President of FEDECAMARAS, as well as being discriminatory, aimed to neutralize or act as retaliation against this employers' official for his activities in defence of employers'

interests and, therefore, it urges the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he may return to Venezuela without delay and without risk of reprisal; the Committee requests the Government to keep it informed in this respect. The Committee deeply deplores the arrest of this employers' official and emphasizes that the arrest of employers' officials for reasons linked to actions relating to legitimate demands is a serious restriction of their rights and a violation of freedom of association, and requests the Government to respect this principle; the Committee also requests the Government to take steps to carry out an investigation into how the police carried out the arrest of Carlos Fernández, his being imprisoned and held incomunicado for a day and the type of cell in which he was imprisoned, and to keep it informed in this respect.

- (g) With regard to the allegations relating to the application of the new system of exchange control in 2001 (suspension of free buying and selling of currencies) unilaterally established by the authorities, discriminating against companies belonging to FEDECAMARAS in the administrative authorization for the purchase of foreign currencies (in retaliation for its participation in the national civic work stoppages); having taken account of the alleged discrimination and serious difficulties expressed by the complainant organizations because of the negative impact in many industries of this system, the Committee requests the Government to examine with FEDECAMARAS, without delay, the possibility of modifying the current system and that it guarantee, meanwhile, in case of complaints, the application of this system without discrimination of any sort, through impartial bodies. The Committee requests the Government to keep it informed in this respect.
- (h) The Committee urges the Government to take the necessary measures without delay:
 - (i) to ensure that the authorities do not try to intimidate, pressure or threaten employers and their organizations for their activities with regard to legitimate demands, in particular in the communications and in the agro-industrial sectors;
 - (ii) to carry out, without delay, an investigation with regard to: (1) the acts of vandalism at the premises of the Lasa Chamber of Commerce by Bolivarian groups supporting the regime (12 December 2002); (2) the looting of the office of Julio Brazón, president of CONSECOMERCIO (18 February 2003); (3) the threats of violence on 29 October 2002 by alleged members of the government political party against Adip Anka, president of the Bejuma Chamber of Commerce;
 - (iii) to carry out an investigation, without delay, into the allegations relating to 180 cases (up to April 2003) that have not been resolved by the authorities of illegal invasion of lands in the states of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojedes, Falcón, Guárico, Lora, Mérida, Miranda, Monagas, Portuguesa, Sucre, Táchira, Trujillo, Yanacuy and Zulia, and requests that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures; and
 - (iv) to urgently carry out an independent investigation (by people in whom the workers' and employers' confederations have confidence) into the violent paramilitary groups mentioned in the allegations (Coordinadora Simón Bolívar, Tupamaros movements and Círculos Bolivarianos Armados, Quinta República, Juventud Revolucionaria del MVR, Frente Institucional Militar and Fuerza Bolivariana) with a view to dismantling and disarming them, and that it ensure that there are no clashes or confrontations between these groups and protestors in demonstrations, and to keep it informed in this respect.

B. The Government's new observations

- 1504.** In its communication of 22 February 2005, the Government states, in relation to the Committee's recommendation on social dialogue, that the Government takes note of the recommendation of the honourable Committee in subparagraph (c) of paragraph 1089. On this point, and taking into consideration the background of destabilization and attacks on democratic institutions, the Government undertook a series of initiatives to consult about

and validate measures and actions designed to protect the interests and rights of the majority sectors of the country who are victims of poverty and structural exclusion, due in large measure to the negative impact on these majority sections generated by unilateral neo-liberal and anti-nationalist policies about which there was no consultation. Noteworthy among these measures and actions were a set of legal instruments, whose drafting and approval by the National Executive had been previously authorized by the National Assembly (enabling act), which were submitted to processes of consultation and dialogue with the social actors. Although the positions adopted were not those of the business sector, there is no question of this consultation process not taking place. Perhaps the misunderstanding arose due to the traditional way in which the dialogue and consultation occurred, in which the Government surrendered its role of protector of the interests of the majorities, allowing a progressive trimming of the economic, social and cultural rights of the population.

- 1505.** The Government indicates that the most striking disagreements with these legal provisions were those relating to demands concerning the privatization of oil and hydrocarbons; land and rural development; fishing and coasts and the Public Administration Act, the latter giving rise to a complaint to the Committee, Case No. 2202, subsequently withdrawn by the complainant trade unions when the observations submitted were remedied. The remainder of the 47 authorized to be drafted and approved by the National Executive entered into force smoothly and did not give rise to major comments.
- 1506.** According to the Government, the criticisms that surfaced around this legislation gave rise to actions against democratic institutions, involving key representatives of the social actors, even to the point of a *coup d'état* and sabotage of the country's main economic activities, with paralysis of essential public services and causing an acute national crisis in the country.
- 1507.** The Government adds, however, that the complaint which gave rise to this case fails to mention the process of dialogue conducted by the authorities prior to approval of the legislative measures and even after their approval consultations took place, without prejudice to recourse to other mechanisms and remedies set out in the national legal system.
- 1508.** In the latter regard, the Government points to the controversial Land and Rural Development Act which was challenged in the Constitutional Division of the Supreme Court of Justice, and which led to several decisions, annulling several of the most controversial articles or provisions. Particular mention should be made of the decisions of the Constitutional Division of 20 November and 11 December 2002, on the application of the National Federation of Stockbreeders (FEDENAGA), whose president is Mr. José Luis Betancourt, which declared null articles 89 and 90 of the Decree with rank of law, the Land and Agrarian Development Act, while at the same time providing an interpretation of articles 25, 40 and 43 of the Act.
- 1509.** Likewise, the Government states that, following an intensive process of consultation and debate in the National Assembly, the text originally approved by the National Executive on the Public Administration Act was revised. Indeed, the new version was approved by the National Assembly on 11 July 2002, extending rights of freedom of association and collective bargaining. Amendments resulting from the consultations were even introduced into the original text, which allowed the Latin-American Workers' Confederation (CLAT) to withdraw the complaint it had submitted to the Committee, recognizing the fruits of the dialogue that had taken place. Thus there is little basis for disputing the form in which the texts were approved by the National Executive as omitting the power to amend them at a later stage in the National Assembly, and also in the Supreme Court of Justice.

- 1510.** The Government states that, despite the public actions of Mr. Carlos Fernández in the April 2002 *coup d'état*, the President of the Republic, in a gesture of humility and magnanimity, invited him a few days later to participate in the forums for dialogue which he was initiating with the country's various social sectors. Despite the fact that Mr. Fernández withdrew from the forums for dialogue within a few days, in the specific case of the labour sector, these forums for dialogue continued with grassroots employers' and workers' organizations, leading to important sectoral agreements at grassroots level (in key sectors such as motor vehicles and spare parts, chemicals and pharmaceuticals, tourism, small and medium-sized enterprises, transport, textiles and clothing, among others). Therefore the Committee's statement concerning the supposed deliberate "marginalization" and "exclusion" of FEDECAMARAS by the Government is perhaps inexact and insufficient, when paradoxically within a few days of a *coup d'état* led by the president of FEDECAMARAS, the vice-president of FEDECAMARAS was asked to form part of the national social forums for dialogue. In the light of this, it seems more appropriate to state that it was a case of self-exclusion and self-marginalization.
- 1511.** The Government indicates that in order to overcome the political crisis caused by the *coup d'état* led by the president of FEDECAMARAS, Mr. Carmona, the Government in November 2002 launched a process of national dialogue with the opposition. This process of dialogue was facilitated by the Organization of American States (OAS), the Carter Center and the United Nations Development Programme (UNDP). The opposition side included a representative of FEDECAMARAS. This dialogue process took place despite the fact that within a few days Mr. Fernández, acting as president of FEDECAMARAS, allied himself publicly with an act of military rebellion led by the generals in the Plaza Altamira de Caracas. In addition, within a few days, Mr. Fernández led the work stoppage for over two months to bring about the removal of the President of the Republic. These elements will put into perspective the soundness of the Committee's recommendation on the supposed marginalization and exclusion of FEDECAMARAS from the dialogue. As both the Committee and other ILO monitoring bodies have been informed repeatedly, the process of dialogue facilitated by the OAS, the Carter Center and the UNDP culminated in the signing of an agreement on 29 May 2003, which ultimately led to the calling of the popular referendum on 15 August 2004.
- 1512.** According to the Government, the consultations on minimum wages since 2002 have been conducted through written requests sent to the various social actors at national, regional and local level. The measures adopted by the Government in this field, particularly in 2004, permitted a recovery in workers' wages against a background of economic growth, and declining rates of unemployment, informality and inflation.
- 1513.** The Government indicates that the consultations on other work-related measures, such as labour immobility, agreements of the Andean Community of Nations, action plan on child labour, ratification of Conventions, Workers' Food Act, etc. have in most cases been conducted through correspondence or letters. This government action aimed at all the social actors has intensified since August 2004.
- 1514.** According to the Government, the consultations on the reform of the Organic Labour Act were conducted directly with representatives of the various social actors, both in the National Assembly and the Ministry of Labour.
- 1515.** The Government adds that, following the regional and municipal elections, the Executive Vice-President of the Republic held meetings with representatives of FEDECAMARAS, at both national and regional level, and with representatives of the affiliated chambers (CONINDUSTRIA, CONSECOMERCIO, among others). This effort by the Government is intended to restore social dialogue with leading social actors, without prejudice to maintaining the impetus of regional and sectoral meetings such as those held since 2002.

- 1516.** The Government indicates that on 14 January 2005, in an event which had not occurred since 2001, the president of FEDECAMARAS attended the session where the President of the Republic reported to the nation on the management of the previous year.
- 1517.** For the Government, as well as an immediate commitment of the National Executive, this effort to meet also directly involved the presidency of the National Assembly, where the national committee of FEDECAMARAS was recently received. This aspect is of particular importance because the President of the National Assembly comes from the Caracas Metro Workers' Union which committed itself to promoting a common agenda for labour legislation, in particular reform of the Organic Labour Act.
- 1518.** As regards social dialogue in a direct and participate democracy, the Government indicates that, in paragraph 1066, the Committee rightly "recalls that the 1944 Declaration of Philadelphia that forms part of the ILO Constitution reaffirms among the fundamental principles on which the ILO is based, the following: the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare".
- 1519.** The Government indicates that the Committee's observation in the previous paragraph is also shared by the Government, which highlights that in no other period of the country's history has there been an inclusive policy of consultation and decision-making involving all elements of Venezuelan society, both organized and otherwise. In the specific case of employers' organizations, the terms "inclusive" and "grassroots" as part of this dialogue should be highlighted, due to the fact that in the past broad swathes of employers' and workers' sectors were left out of the discussions and decisions which affected or regulated their relations with the Venezuelan State, and as established in the Declaration of Philadelphia "the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare".
- 1520.** In this regard, what the Government has done is to enlarge the basis of the customary consultations or dialogue which took place during the so-called "representative" democracy which existed in the Republic until 1999, dominated by the exclusiveness and privilege of the employers' representation, before giving way to plurality instead of exclusion, allowing, for example, the Federation of Artisans, Micro, Small and Medium-Sized Industrialists of Venezuela (FEDEINDUSTRIA), founded over 30 years ago, to participate in forums for dialogue or consultations, something which was not usual until the present Government came into power.
- 1521.** The Government adds that it is important to stress than, in terms of bipartite and tripartite dialogue and consultation since 1999, what was done was simply to comply with the ILO Constitution and the provisions of the Conventions duly ratified by the Republic, highlighting in this process the importance of including participatory, proactive and inclusive democracy, i.e. that the country's important decisions are the subject of wide consultation with all members of the different productive sectors, in this case old and new employers' organizations.
- 1522.** Consequently, what has been seen is that the conduct of FEDECAMARAS from 2001 up to November 2004 was directed – inexplicably – at marginalizing and excluding itself, by changing from a social actor to a political one, causing economic losses to a large number of its members, promoting disregard for legality, and evading its social obligations and responsibilities. Such acts are not only contrary to the spirit of social dialogue in a

democratic framework, but contrary to the social state under the rule of law and justice with which Venezuelan men and women are blessed under the Constitution.

- 1523.** According to the Government, the process of establishing mechanisms of consultation and participation is what has made economic recovery possible, generating new fair and decent work, progressively surmounting social exclusion and enhancing the quality of life of the population, correcting in ample measure the various situations noted by the complainants and the Government before the Committee in March 2003 and March 2004.
- 1524.** As regards the statements concerning the responsibility of FEDECAMARAS, like the Committee, the Government also regrets the discrediting of FEDECAMARAS and its officials (paragraph 1057 of the Conclusions). However, it should be stressed that, at the time of the events at the end of 2001, throughout 2002 and early 2003, there were few protests by other employers affiliated to the employers' organization expressing their disagreement or differences with the leadership indicated in advance (prior to the actions of Mr. Carmona and Mr. Fernández).
- 1525.** In this case, the Government is referring to employers affiliated to FEDECAMARAS who at that point in time and in the then political situation, did not express their disagreement with the well-known public actions of their leaders. In any case, as was already made clear, the Government points out that, since then, matters have been evolving in a positive way, particularly since the holding of the presidential referendum of 15 August and the regional and municipal elections of 31 October 2004. The new political events have enabled the re-establishment of forums for meeting and dialogue, turning the page on the rifts that occurred between 2001 and 2003. Thus, many of the unconstitutional and illegal actions perpetrated against Venezuela's institutions and people are now in the hands of the respective law enforcement agencies and the courts (Office of the Attorney-General and the Judicial Power), where those under investigation enjoy due guarantees in the framework of due process.
- 1526.** In its communication of 25 February 2005, concerning the *coup d'état* of April 2002, the Government draws to the Committee's attention that, in its conclusions (paragraph 1055), it should take into account, based on the observations submitted by the Government, that "the Committee observes that in response to the complaint as a whole and to an incidental claim by the complainants (that the national civic work stoppage on 9, 10 and 11 April 2002 led to the national crisis that resulted in the resignation of the President of the Republic which was publicly confirmed by the country's highest military official, but that only lasted a few days as it was later cancelled by the President himself) ...".
- 1527.** The Government points out that, in highlighting the facts, the Committee contradicts itself, since it states in paragraph 1056 "... that this complaint does not relate to Pedro Carmona, that the allegations relate to situations both preceding and following the events of 12 and 13 April 2002 (above all the national civic work stoppages of December 2002 to January 2003), that its mandate is limited to examining the allegations of violations of the rights of workers' and employers' organizations, their representatives and affiliates, and that it is not the competent international forum to deal with questions of an exclusively political nature".
- 1528.** The Government indicates that the Committee itself supports the Government's argument through an "incidental claim by the complainants" [IOE – FEDECAMARAS], in other words, the complainants themselves assume the involvement of the employers' organizations and their then leaders in the observations made by the Government in March 2004 which the Committee summarizes in paragraph 1056.

1529. For the Government, the participation, inter-dependency and relationship that existed between both members of the FEDECAMARAS leadership (whose president was Mr. Carmona and vice-president Mr. Fernández) in the events of April 2002 is clear. The actions by both led to a *coup d'état*. These actions are evidenced in documents and newspaper articles provided by the Government to the Committee in its observations of March 2004.

1530. The Government refers to the Committee's summary in paragraph 924 (the Government's reply), which it quotes: "Carlos Fernández succeeded Carmona Estanca in the presidency of FEDECAMARAS, as he was the first vice-president of the association when the unconstitutional presidency of Carmona Estanca as de facto President was announced. The first official act of Carlos Fernández as president of FEDECAMARAS was to acknowledge the regime of Carmona Estanca, and it was on 12 April 2002 that Mr. Fernández signed the 'Act of Constitution of the Government of Democratic Transition and National Unity' as representative of the employers. The Act referred to tried unconstitutionally to justify the *coup d'état* by the employers, the military, opposition political parties and a minority of 'civil society' with the so-called 'Government of Democratic Transition and National Unity'".

1531. The Government adds that the cited observations were accompanied by the copy of the Act of the so-called transitional government over which Mr. Carmona presided for a few hours and which Mr. Fernández endorsed with his signature on behalf of the employers of Venezuela. These actions, the Government recalls, led to:

- a. the removal and persecution of the President of the Republic, the Executive Vice-President of the Republic, ministers and other government officials;
- b. the removal and persecution of governors and mayors belonging to the government party, previously elected (like the President of the Republic) by the will of the people;
- c. removal and suppression of the National Assembly (National Legislative Power);
- d. removal of the judges of the Supreme Court of Justice (Judicial Power);
- e. removal of the Office of the Attorney-General, Office of the Ombudsman and Office of the Comptroller-General of the Republic (Civil Power); and
- f. removal of the judges of the National Electoral Council (Electoral Power).

1532. The Government adds that these acts transmitted throughout the country by radio and television clearly showed that these representatives of FEDECAMARAS (president and vice-president) were acting contrary to the Constitution, laws and international Conventions on human rights. These acts include the unconstitutional detention or deprivation of liberty, in the form of kidnapping of the President of the Republic, legitimately elected in 2000 by the vast majority of the Venezuelan people (over 60 per cent of the vote).

1533. The Government states that any attempt to distinguish the action of Mr. Carmona from that subsequently taken by Mr. Fernández is a serious error, both in historical and legal terms, since it was a case of a series of facts or events related to each other, as shown by the actions that were taken.

1534. For example, the Government adds, prior to the indefinite employers' stoppages of December 2002 and January 2003, there had already been the employers' stoppage of 10 December 2001, the employers' stoppage of 9, 10 and 11 April 2002 and the employer's stoppage of 21 October 2002. In all those cases, those who represented

FEDECAMARAS as president (first Mr. Carmona and later Mr. Fernández) acted with the support of private television and radio companies on public channels, directing their actions against the democratic system.

- 1535.** As regards the judicial detention of Mr. Carlos Fernández, the Government is concerned at the statements by the Committee on Freedom of Association in its interim conclusions on the judicial detention of Mr. Carlos Fernández, the opinions expressed by the Committee on Freedom of Association and adopted by the Governing Board with the respective reservations by the Government of Venezuela at the 290th Session of the Governing Board (summary record of the meeting annexed). The Committee exceeds its powers on the substance of the matter, when it overlooks the principles of international law on the burden of proof and evaluation of evidence. Consequently, its conclusions are reckless and mistaken because they are based on false suppositions. The Government stresses that Mr. Carlos Fernández is a fugitive from justice, which places him in a special position because he has evaded justice.
- 1536.** In the Government's opinion, the Committee exceeds its powers on the substance of the matter when it passes judgment on matters which are a matter for the criminal courts of Venezuela and which are not established in Conventions Nos. 87 and 98. According to the Government, in pronouncing on whether a person has been the victim of ill treatment during his detention, the Committee did not take sufficiently into account the observations submitted in this case, as set out in the reply and annexes in March 2004.
- 1537.** The Government indicates that the Committee overlooks the principles of international law concerning the burden of proof and evaluation of evidence. Indeed, according to the Government, the Committee reverses the burden of proof and its evaluation of the evidence submitted by the parties is inadequate. The Committee, by breaching the principles of international law, reverses the burden of proof and finds the complainants' statements to be true even when the Government presented solid evidence and documents such as judicial decisions, and statements by the alleged victim and his wife to the mass media.
- 1538.** Concerning the putative ill-treatment alleged by the complainants, the Government states that, while the complainants stated in the Committee that Mr. Fernández had been ill-treated, the alleged victim never made any complaint in that respect to any national authority. This is a negative fact about which the Government cannot present any evidence, it being up to the complainants to provide evidence that Mr. Fernández entered a complaint of any kind for alleged human rights violations. In this respect, they should annex the complaints made to the competent judicial organs, i.e. the Office of the Attorney-General and the Office of the Ombudsman. Unlike the complainants, the Government submitted documentary evidence consisting of statements to the mass media by Mr. Fernández' wife saying that he had been well treated.
- 1539.** The Government adds that faced with the above situation, the Committee rejects the evidence presented by the State because it considered that it is "of limited value as evidence". By virtue of the application of the principles of burden of proof, even if a more limited role is given to the value of a statement to the press, the Committee should give it precedence over the statements by the complainants to the Committee on Freedom of Association. The Committee's conclusions and recommendations "to carry out an investigation in this respect and to keep it informed" are futile and difficult to comply with, since the Government cannot initiate an investigation into facts which have never been reported to it by Mr. Carlos Fernández. The Government reiterates that the conditions under which Mr. Fernández was arrested were in accordance with the law and he did not suffer any ill-treatment during his judicial arrest and brief imprisonment.

1540. The Government urges the Committee on Freedom of Association to send the evidence presented by FEDECAMARAS and the IOE in support of the alleged ill-treatment that caused injuries and bruises to Mr. Carlos Fernández at the time of his arrest and imprisonment, such as forensic examinations (physical and psychological), as this would lend greater credibility to the statements of the complainants and the Committee on Freedom of Association.

1541. With regard to the alleged violation of due process to which the Committee refers (paragraph 1075 and following), it is the Government's opinion that although the complainants stated to the Committee that Mr. Fernández' right to due process had been violated, the Government maintains that in the present case the judicial organs respected due process, since the arrested person was immediately brought before a judge and the judge took measures concerning his detention in a reasonable time and in accordance with the current law. In this regard, the Government reiterates the following observations:

- (1) The detention of Carlos Fernández occurred following a legally valid request executed by the Office of the Attorney-General of the Republic, in the person of the Sixth Prosecuting Attorney of the Office of the Attorney-General.
- (2) The proceedings were originally initiated for the offences of instigation to commit an offence, devastation, incitement to conspire and treason, at the request of the Office of the Attorney-General of the Republic, in accordance with the organic Criminal Procedures Code (COPP). These accusations were brought against him given the extent of the evidence of damage to the country by the repeated public protests by Mr. Fernández which gave rise, among other things, to sabotage of the oil industry, closing of food-producing firms during the public and notorious leadership by Mr. Fernández of the so-called "civic work stoppage" or lockout that took place in December 2002 and January 2003.
- (3) The trial judge was No. 34 of the criminal jurisdiction of the Metropolitan Area of Caracas, who in turn was challenged by the defence lawyers of Mr. Fernández, exercising his human right to defence, and the case was transferred to trial judge No. 49.
- (4) The offences of treason, incitement to conspire (conspiracy) and devastation were not accepted by the new judge but the judge upheld the accusations of civil rebellion and instigation to commit offences and ordered Mr. Fernández to be placed under house arrest (at his residence and home), as he suffered from blood pressure problems, thus enjoying procedural privileges and special treatment during the trial proceedings as laid down in our criminal procedures legislation.
- (5) It should be noted that on 30 January 2003, before his judicial detention, Mr. Fernández made a statement as a witness at the premises of the Office of the Attorney-General, following which he had been summoned to make another statement as a defendant, a summons that he did not attend.
- (6) Consequently, on 18 February 2003, the representatives of the Attorney-General requested the trial judge for the arrest of Mr. Fernández and that he should be brought before the jurisdictional body, and the judge to rule as appropriate.
- (7) On 19 February 2003, Court No. 34, in the exercise of its powers, agreed to the request and issued an order for the arrest and detention of Mr. Fernández.
- (8) On 20 March 2003, the Appeals Court decided to free Mr. Fernández, withdrawing the charges against him. Mr. Fernández then immediately left the country.

- (9) On 20 March 2003, in the Appeals Court of Caracas, the Sixth Prosecuting Attorney in the Office of the Attorney-General lodged an appeal for the protection of constitutional rights (*amparo*) with the Constitutional Division of the Supreme Court of Justice which accepted the allegations set out by the Office of the Attorney-General of the Republic and once again ordered the house arrest of Mr. Carlos Fernández. The Supreme Court of Justice upheld the detention order in a decision read out by the president of the Court on 2 August 2003. As Mr. Fernández was outside the country and did not report to the judicial authorities, he is thus a fugitive from Venezuelan justice.
- 1542.** The Government indicates that, in paragraph 1076 of the report, the Committee observes that the Government had conveyed the decision of the Supreme Court of Justice (8 August 2003) that revoked the decision of the Appeals Court on procedural grounds (missing signature of one of the three magistrates (21 March 2003) who, for reasons of health, had been absent from the court for some hours).
- 1543.** The Government stresses that in any trial, mishaps may occur. In the case of Mr. Fernández, the mishaps that arose were resolved satisfactorily. Specifically, the charges and any other recourse exercised by a plaintiff may not be interpreted, nor should the Committee be “surprised” that “a judge was challenged; three of the charges were suppressed by another judge and the Appeals Court ended up dropping all of them” (...) “The decision of this court was appealed in the Supreme Court of Justice, which revoked it on procedural grounds and once again, at the request of the Office of the Attorney-General (the same prosecuting attorney that had originally accused him of the five offences) ordered the arrest of Mr. Fernández.” All these observations by the Government show that in Venezuela the justice system is autonomous, independent and impartial.
- 1544.** Moreover, the Government is concerned that the Committee did not express an opinion on and did not take into account the Government’s explanations in its reply of March 2004 concerning the conduct of the trade union officials, which was in violation of Article 8 of Convention No. 87: “In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land”.
- 1545.** The Government indicates that it is clear that the detention of Mr. Carlos Fernández, president of FEDECAMARAS in this instance, having succeeded the dictator Pedro Carmona Estanca, is directly and immediately linked to the employers’ lockout and oil stoppage which took place from 2 December 2002 to the end of January 2003. These are offences laid down in law prior to the events themselves and before the current President of the Republic took office. The Government stresses, as laid down in Article 8 of Convention No. 87 cited above, that no political or trade union activity means, nor can mean, licence to commit offences.
- 1546.** As regards the supposed legitimacy given to the so-called “civic work stoppage” of December 2002 and January 2003, the Government states that, in paragraphs 1080, 1081 and 1082, the Committee refers in worrying terms to the economic sabotage imposed in an anti-democratic manner for two months by the political opposition including the employers’ organization FEDECAMARAS as “civic work stoppages”. The Government’s attention, as representative of the Venezuelan people from which it derives its existence and the legitimacy of its mandates, is drawn to the subtle justification and even validation of breaking the law applicable in the Bolivarian Republic of Venezuela, in relation to the said stoppage. In this regard, reference is made to paragraphs 1080, 1081 and 1082 (part) of the report in question.

- 1547.** The Government indicates that the conclusions expressed by the Committee in this regard are similar to the grounds wrongly asserted by opposition parties during the so-called “civic work stoppage” to justify human rights violations on a massive scale and interruption of essential public services, which seemed to be validated as the inevitable and necessary consequences or lesser evils of the promotion of the stoppage organized against the legitimate authorities and against the Constitution of the Republic.
- 1548.** The Government adds that the extremely broad definition of human rights enshrined in the Constitution is no reason to seek to justify actions in the name of neo-liberalism and neo-fascism to the detriment of the majority and the democratic system which this majority choose freely and in the exercise of its sovereignty.
- 1549.** Thus, the Government indicates, in relation to articles 53 and 97 of the Constitution, the Committee errs in both cases in omitting the provision that rights of public assembly and strike must be exercised in express compliance with the respective laws.
- 1550.** The Government adds that in this regard, article 53 of the Constitution states: “Any person shall have the right to meet, in public or in private, without prior authorization, for lawful purposes and without arms. Meetings in public places shall be regulated by law”. The expression “regulated by law” denotes the importance that this provision of the Constitution attaches to people’s right of assembly, without seeking to undermine the exercise of other rights by the remainder of the population, such as the right to life, food, freedom of movement, etc. However, what is of concern is the expression ignored by the Committee “... for lawful purposes and without arms. Meetings in public places shall be regulated by law”. This needs emphasizing, since precisely what Mr. Fernández was doing was to incite incessantly to violence and breach of the law.
- 1551.** Thus, the Government indicates, the Committee erred in its conclusions by including the phrase “very generously”, alluding in a partial manner to the provisions of the Constitution “and the right to strike, in the public and private sector” (article 97), inexplicably ignoring the rest of article 97 “shall have the right to strike, under such conditions as are established by law”. It is important to stress that the promoters and leaders of the so-called “civic work stoppage” did not comply with the special legislation, the Organic Labour Act, Title VII, Collective Labour Rights, specifically on the regulation of the right to strike.
- 1552.** The Government states that, in the case of the right to strike to which article 97 of the Constitution refers, the Organic Labour Act, which came into force in 1990 and was reformed in 1997, not only expressly does not recognize the concept of general strike but also expressly abolished the concept of lock-out, in contrast to its recognition in the repealed 1936 law. The abolition of the concept of lock-out in the 1990 Organic Labour Act (known as the Caldera Act) was considered as very appropriate by the social actors, which regarded it as a step forward in protection against anti-trade union practices. In any case, the Organic Labour Act and its subsidiary regulations expressly establish the requirements and conditions for the exercise of the right to strike, which may never affect the rights of others and even less so the rights of majorities of the population.
- 1553.** The Government indicates that these aspects were sufficiently supported in the observations sent by the Government in March 2004, because the law specifically guarantees peaceful coexistence of citizens and prevention of anarchy, abuse by a few to the detriment of the majority and contempt for the freedom of all. Thus, those who deliberately ignore it, as well as placing human rights in jeopardy, must be subject for their actions to the appropriate sanctions laid down through due process in the competent judicial organs.

- 1554.** The Government states that, as established in its previous replies on the same events of December 2002 and January 2003 (Case No. 2249), the Committee seems to have fallen unnecessarily into contradictions, including with its own doctrine on paralysis of essential public services, general strike, acute national crisis, among other issues. The Committee's clear contradiction of a doctrine built up over the years, as well as implying a negative or regressive precedent with respect to human rights, is a worrying signal with regard to legal certainty for members of the Organization.
- 1555.** As to the inappropriate justification of the so-called civic work stoppage based on article 350 of the Constitution of the Republic, the Government indicates that it might be interpreted that the Committee is trying to minimize or divert attention from the Government's allegations submitted in March 2004, as well as seeking to criticize the Constitution by using the expression "very generously". The broad recognition in the Constitution of rights and guarantees and of a deeply democratic and participatory economic, social, political system cannot be taken and used to distort its content, since the Constitution itself establishes parameters to prevent this, together with the respective laws and court decisions which interpret it.
- 1556.** Thus, the Government states that the unconstitutional and illegal nature of the so-called "civic work stoppage" cannot be justified by the phrase "very generously", by which the Committee refers to the Constitution, especially as it does not take sufficient account of the observations sent by the Government in March 2004. In the light of this situation, we request the Committee on Freedom of Association to provide detailed clarification of the thinking behind its interpretation of our Constitution. This clarification could also involve other organs of the Organization in relation to article 350 of the Constitution.
- 1557.** The Government states that the Committee's interpretation in paragraph 1082 of article 350 of the Constitution coincides with the interpretation made and wrongly invoked by the political opposition. It should be indicated that in this regard the Supreme Court of Justice, in a judgement of the Constitutional Division of 22 January 2003 (annexed by the Government) interpreted the said article 350 and set aside the incorrect interpretations of that article of the Constitution.
- 1558.** The Government indicates that the judgement in question was subsequently ratified by the Constitutional Division of the Supreme Court of Justice itself on 13 February 2003. Both judgements already existed and were fully known, due to the importance of the subject, at the date of the submission of the complaint by FEDECAMARAS and the IOE on 17 March 2003. In other words, they were handed down almost two months before the submission of the abovementioned complaint to the Committee, which shows that they did not act with due reasonableness and fairness before this tripartite body, i.e. in seeking the truth on the interpretation of this constitutional provision.
- 1559.** In any case, the Government points out that, the Committee was informed by the Government of both judgements of the Supreme Court of Justice in a Case (No. 2249) dealing with the same events and the actors acting jointly with FEDECAMARAS in the so-called "civic work stoppage" in a letter sent on 15 June 2004, specifically pages 20-24 inclusive.
- 1560.** The Government indicates that the above is intended to alert the Committee to its mistaken conclusions concerning article 350 of the Constitution of the Bolivarian Republic of Venezuela, since according to the interpretations of the Committee on Freedom of Association, "because this is a recent Constitution, these rights have not been developed in legislation (for example, in cases of conflicts of constitutional rights; or of minimum services to be maintained during strikes)".

- 1561.** On the decision on exchange control and control of issue of foreign currency, the Government views with concern that in paragraph 1085 of the 334th Report, there was minimal mention of the reasons justifying such an urgent and necessary measure as the establishment of exchange control, creating for the purpose the Foreign Exchange Control Commission (CADIVI). In this respect, the Government reiterates that its reply sent in March 2004 contained sufficient explanation, and now provides further details by annexing information on foreign currency authorized, as well as making available to the Committee the explanation by the Ministry of Labour in the abovementioned communication of 10 January this year, including annexes in accordance with the procedure established in article 26 of the ILO Constitution:

With respect to the alleged discrimination in the foreign exchange administration and control system, this was a measure adopted by the Government to control the massive and deliberate flight which depleted international reserves and led to rising inflation in the country which affected access by the population to food and basic services. Employers must satisfy the basic conditions (lack of indebtedness to the tax and social security administration) and in the event of mishaps in the process they may resort to the administrative and judicial authorities. In any case, given the imprecise and general nature of the allegation formulated by the complainants, we consider that they confused the teething problems in implementing a foreign exchange control and administration system with discriminatory action. It is certainly true that historically similar problems of implementation arose when similar measures were taken in 1961, 1983 and 1994. In order to refute the allegations of the complainants, the distribution of foreign exchange at the end of 2004 is shown in the annexes. This distribution covered all productive sectors, including nationally and internationally owned companies.

- 1562.** In turn, the Government indicates, the Minister of Labour observed in the same communication that:

The Committee, without identifying the companies affected by alleged discriminatory treatment, requests the Government to "modify the current system", which invades areas of monetary and exchange policy, adopted after a massive capital flight intended to create political instability in 2002 and 2003. This capital flight, as it happened, was accompanied by basic food shortages and sabotage of essential public services (in particular petrol and domestic gas), thereby endangering the lives, health and safety of the country's population.

- 1563.** The Government says that it still hopes at the present time that the complainants and the Committee on Freedom of Association itself will officially convey the list showing the precise identity of the firms affected by the discriminatory application of the foreign exchange control system operating in the country since 2003. The Government hopes that the complainants will present formal complaints to the competent national authorities with respect to the alleged discriminatory treatment to which the Committee's report refers.

- 1564.** The Government places on record that it has held regular meetings with the employers' sector, in particular, the industrial sector affiliated to FEDECAMARAS, and the social actors to resolve problems in the application of the system and to correct its failings. An example of this is the meetings held by CONINDUSTRIA with CADIVI last November.

- 1565.** The Government has systematically explained to the ILO monitoring organs that the existence of armed groups is completely false, let alone that these alleged groups have the support of the Government or other government authorities.

- 1566.** The Government also notes that, according to the 334th Report, paragraph 1087, the Committee regrets that the Government has not specifically replied to these allegations. In this respect, the Government reports that the complainants do not attach the relevant complaints concerning the events about which the Committee requests the Government to inform it in paragraph 1087.

- 1567.** The Government stresses that the specific political violence and intolerance by the sectors in dispute during 2002 and part of 2003, the product of political polarization, which has now been overcome, was a problem addressed from the outset in the so-called Table for Negotiation and Agreement (November 2002-May 2003) facilitated by the Carter Center, the United Nations Development Programme (UNDP) and the Organization of American States (OAS). This forum for dialogue managed to achieve a commitment by both sectors (Government and opposition) to condemn violence, followed by an important product of the agreement, namely the Decree on the disarming of the population (illegal arms) and suspension of the carrying of arms without exception for all citizens of the Republic, in order to establish and maintain a reliable register of those with permits to carry arms in accordance with the law. In addition, the Constitution of the Republic clearly establishes that the State has a monopoly of arms.
- 1568.** In any case, the Government states that the Committee was informed of this and the respective agreements of the Table for Negotiation and Agreement were submitted to it, stressing the participation of FEDECAMARAS on a permanent basis through the president of one of its branches, the Venezuelan Chamber of Food (CAVIDEA).
- 1569.** With respect to the above paragraph, the Government reiterates its comments on the matter in its communication (already indicated), No. 004 of 10 January 2005, which states:

The Committee recommended the Government to establish an “independent” commission, (by people responsible for the *coups d'état* and petroleum lock-out in 2002-2003, with a view to “dismantling”, proscribing or banning various social organizations which exercise the right of association. Among them the Quinta República Movement, a government party with a majority in the National Assembly as well as in 20 of the 22 State governments and 270 of the 340 municipalities in the country and Juventud Revolucionaria del MVR. This political party has won nine national, regional and local elections between 1998 and the present. It should be noted that the Committee on Freedom of Association requested the “dismantling” of the main political party in Venezuela and other legally constituted social organizations, which is legally impossible, and would not be feasible in practise. (Annexed is a press article which mentions the MVR as the main political party).

- 1570.** As regards the investigation into acts of vandalism and 180 cases of alleged invasion of farms, the Government states what was already explained in the abovementioned letter No. 004 of 10 January 2005, as follows:

As regards the alleged harassment of members of the employers’ organization, it should be stressed that despite the tension experienced at times during the period concerned here, no trade union or employers’ leader was arrested and no trade union office raided, except for those specific measures implemented in accordance with judicial decisions and those of the Office of the Attorney-General. These judicial decisions are directly linked to the investigation into those responsible for the *coup d'état* in April 2002 and the economic and oil sabotage in December 2002 and January 2003. The provisions of the Convention do not authorize or lend legitimacy to acts in violation of the law, but on the contrary require representatives of the social actors to respect the basic rules for living together in a democracy. The measures adopted by the police authorities were always the result of proceedings and previous decisions by the independent and autonomous organs of the public power, which did not involve persecution or limitation of the exercise of rights and freedoms of association.

- 1571.** Regarding the alleged invasions of farms (180) and other abuses, which, according to the employers’ organization, were suffered by the president of CONSECOMERCIO, Mr. Julio Brazón, during an alleged looting of his office, and the harassing of the president of the Bejuma Chamber of Commerce, Mr. Adip Anka, in the form of alleged threats of violence by alleged members of the government party, the Government considers that there is no basis whatsoever in either case, and there is no evidence to support or prove them.

1572. The Government states that the institutions and population in general are fully aware that Venezuela functions under the rule of law and justice, such that whenever there is a breach or violation of the law, the facts must be reported to the appropriate authorities. For this purpose, a complaint must be made to the competent authorities providing evidence of the facts. As evidence that what the complainants in this case allege happened actually happened, the complainants could at least have annexed the respective complaints to the administrative and judicial authorities of the Venezuelan State to the written submission to the Committee on Freedom of Association. The Government therefore regrets that the allegations of the employers' organization FEDECAMARAS were not supported by sound evidence and requests the Committee to consider this aspect, and to discount it for the reasons set out above.

1573. As to the comments on enabling acts, the Government reiterates what it stated in its reply sent in its communication No. 094 of 9 March 2004, and also sets out what it indicated in its communication of 10 January, namely:

As regards the approval of laws passed in the context of an enabling act of 2000, consultations were held with all sectors, mainly in August 2001, following a systematic method of work and timetable, in particular with FEDECAMARAS and its affiliated organizations. However, it should be clearly understood that after consulting with the sectors concerned and listening to their particular interests, the State adopted measures in which the general interest of the population was given priority or preference, particularly excluded sectors in the urban and rural areas, demonstrating the exercise of political will in accordance with the majority of the electorate which elected it. In any case, any disputes of particular items of the content were examined and decided at the time by the Supreme Court of Justice of Venezuela, and the necessary corrective measures taken, including declaring null certain specific provisions of various bodies of legislation.

1574. In any case, the Government informs the Committee of the results of the appeals by the employers affiliated to FEDECAMARAS in relation to the decree-laws under the Enabling Act and the consultations in the National Assembly concerning review and correction of some articles of those decree-laws. These can be summarized as follows:

On the Decree with rank and force of law, Land and Agrarian Development Act, published in the *Official Gazette*, No. 37,323 of 13 November 2001, it should be pointed out that the Supreme Court of Justice, Constitutional Division, ruled as follows:

ONE: the articles of the laws set out in articles 82 and 84 of the Decree with rank and force of law, Land and Agrarian Development Act published in the *Official Gazette*, No. 37,323 of 13 November 2001 are held to be constitutional.

TWO: interprets and, in consequence, recognizes, in the terms set out in this ruling, the full force and validity of the provisions contained in articles 25, 40 and 43 of the Decree with rank and force of law, Land and Agrarian Development Act published in the *Official Gazette*, No. 37,323 of 13 November 2001.

THREE: articles 89 and 90 of the Decree with rank and force of law, Land and Agrarian Development Act published in the *Official Gazette*, No. 37,323 of 13 November 2001 are found to be unconstitutional.

FOUR: in accordance with the provisions of articles 119 and 120 of the Organic Act of the Supreme Court of Justice, the immediate publication of this judgement in the *Official Gazette* of Venezuela is ordered, stating in the summary the following title:

Ruling of the Supreme Court of Justice, in the Constitutional Division, which holds that articles 82 and 84 are constitutional; which finds that articles 89 and 90 are unconstitutional; and interpretation of articles 25, 40 and 43 of the Decree with rank and force of law, Land and Agrarian Development Act published in the *Official Gazette*, No. 37,323 of 13 November 2001.

FIVE: The effects of this ruling shall be effective with immediate effect, that is from their publication in the *Official Gazette*.

To be published, recorded and notified. Let what is ordered be done.

Done, signed and sealed in the chamber of the Constitutional Division of the Supreme Court of Justice, in Caracas, on this 20th day of the month of November two thousand (2000). Year: 192 of Independence and 143 of the Federation.

The President ...

- 1575.** The Government states that the Supreme Court of Justice, Constitutional Division, in Ruling No. 1157 of 15 May 2003, upheld the application in the present case against Decrees Nos. 1546 and 5120 with force of law, the Land and Agrarian Development Act and the Organic Hydrocarbons Act, published in the *Official Gazette* of the Bolivarian Republic of Venezuela, No. 37,323 of 13 November 2001.
- 1576.** On the Public Registry and Notaries Act (enabling act) the Supreme Court of Justice, Constitutional Division, on 15 July 2003, admitted an action in respect of the unconstitutionality of articles 14, 15, 62, 63, 64, 65 and 66 of that Act.
- 1577.** On the Fisheries and Fish-farming Act (enabling act), the application for nullity on the grounds of unconstitutionality and the request for a temporary injunction to suspend the effects of the decree-law, the Constitutional Division of the Supreme Court of Justice declared inadmissible the application for a temporary injunction, in Judgement No. 408 of 8 March 2002. However, the National Assembly partly reformed that law, which is intended to regulate the fisheries and fish-farming sector by means of provisions which allow the State to encourage, promote, develop and regulate fisheries, fish-farming and related activities, based on guiding principles which ensure the production, conservation, control, administration, promotion, research and responsible and sustainable exploitation of fish-stocks, taking into account the relevant biological, technological, economic, food security, social, cultural, environmental and commercial aspects.
- 1578.** The Government states that on the decree with force of law, the Coastal Zones Act, which was republished in *Official Gazette* No. 37,349 of 19 December 2001, it is clear that "it reserves the rights legally acquired by private individuals ...". With respect to this law, it should be borne in mind that article 9 of Decree No. 1468 with force of law, the Coastal Zones Act, published in the *Official Gazette* No. 37,319 of 7 November 2001, was declared null on 24 September 2003 in Judgement No. 2573-240903-01-2847.
- 1579.** With respect to Decree with Force and Rank of Law, No. 126, which establishes the value added tax, partly amended by the National Assembly, *Official Gazette*, special edition, No. 5,600 of 26 August 2002, the Government states that the Supreme Court of Justice, in Judgement No. 1505 of 5 June 2003, declared admissible the action for protection of constitutional rights (*amparo*) brought by Fernando José Bianco Colmenares, acting as president of the College of Physicians of the Metropolitan District of Caracas and in defence of the broad interests of all Venezuelans against the provision in article 63, paragraph 5, of the Act to amend in part the Value Added Tax Act, published in the *Official Gazette*, special edition, No. 5,600 of 26 August 2002 and reprinted for material error in *Official Gazette*, special edition, No. 5,601 of 30 August 2002. In this case, the Court ruled that the Act did not apply to all value added taxpayers who provided or received private medical services, dental services, surgery and hospitalization, given the effective protection of the general rights and interests inherent in the present case; and in order to ensure effective tax justice, it declared medical and healthcare services, dental services, surgery and hospitalization provided by private bodies exempt from value added tax, for which reason article 3 also of the Act in question did not apply with respect to those services. This means that in this matter, the provisions of the original decree-law in respect of the abovementioned services are reinstated.

1580. The Government indicates that the foregoing summary complements the observations provided in March 2004 on enabling acts, showing that, in the face of non-conformity by the complainants, the Supreme Court of Justice and the National Assembly acted in favour of social harmony and the interests of the Venezuelan population as a whole and the priority economic and political sectors with which it historically maintained relations.

1581. As regards the alleged exclusion and marginalization of FEDENAGA, the Government states that FEDENAGA took part in the forums for social dialogue which were held following the failed *coup d'état* in 2002, which makes it surprising that they should now say that they were not invited. Another problem is the fact that they abandoned this legitimate path provided by the Government using their self-exclusion as justification for their subsequent involvement and participation in the work stoppage called by Mr. Carlos Fernández at the end of 2002.

1582. The Government states that it recognizes the employers' organization FEDECAMARAS and welcomes the positive change in the attitude of FEDECAMARAS as can be seen from its communication No. 004 of 10 January 2005, in which we state that:

Following the holding of the presidential referendum in August 2004 and the regional and municipal elections in October 2004, a positive development on the part of the FEDECAMARAS leadership can be seen, shifting from disregard for the will of the people, initially coming to a head in loud claims of "electronic fraud", to an appreciation of the efforts made by the Government to restore a climate of social dialogue, with the active participation of the Executive Vice-President of the Republic, as well as several ministries, including the Ministry of Labour. In the latter case, we stress the initiatives taken in promoting consultation on reform of the Organic Labour Act and the various social security laws. Thus the FEDECAMARAS leadership has involved itself in the intensive process of democratic dialogue that has been taking place in the country since 1999, linked initially to the constitutional process and subsequently to the transformation of the political, economic and social model. The Government annexes documentation relating to this.

1583. Concerning the need to maintain a balance and equality in proceedings before the Committee, and with a view to keeping this important tripartite committee on course, its actions must reflect balance and fairness in the treatment of information and its evaluation. Weaknesses perceived in this area will affect both the credibility and the working methods used to reach conclusions and formulate the respective recommendations.

1584. In this respect, and without prejudice to what has been stated above, the Government wishes to stress its concern that the Committee indicated that the press articles presented by the Government as items of evidence or arguments to indicate and rebut the allegations of ill-treatment of Mr. Carlos Fernández were of limited value and practically ignored them in its conclusions, where it states that the press articles are of limited value as evidence.

1585. The Government adds that a few paragraphs later, however, in the same report, specifically paragraph 1082, the Committee, in explaining the issues involved in determining the nature of the work stoppage, considered, with respect to the complainants, the press articles sent by the Government, and quotes: "includes statements vindicating Mr. Fernández that show that the national civic work stoppage was an act of protest by FEDECAMARAS for employer reasons ...".

1586. The Government indicates that this differential treatment merits clarification by the Committee on Freedom of Association, since that would make it possible to interpret the inexplicable legitimacy assigned to the declaration by the complainant employers' organization to justify a series of events including the call to the unconstitutional and illegal work stoppage.

1587. In other words, for the Government, credibility means maintaining predictable, balanced and fair parameters, in order to preserve the necessary legal certainty that the different actors which make up the International Labour Organization deserve, to the exclusion of any differential treatment in the evaluation of arguments or evidence.

D. The Committee's conclusions

1588. As regards the various outstanding issues relating to the exclusion of FEDECAMARAS from the social dialogue, in its previous examination of the case the Committee pointed out the following: (1) the Government's reply does not mention any bipartite or tripartite agreement or consultation with FEDECAMARAS as from September 2001 in matters (policies or legislation) of a labour or economic nature; (2) the Government has not denied that the National Tripartite Commission has not met for years as stated in the allegations; and (3) the Government has also not denied the alleged lack of consultations with FEDECAMARAS in respect of the process of drafting important legislation such as the Labour Procedure Act, the widespread increase in the minimum wage of 20 per cent by way of order or in respect of the process of ratification of ILO Convention No. 169, the new banking control scheme or, on a more general note, the establishment of economic policies and guidelines [see 334th Report, para. 1064]. Furthermore, with reference to the question of the consultations relating to the 47 Decrees which had been issued as a first stage only (up to August 2001) and then interrupted, the Committee had urged the Government to examine together with the social partners, all laws and Decrees adopted without tripartite consultation.

1589. The Committee observes that the Government has not replied to its recommendation without delay to periodically convene the National Tripartite Commission as envisaged in the legislation. The Committee again urges the Government to comply with its legislation and without delay to periodically convene the Tripartite Commission.

1590. As to the question of laws and Decrees adopted without tripartite consultation mentioned in the complaint, the Committee notes that the Government states that: (1) the complaint fails to mention the process of dialogue conducted by the authorities prior to approval of the legislative measures and even after their approval consultations took place, without prejudice to recourse to other mechanisms and remedies set out in the national legal system; (2) the Government applies an inclusive policy of consultation and decision-making involving all elements of Venezuelan society, both organized and otherwise, eliminating exclusiveness and privilege in the representation of employers, making way for plurality and, for example, allowing FEDEINDUSTRIA and the other productive sectors to participate regularly in dialogue; (3) from 2001 up to November 2004 the conduct of FEDECAMARAS was directed, unacceptably, at marginalizing and excluding itself by changing from a social actor to a political one with actions contrary to the spirit of social dialogue and abstaining from participation in the forums for social dialogue; (4) the consultations on minimum wages since 2002 were conducted through written requests sent to the various social actors at national, regional and local level and in 2003 an agreement was concluded between the Government and the political opposition, also signed by a representative of an organization affiliated to FEDECAMARAS. As to the Government's assertion that FEDECAMARAS did not take part in the forums for dialogue in 2002, the Committee recalls that this absence was due to the fact that the authorities had not invited the president of the principal workers' federation in that capacity.

1591. In the light of the information in the Committee's possession (information from the complainants and the Government's successive replies), it considers that, in the period between August 2001 to the date of the IOE complaint (17 March 2003), the Government's consultations with FEDECAMARAS on social, economic and labour issues (apart from the consultation on minimum wages in 2002 to which the Government now refers) were

practically non-existent, and the Government has not shown that in the process of adopting the 47 Decrees, they were significant to the extent of taking duly into account the legal and constitutional defects invoked by FEDECAMARAS and which were detailed in the previous examination of the case [see 334th Report, para. 884]. The Committee observes in this respect that the Government in its reply refers to a series of decisions of the Supreme Court of Justice annulling certain provisions of the Land and Agrarian Development Act or interpreting others, admitting an action for unconstitutionality of various provisions of the Public Registry and Notaries Act, and partially reforming the Fisheries and Agriculture Acts and declaring null an article of the Coastal Zones Act and making the Value Added Tax Act inapplicable to certain services. According to the Government, the remaining Decrees did not give rise to significant observations. The Committee further observes that the Government has not provided specific information which might refute the allegation relating to the lack of consultation in the period covered by the present conclusions with respect to the Labour Procedures Act, ratification of ILO Convention No. 169, the new exchange control system or, more generally, the establishment of economic policies and directives.

- 1592.** *The Committee reiterates the importance of draft bills which affect them directly being the subject of consultation with the most representative workers' and employers' organizations and again points out to the Government the following principle [see 334th Report, para. 1065]:*

The most representative employers' and workers' organizations, and in particular the confederations, should be consulted at length, on matters of mutual interest, including everything relating to the preparation and application of legislation concerning matters relating to them and to the fixing of minimum wages; this would contribute to legislation, programmes and measures that the public authorities have to adopt or apply being more solidly founded and to greater compliance and better implementation. This being the case, the Government should, as far as possible, also base itself on the consensus of workers' and employers' organizations, which should share the responsibility for achieving well-being and prosperity for the community in general. This is particularly true in the light of the growing complexity of problems facing societies, and also, of course, facing the people of Venezuela. No public authority should claim to hold all knowledge nor presume that what it proposes will always and entirely satisfy the objectives in any given situation.

- 1593.** *With respect to the subsequent evolution of social dialogue since the last examination of the case, the Committee observes that the Government reports certain improvements in terms of consultations since the previous examination of the case, specifically consultations with FEDECAMARAS since August 2004 on labour immobility, agreements of the Andean Community of Nations, action plan on child labour, ratification of Conventions, Workers' Food Act (in most cases conducted through correspondence or letters); according to the Government, consultations on the reform of the Organic Labour Act and social security legislation were conducted directly with representatives of the various social actors both in the National Assembly and the Ministry of Labour; the Executive Vice-President of the Republic held meetings with national representatives of FEDECAMARAS and certain affiliated chambers; the president of the National Assembly received the national leadership of FEDECAMARAS and the president of FEDECAMARAS attended the session where the President of the Republic reported to the nation on the management of the previous year. The Committee notes that the Government also reports: (1) that the new political events (constitutional referendum of 15 August 2004 and the regional and municipal elections of 31 October 2004) have enabled the re-establishment of forums for meeting and dialogue, turning the page on the rifts that occurred between 2001 and 2003; (2) that FEDECAMARAS has pointed to government efforts (Vice-President of the Republic and various ministries, including labour) aimed at restoring social dialogue with the leading social actors; and (3) the Government highlights a positive development on the part of FEDECAMARAS and a favourable change of*

attitude to the extent of appreciating the Government's efforts, and that the FEDECAMARAS leadership has joined in the intensive process of democratic dialogue.

- 1594.** *The Committee underlines that over and beyond the consultations and meetings held between the authorities and FEDECAMARAS, which the Committee can but encourage, it is important to consolidate these first steps in the new direction and structure them on a permanent footing. The Committee again offers the Government the services of the ILO to provide the State and society with its experience so that the authorities and social partners may regain trust and, in a climate of mutual respect, establish a system of labour relations based on the principles of the ILO Constitution and of its fundamental Conventions, as well as the full recognition, in all its consequences, of the most representative confederations and all organizations and important tendencies in the world of work [see 334th Report, para. 1089(d)]. The Committee requests the Government to keep it informed of all instances of social dialogue with FEDECAMARAS and bipartite and tripartite consultations, and any negotiations or agreements that ensue and the Government's intentions with respect to the above offer of ILO technical assistance.*
- 1595.** *With respect to the previous recommendation urging the Government to reinstate FEDENAGA to the Agriculture and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENAGA, the Committee notes that the Government states: (1) that FEDENAGA took part in the forums for social dialogue which were held following the failed coup d'état in 2002; (2) that another problem was the fact that they abandoned this legitimate path provided by the Government using their self-exclusion as justification for their subsequent involvement and participation in the civic work stoppage called by Mr. Carlos Fernández at the end of 2002. The Committee points out that the forums for social dialogue to which the Government refers still do not exist, and are not the same as the Agriculture and Livestock Council. Consequently, the Committee reiterates its previous recommendation and requests the Government to reinstate FEDENAGA to the Agriculture and Livestock Council.*
- 1596.** *As regards the recommendations concerning the president of FEDECAMARAS, Mr. Carlos Fernández, the Committee noted that the Government states that it "reiterates" that the conditions under which Mr. Fernández was arrested were in accordance with the law and he did not suffer any ill-treatment during his judicial arrest and brief imprisonment, that he did not report these matters to the authorities and that it produced documentary evidence (press articles) consisting of statements to the mass media by Mr. Fernández and his wife that he had been well treated. The Committee wishes to refer to the Government's comments critical of the fact that limited value as evidence had been attached to the press extracts and expressing the view that it had exceeded its powers. In this respect, the Committee points out: (1) that it is one thing for the Government to refer to press articles as it did in its first reply and quite another, as now, to state categorically that Mr. Fernández' arrest was in accordance with the law and he did not suffer any ill-treatment; (2) that the Committee did not state that Mr. Fernández had suffered ill-treatment but had requested an investigation into the alleged instances of ill-treatment listed; (3) that the Committee has expressed an opinion many times on allegations of physical ill-treatment in the course of criminal judicial proceedings. As to the absolute contradiction between the allegations and the Government's new reply and taking into account its assertion that Mr. Fernández may lodge complaints if he so wishes, the Committee will not proceed with examination of this aspect of the case.*

- 1597.** As regards the recommendations and allegations concerning a number of irregularities or breaches of due process, the Committee notes all the statements and comments made by the Government which essentially reiterate its previous statements. The Committee refers to the extensive allegations of the complainants [see 334th Report, paras. 1073 and 1074] on these questions, points out that the Government had not replied in detail to them and recalls its previous conclusions that in this case there had been a lack of impartiality [see 334th Report, para. 1076].
- 1598.** Concerning the substance of the matter (trial and detention of Mr. Carlos Fernández, president of FEDECAMARAS), the Committee notes the Government's statements and once again observes that they essentially reiterate previous statements. The Committee recalls its final conclusions on that subject. In relation to this and to certain Government's statements, the Committee stresses: (1) that the national civic work stoppage of December 2002-January 2003 was several months after the coup d'état and was massively supported by a large part of the population and that on some days a million-and-a-half people took part in the protests; (2) that the oil sector is not an essential service in the strict sense of the term, that is the interruption of which would affect the life, safety or health of the persons and that the principles of freedom of association recognize the right to general strike in protest against the Government's economic and social policy; (3) that the Government has not provided a single piece of evidence to show that Mr. Carlos Fernández incited sabotage, acts of violence or similar offences; the Committee stresses that the causes of the civic work stoppage have their roots in the absence of social dialogue and the Government's economic and social policy, as it appears from the allegations, and that in its previous reply, the Government sent press articles on FEDECAMARAS' criticisms of that policy; (4) that for the reasons set out by the Committee, it does not share the view that the civic work stoppage had nothing to do with employers' organizations or trade union matters as the Government asserted, even though the work stoppage did also have obvious political ends which were nevertheless not illegal at the time; (5) that criminal responsibility of members of trade unions or employers' organizations for any individual offences must not be transferred to leaders of the organizations; (6) that apart from the president of FEDECAMARAS and the CTV, no other organizer of the civic work stoppage (NGO, political parties, etc.) was arrested; (7) that in its reply, the Government gave incomplete quotations from the Committee's previous conclusions; (8) that it is surprised that the Government invokes the shortage of basic foods, gas or petrol or the Committee's principles in cases of acute national crisis or paralysis of essential services to suggest that the Committee has breached such principles in the present case given that the Government did not provide any solution whatsoever by imposing minimum services essential to the community, either in this long civic work stoppage or in previous civic work stoppages; (9) that in its conclusions the Committee did not criticize the Constitution but indicated that the legislation (new legislation) had still not determined the scope of public rights and freedoms and that it could give rise to confusion (as happens every time a new Constitution is adopted in a country); (10) that in relation to this question, the Government itself refers in its reply to decisions which, for example, interpret article 350 of the Constitution and indicates that the judgement "set aside the incorrect interpretations of that article of the Constitution"; and (11) that the Committee had not interpreted the wording of the Constitution but had merely indicated that some of its provisions provided very generously for certain human rights, for which reason it does not understand why the Government can think that the Committee was criticizing the Constitution in this regard since the Committee had no intention to make criticisms. Finally, the Committee points out that the Government has not explained why it implicates the president of the private sector workers' confederation in the paralysis of the state oil company PDVSA.

1599. Taking all the foregoing into account, the Committee again considers that the arrest of Carlos Fernández, as well as being discriminatory, aimed to neutralize or act as retaliation against this employers' official for his activities in defence of employers' interests and, therefore, it urges the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he may return to Venezuela without delay and without risk of reprisal. The Committee requests the Government to keep it informed in this respect. The Committee deeply deplores the arrest of this employers' official and emphasizes that the arrest of employers' officials for reasons linked to actions relating to legitimate demands is a serious restriction of their rights and a violation of freedom of association, and requests the Government to respect this principle. The Committee deplores the fact that this employers' leader has already been in exile for several years and cannot return to the country for fear of reprisal by the authorities.

1600. With regard to the previous recommendation concerning the application of the new system of exchange control, the Committee notes that the Government states: (1) that the complainant organizations have not indicated the specific firms allegedly suffering discrimination under this system; (2) that the Minister of Labour stated that "the Committee, without identifying the companies affected by alleged discriminatory treatment, requests the Government to 'modify the current system', which invades areas of monetary and exchange policy, adopted after a massive capital flight intended to create political instability in 2002 and 2003". In this respect, the Committee stresses that it did not request the current system to be modified but after criticizing the fact that it was established unilaterally requested the Government "to examine with FEDECAMARAS, without delay, the possibility of modifying the current system", following allegations of discrimination by the authorities against firms belonging to FEDECAMARAS in relation to administrative permits to purchase foreign exchange. The Committee notes in this respect that the Government has held regular meetings with the employers' sector affiliated with FEDECAMARAS and the social actors to resolve problems in the application of the system and correct any failings found in it. The Committee trusts that this dialogue will ensure that the exchange control system will be applied without discrimination against firms affiliated to FEDECAMARAS.

1601. As regards the Committee's recommendation concerning the allegations regarding the operations of paramilitaries (the Government had not replied specifically to that allegation) the Committee notes that the Government states: (1) that the Committee had requested the "dismantling" of the main government political party (Movimiento Quinta República) and other legally constituted social organizations (the Committee underlines in this respect that the Government did not reply to the allegations about paramilitary groups, that the allegations did not mention that political party but rather groups such as "Círculo Boliviarianos Armados, Quinta República" or "Juventud Revolucionaria del MVR" and that it did not request the dismantling of the Movimiento Quinta República); (2) that the existence of armed groups is completely false, let alone that these alleged groups have the support of the Government or other government authorities; (3) that the specific political violence and intolerance by the sectors in dispute during 2002 and part of 2003, the product of political polarization, which has now been overcome, was a problem addressed from the outset in the Table for Negotiation and Agreement (November 2002-May 2003) facilitated by the Carter Center, the United Nations Development Programme (UNDP) and the Organization of American States (OAS); (4) that this forum for dialogue managed to achieve a commitment by both sectors (Government and opposition) to condemn violence, followed by an important product of the agreement, namely the Decree on the disarming of the population (illegal arms) and suspension of the carrying of arms without exception for all citizens of the Republic, in order to establish and maintain a reliable register of those with permits to carry arms in accordance with the law; (5) that the Constitution of the Republic clearly establishes that the State has a monopoly of arms.

The Committee observes that the Government recognizes that there was political violence and intolerance in 2002 and part of 2003 by the conflicting parties. The Committee also observes that, since the submission of the complaint, the complainant organizations have not sent new allegations relating to acts of violence by violent or armed groups. The Committee will therefore not pursue the examination of this aspect of the case unless the complainant organizations produce new evidence.

1602. As regards the previous recommendations urging the Government: (a) to carry out, without delay, an investigation with regard to the acts of vandalism at the premises of the Lasa Chamber of Commerce by Bolivarian groups supporting the Government (12 December 2002); the looting of the office of Julio Brazón, president of CONSECOMERCIO (18 February 2003); the threats of violence on 29 October 2002 by alleged members of the government political party against Adip Anka, president of the Bejuma Chamber of Commerce; (b) to carry out an investigation, without delay, into the allegations relating to 180 cases (up to April 2003) that have not been resolved by the authorities of illegal invasion of lands in the states of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojidas, Falcón, Guárico, Lara, Mérida, Miranda, Monagas, Portuguesa, Sucre, Táchira, Trujillo, Yaracuy and Zulia; and (c) requested that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures, the Committee notes that the Government states that these allegations are unfounded, that there is no evidence to support them and that those concerned have not lodged complaints with the national authorities. Nevertheless, the Committee considers that, whether or not the parties concerned lodged complaints with the national authorities, these are serious and relatively precise allegations, for which reason it reiterates its previous recommendations and suggests that the Government should make direct contact with the persons and institutions mentioned and with FEDECAMARAS with a view to carrying out an independent judicial investigation.

The Committee's recommendations

1603. *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) *The Committee again urges the Government to comply with its legislation and without delay to convene periodically the tripartite commission.*
- (b) *The Committee reiterates the importance of draft bills which affect them directly being the subject of consultation with the most representative workers' and employers' organizations and again points out to the Government the principles set forth in the conclusions concerning consultations.*
- (c) *The Committee underlines that over and beyond the consultations and meetings held between the authorities and FEDECAMARAS, which the Committee can but encourage, it is important to consolidate these first steps in the new direction and structure them on a permanent footing. The Committee again offers the Government the services of the ILO to provide the State and society with its experience so that the authorities and social partners may regain trust and, in a climate of mutual respect, establish a system of labour relations based on the principles of the ILO Constitution and of its fundamental Conventions, as well as the full recognition, in all its consequences, of the most representative confederations and all organizations and important tendencies in the world of work. The*

Committee requests the Government to keep it informed of all instances of social dialogue with FEDECAMARAS and bipartite and tripartite consultations, and any negotiations or agreements that ensue and the Government's intentions with respect to the above offer of ILO technical assistance.

- (d) *The Committee again urges the Government to reinstate FEDENAGA to the Agricultural and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENAGA.*
- (e) *The Committee once again considers that the arrest of Carlos Fernández, president of FEDECAMARAS, as well as being discriminatory, aimed to neutralize or act as retaliation against this employers' official for his activities in defence of employers' interests and, therefore, it urges the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he may return to Venezuela without delay and without risk of reprisal; the Committee requests the Government to keep it informed in this respect. The Committee deeply deplores the arrest of this employers' official and emphasizes that the arrest of employers' officials for reasons linked to actions relating to legitimate demands is a serious restriction of their rights and a violation of freedom of association, and requests the Government to respect this principle. The Committee deplores the fact that this employers' leader has already been in exile for several years and cannot return to the country for fear of reprisal by the authorities.*
- (f) *The Committee again urges the Government to carry out, without delay, an independent investigation with regard to: (1) the acts of vandalism at the premises of the Lasa Chamber of Commerce by Bolivarian groups supporting the Government (12 December 2002); (2) the looting of the office of Julio Brazón, president of CONSECOMERCIO (18 February 2003); (3) the threats of violence on 29 October 2002 by alleged members of the government political party against Adip Anka, president of the Bejuma Chamber of Commerce; and (4) the allegations relating to 180 cases (up to April 2003) that have not been resolved by the authorities of illegal invasion of lands in the States of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojedes, Falcón, Guárico, Lara, Mérida, Miranda, Monagas, Portuguesa, Sucre, Táchira, Trujillo, Yaracuy and Zulia, and urges that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures. The Committee suggests that the Government should make direct contact with the persons and institutions mentioned and with FEDECAMARAS with a view to carrying out an independent judicial investigation.*

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

**Complaint against the Government of Venezuela
presented by
Latin America Central of Workers (CLAT)
supported by
the World Confederation of Labour (WCL)**

Allegations: Anti-trade union dismissals of trade union members of the state government of the State of Táchira, for exercising their right to strike, as well as groundless accusations regarding criminal acts, levelled at the trade union members; refusal on the part of the employer to comply with legal rulings in favour of the abovementioned trade union members; threats against trade union members

- 1604.** The complaint is contained in a communication from the Latin American Central of Workers (CLAT) dated 5 May 2004. The World Confederation of Labour (WCL) supported the complaint in a communication dated 28 July 2004.
- 1605.** The Government sent its observations in communications dated 21 January and 24 February 2005.
- 1606.** Venezuela has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

- 1607.** In its communication dated 5 May 2004, the CLAT alleges dismissals of workers and trade union members, that the workers are subject to political discrimination in the workplace and their right to equal working conditions is being flouted in a vulgar, flagrant, imminent, public and obvious fashion. The CLAT states that the events of 11 April 2002 in Venezuela (which gave rise to a *coup d'état*) led to a series of unforeseen events that occurred in San Cristóbal, in the State of Táchira, on 12 April 2002. Through the media, the Governor of the State of Táchira called the people of San Cristóbal and representatives of civil society and political bodies to the Governor's residence and it was members of the National Guard who opened the doors to that residence. Likewise, work at installations run by the Directorate of Infrastructure and Maintenance of Works (DIMO) of the State of Táchira was halted at 9:30 a.m., with the Director of Human Resources and the Deputy Director of Technical Coordination of DIMO stating in their reports that the workers behaved in a public-spirited fashion.
- 1608.** More specifically, the complainant adds that, on 11 April 2002, the office clerks working for the Executive of the State of Táchira declared the third legal strike of the year, for non-compliance with the collective agreement in force and for refusal to discuss the draft collective agreement submitted to the Ministry. In response to this, the Regional Executive

launched a campaign of persecution against the workers, especially against trade union leaders, accusing them of conduct detrimental to the State Governor and/or the Director of Infrastructure and Maintenance, as is confirmed by press statements. According to the Government, such conduct constituted labour offences, but the cases were brought before the corresponding tripartite committees, whose majority ruled that the events presented by the Human Resources Directorate of the state government as offences could not be held to be offences, leading to the corresponding notifications of reinstatement and to a ruling that the cases should be considered as having been resolved at an administrative level.

- 1609.** However, the regional government decided to initiate a series of procedures confirming dismissal before the Labour Inspectorate for the State of Táchira, apparently on 6 May 2002. Apparently, this request was later amended but it is not known when this amendment was made, neither is the date mentioned in the amendment.
- 1610.** CLAT states that the Labour Inspectorate was not present during proceedings to hear the allegations and encourage the parties to adopt a conciliatory approach, contrary to the provisions of the relevant legislation. It is common knowledge that the file had been transferred to the office of the Human Resources Directorate of the Regional Executive, which has been recorded in a document prepared by the Ombudsman for the State of Táchira.
- 1611.** In the light of these and other irregularities, the complainant organization lodged an *amparo* proceedings (enforcement of constitutional rights) with the Administrative Court of the Andean Region against the Labour Inspectorate of the State of Táchira for violation of due process. This action was upheld, with the court ordering the Labour Inspector for the State of Táchira to cooperate with the Attorney-General of Táchira in order immediately to re-establish working conditions, the effective reinstatement of workers, the payment of wages and the effective payment and granting of holidays; however this constitutional order was not complied with. On 4 September 2002, the judicial authority issued a decision on the *amparo* application, finding in favour of the complainant organization, ordering that the case be put back on the docket as it stood when the summonses were issued, taking into account the documents related to the amendment and ordering that, during the procedure, the workers should be maintained in their posts and their wages paid. On 3 October 2002, the Court ordered the effective reinstatement of the workers and the payment of their corresponding wages. On 4 December 2002, in the light of the Inspector's failure to obey the order to put the case back on the docket, the judicial authority ordered the Inspector to suspend proceedings until the replacement of the case on the docket.
- 1612.** Dr. Judith Nieto was subsequently appointed to the office of Labour Inspector in the State of Táchira and within three days of taking up her appointment had flouted the judicial order, ordered the continuation of proceedings. Two days later, the Director of Human Resources of the Executive of the State of Táchira acting as a representative of the employer, dropped the actions and procedures and on 13 February 2003, the Labour Inspector ordered the lifting of the measures suspending the workers from their posts. Against this background, each worker continued to go to work, requesting to speak to their immediate superiors but the latter made it clear to them verbally that they could not allocate them work, or record that they had reported for work until they had received instructions from the Human Resources Directorate. Day by day there were constant clashes with the workers who call themselves Bolivarians, or with a group of *semaneros* (workers who provide their services by the week) and who call themselves the Bolivarian Military Reservist Front, who handed the workers leaflets describing them as being part of the pro-coup faction, or as terrorists.

- 1613.** The CLAT alleges that, to the date of this complaint, the Attorney-General of the State of Táchira has not complied with the *amparo* ruling; on the contrary, a circular forbidding the workers and trade union leaders access to their workplaces since 14 February 2002 is still hanging on the notice board of the Public Works Directorate and the workers and trade union leaders have not been paid the entirety of their wages for the previous months. They also remain excluded from the list of employees insured for the year 2003, neither have they received holiday pay nor the extra month's salary paid at Christmas.
- 1614.** On 26 February 2003, the First Administrative Court ordered enforcement, but consequently a new judge was appointed, who issued an invalid writ halting the case; the complainant organization appealed against that writ which, at the date of the complaint, is pending before the First Administrative Court.
- 1615.** The complainant organization encloses the ruling handed down by the Higher Civil and Administrative Court of the Judicial District of the Andean Region ordering the Labour Inspector of the State of Táchira to cooperate with the Attorney-General of that State order immediately to re-establish working conditions with reference to the effective reinstatement of the workers, the payment of wages in the same form and under the same conditions as beforehand and the effective payment and granting of holidays whilst the proceedings are ongoing; the complainant organization also encloses the ruling handed down by the Higher Civil and Administrative Court of the Judicial District of the Andean Region upholding the *amparo* proceedings of the complainant organization, in which it orders the voluntary execution of the ruling ordering the effective reinstatement of the workers and the payment of wages and other benefits owing to them; and the order from the Human Resources Directorate of the Executive of the State of Táchira ordering the execution of the writ regarding the reinstatement of the workers. It would seem that the latter was a precautionary measure taken whilst the judicial authority examined the matter of the dismissals.
- 1616.** The CLAT provides a list of 41 workers or trade union members who were dismissed and who are involved in this case.
- 1617.** According to the CLAT, those workers and their representatives who have not yet been reinstated have been threatened several times with arrest as part of a criminal inquiry being carried out by the Sixth District Attorney's Office of the Ministry of Public Affairs of the State of Táchira.

B. The Government's reply

- 1618.** In its communications dated 21 January and 24 February 2005, the Government encloses copies of the communication from the Human Resources Directorate of the State Government of the State of Táchira, and documents dealing with the labour proceedings brought at an administrative and legal level against the workers involved. The Government states that the version of events presented in the complaint, which states that the workers are subject to political discrimination in the workplace and their right to equal working conditions flouted in a vulgar, flagrant, imminent, public and obvious fashion, is legally unfounded in so far as the labour proceedings launched against the workers named in the complaint as complainants were processed strictly in accordance with the corresponding legislation, before the Labour Inspectorate, in order to request a fault-finding procedure with regard to the dismissal. The abovementioned workers were covered by the provisions on justified dismissal established in clauses (b) and (c) of article 102 of the Organic Labour Law, whereby the workers concerned are guaranteed the right to defence and to due process. The Government states that the workers for which it requested a fault-finding procedure for dismissal lodged a constitutional *amparo* application with the Court of First Instance of Labour and Agricultural Affairs of the Judicial District of the State of Táchira

which found in favour of the state government of the State of Táchira, according to a ruling dated 3 April 2003. The ruling handed down by the abovementioned court was reviewed by the Higher Civil and Administrative Court of the Andean Region which confirmed the ruling handed down on 15 May 2003. For this reason, according to the Government, freedom of association and protection of the right to organize were respected at all times, as the workers had recourse to the relevant courts in order to enforce the rights of the trade union that were supposedly violated.

- 1619.** With reference to the 23 workers whose names are mentioned by the Government (see Annex I), the Government states that they were paid their social security benefits through a settlement, in accordance with the collective agreement and the Organic Labour Law, reached before the Labour Inspectorate, concluding the labour relationship with the abovementioned workers, the force of *res judicata* applying.
- 1620.** The Government states on 11 June 2002, the trade union representatives lodged an *amparo* application with the Administrative Court of the Andean Region, against the Labour Inspectorate. On 15 May 2003, the presiding judge issued a writ ordering the case to be halted for lack of evidence, therefore ruling that the trade union had always had the right to defence and due process.
- 1621.** The Government states that the CLAT alleges that, on various occasions, articles attacking the workers and written by political leaders of the parties belonging to the ruling coalition appeared in the press. In this respect the Government states that this allegation is untrue and that the state government, as the employer, has never published articles in the press attacking the workers.
- 1622.** As to the criminal inquiry, being undertaken by the Sixth District Attorney's Office of the Ministry of Public Affairs of the State of Táchira, the Government states that it falls upon this public body to investigate whether the workers have committed an offence or fault defined in the penal order currently in force, and in the light of this does not believe that this allegation should be brought before the International Labour Office.
- 1623.** The Government states that in its complaint, the trade union organization argues that constitutional labour rights were violated but that this allegation is unfounded, given that the state government of the State of Táchira has proceeded at all times, in accordance with the provisions of the Constitution and the labour legislation of the Republic, respecting the rights due to every worker.
- 1624.** The Government states that it expects the complaint to be dismissed for lack of evidence, since there needs to be consistency between the facts, the right supposedly having been violated and the documents supporting these elements, combined with compliance with the procedures established by such a venerable international body.
- 1625.** As to the dismissals, the Government encloses a ruling handed down by the Higher Civil and Administrative Court of the Judicial District of the Andean Region, confirming the ruling handed down by the Court of the First Instance of the Judicial District of the State of Táchira. The Higher Court's ruling, dated 15 May 2003, confirms the ruling handed down by the Court of the First Instance, declaring the inadmissibility of the *amparo* action for lack of evidence of discrimination or political persecution and states that the workers who were dismissed may have recourse to the civil courts when pursuing their case against the defendant institution.

C. The Committee's conclusions

1626. *The Committee observes that in this case the complainant organization alleges that:*

- *the dismissal of 41 workers and trade union leaders, in particular office workers employed by the Executive of the State of Táchira who called the third legal strike of the year on 11 April 2002, for non-compliance with the collective agreement in force and for refusal on the part of the Ministry to discuss the draft collective agreement that had been submitted; the Executive of the State of Táchira accused them of conduct detrimental to the State Governor and/or the Director of Infrastructure and Maintenance;*
- *the cases were brought before the tripartite committees which ruled by a majority that the events presented by the Human Resources Directorate of the state government as offences could not be held to be offences, leading to the corresponding notifications of reinstatement and giving rise to the ruling that the cases should be considered as having been resolved at an administrative level, although neither the effective reinstatements nor the payment of wages were carried out;*
- *the regional government decided to initiate a series of procedures confirming dismissal before the Labour Inspectorate which were irregular (the labour inspector was not present to hear the allegations and encourage the parties to adopt a conciliatory approach, contrary to the provisions of the relevant legislation; proceedings were transferred to the office of the Human Resources Directorate of the Regional Executive, etc.);*
- *despite a precautionary measure issued by the judicial authority as a result of an amparo appeal, ordering the reinstatement of the workers and payment of the corresponding wages (never carried out), the judicial authority subsequently issued an invalid writ confirming the dismissals;*
- *the complainant organization then lodged an appeal and at the time of the complaint the process is pending before the First Administrative Court.*

1627. *The complainant organization also alleges that:*

- *on various occasions, articles attacking the workers and originating from political leaders of the ruling coalition, have appeared in the press, this being evidence of political persecution.*
- *on various occasions, the workers and their representatives who have not yet been reinstated have threatened with arrest as a part of a criminal inquiry being carried out by the Sixth District Attorney's Office of the Ministry of Public Affairs of the State of Táchira.*

1628. *The Committee observes that the Government states that:*

- *during the dismissal procedures before the Labour Inspectorate (a fault-finding procedure regarding dismissal) the workers previously mentioned in the complaint were guaranteed the right to defence and due process and those workers were found to be covered by the grounds for justifiable dismissal established in clauses (b) and (c) of article 102 of the Organic Labour Law;*

Article 102: The following acts on the part of the worker shall be considered to be grounds for justifiable dismissal:

[...]

- (b) *use of force, except in legitimate self-defence;*
- (c) *slander, or a serious lack of the respect and consideration due to the employer, representatives of the employer, or members of the employer's family living with him/her.*

- *the workers lodged a constitutional amparo application against the Labour Inspectorate before the Court of First Instance of Labour and Agricultural Affairs of the Judicial District of the State of Táchira, which ruled in favour of the state government of the State of Táchira, according to a ruling dated 3 April 2003; this ruling was confirmed by the Higher Civil and Administrative Court of the Andean Region, on 15 May 2003; more specifically, in the abovementioned ruling, the judicial authority in the second instance confirms the ruling of the first instance, declaring the inadmissibility of the amparo application due to lack of evidence of discrimination or political persecution and states that the dismissed workers may have recourse to the civil courts when pursuing their case against the defendant institution;*
- *23 of the 41 workers named by the Government (see Annex I) were paid their social benefits through a settlement, in accordance with the collective agreement and the Organic Labour Law, reached before the Labour Inspectorate, concluding the labour relationship with the abovementioned workers, the force of res judicata interposing.*

1629. *The Committee observes that, in its reply, the Government states that 23 workers and trade union members who were dismissed (see Annex I) concluded a settlement regarding through the payment of their social security benefits, terminating their labour relationship. As to the 18 workers and trade union members remaining (see Annex II), taking into account the differences between the allegations stating that the dismissals were discriminatory in nature, made against the background of a strike linked to the collective bargaining process, and the fact that there were certain irregularities regarding the administrative proceedings and the Government's reply (according to which the workers in question had given grounds for dismissal, more specifically with regard to use of force and/or slander or serious lack of respect and consideration due to the employer), the Committee requests the Government and the complainant organizations to indicate whether the workers have initiated judicial proceedings against their dismissal and, if so, to communicate the corresponding ruling.*

1630. *As to the allegation that on various occasions political leaders of the ruling coalition wrote articles published in the press attacking the workers, this being evidence of political persecution, the Committee notes that the Government denies the allegations and states that the complainant's claims are groundless. The Committee notes that the complainant has sent no press clippings in the annex to its complaint and that the judicial authority dismissed the allegations of political persecution for lack of evidence.*

1631. *The Committee also notes the declaration of the Government according to which the criminal inquiry is being carried out by the Sixth District Attorney's Office of the Ministry of Public Affairs of the State of Táchira and it falls upon this public body to investigate whether the workers have committed an offence or fault defined in the penal order currently in force, and in the light of this does not believe that this allegation should be brought before the International Labour Office. The Committee stresses in this respect that in order to examine a criminal action against the workers who, according to the allegations were on strike, it believes it necessary to examine the ruling handed down to ascertain whether the acts of the workers are accused of committing fall within the*

legitimate exercise of trade union rights or not. The Committee requests the Government to send a copy of the ruling handed down with regard to these workers.

The Committee's recommendations

1632. In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

- (a) *The Committee requests the Government and the complainant organizations to indicate whether the 18 workers and trade union members, who were dismissed and who are named in Annex II, have begun judicial procedures against their dismissal and, if so, to be provided with the corresponding ruling.*
- (b) *The Committee requests the Government to send a copy of the ruling handed down with regard to the workers against whom a criminal action has been launched.*

Annex I

List of individuals dismissed who concluded an agreement

Rojas Cárdenas, Ciro
Díaz Villate, José Orlando
Guanipa, José Enrique
Azara Hernández, Edgar
Ostos Ayala, José Félix
Guanipa Guerrrero, Iván Javier
Coronel Alba, Dolores
Guerrero Novoa, Gregorio
Guanipa Guerrrero, Aura Elena
Herrera Colmenares, Wilmer
Gómez Carrero, Gustavo Adolfo
Maldonado Algeviz, Armando
Carreño Joya, Eduardo
Suárez Salas, Oscar Antonio
Nieto Pérez, Cibar
Kopp Contreras, Jesús

Méndez Useche, Ciro Alberto
Mendoza Mendoza, José Leopoldo
Duque Romero, Rubén Darío
Martínez Torres, Jesús Eduardo
Martínez Sánchez, Pedro
Sánchez Cáceres, Blanca Margarita
Martínez Torres, Omar Alexis

Annex II

List of individuals dismissed who concluded an agreement

Sotero Corredor, Héctor
Cárdenas, José Aurelio
Pérez Dávila, Samuel Eugenio
Romero Durán, Jorge
Moreno Camero, Raúl Gregorio
Castro Chacón, José Daniel
López García, Hernando
Parada Medina, Ricardo
García Guerrero, Jesús
Prato Salinas, José Rafael
Contreras Velasco, Antonio
Coiza Martínez, Alexander
James, Yolimar del Carmen
Maldonado, Carmen Teresa
Martínez, Juan Alberto
Arellano Rojas, Jesús Antonio
Delgado Quiroz, Carlos Alberto
Cuevas, Neptalí

CASE NO. 2365

INTERIM REPORT

**Complaint against the Government of Zimbabwe
presented by
the International Confederation of Free Trade Unions (ICFTU)**

Allegations: The complainant organization alleges that the Government is directly responsible for numerous violations, such as attempted murders, assaults, intimidation, arbitrary arrests and detentions, as well as arbitrary dismissals and transfers committed against members, activists and leaders of the country's trade union movement and members of their families

- 1633.** The Committee already examined the substance of this case at its March 2005 meeting, where it presented an interim report to the Governing Body [see 336th Report, paras. 891-914, approved by the Governing Body at its 292nd Session].
- 1634.** The complainant organization submitted additional information in a communication dated 7 February 2005. The Government provided its additional observations in a communication dated 16 February 2005.
- 1635.** Zimbabwe has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and the Workers' Representatives Convention, 1971 (No. 135).

A. Previous examination of the case

- 1636.** In its previous examination of the case, the Committee made the following recommendations [see 336th Report, para. 914]:
- (a) The Committee requests that, if the competent body decides that the dismissal of Mr. Takaona was for anti-union reasons, Mr. Takaona be rapidly reinstated in his functions, or in an equivalent position, without loss of pay or benefits. The Committee requests the Government to keep it informed of developments in this respect and to provide it with a copy of any decision handed down.
 - (b) The Committee urges once again the Government to abstain in future from resorting to measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities.
 - (c) The Committee urges the employer and the union to reconsider the transfer decision affecting trade union leader Mr. Mangezi, with a view to permitting his return to his initial workplace in due course, if he so desires. The Committee requests the Government to keep it informed of developments in this respect.
 - (d) The Committee once again calls the Governing Body's special attention on the extreme seriousness of the general trade union situation in Zimbabwe.
 - (e) The Committee will examine the new allegations made by the ICFTU in a communication of 7 February 2005 and the Government's reply of 21 February at its next meeting.

B. New allegations

- 1637.** In its communication of 7 February 2005, the ICFTU provided information on the cases of Messrs. Matombo, Nkala, Chizura and Munandi (which will be dealt with by the Committee as part of Case No. 2328).
- 1638.** Concerning the arrest of four trade union leaders on 5 August 2004 (namely Lucia Matibenga, ZCTU Vice-President and President of SATUUC; Wellington Chibebe, ZCTU Secretary-General; Sam Machinda, Vice-Chairman, ZCTU central region; and Thimothy Kondo, ZCTU Advocacy Officer) the complainant organization stated that they were arrested for attending a ZCTU workshop held in Gweru to discuss various subjects: the high level of taxation; the Tripartite Negotiating Forum; social security and the National Social Security Authority (NSSA); AIDS; and feedback on the June 2004 ILO Conference. They were initially accused with organizing the workshop without police clearance but the charges were changed later that day, which the ICFTU believed was due to section 46(j) of the Public Order and Security Act (POSA) which provided that trade unions do not have to seek police clearance before meetings. During the afternoon, the four leaders were fingerprinted and given oral warnings, while new charges were being prepared. The ZCTU believes that the police was acting under external pressure because it took it very long to press charges, and it kept passing the final decision back and forth between the officers responsible for the arrest and the Law and Order Department.
- 1639.** During their detention, Mr. Sam Machinda, who suffers from diabetes, was refused medication; the police insisted to see a letter from his doctor confirming his medical condition. The ZCTU lawyer was prevented for a day from filing an urgent application for their release at the High Court as the duty officer was not available; he instead tried to have them released on bail. After a short appearance at the Gweru court on 6 August, the four trade union leaders were released on a Z\$200,000 bail each. They were set to appear in Gweru magistrate court on 8 September 2004 for violation of section 19(1)(B) of the POSA (conducting a riot, disorder or intolerance); they were also accused of uttering words likely to cause despondence and encourage the overthrow of the Government. The case was postponed to 3 November, where the cases of Ms. Matibenga, Mr. Machinda and Mr. Kondo were withdrawn before plea; Mr. Chibebe was ordered to reappear in court on 25 November 2004 and later on 1 March 2005. Mr. Chibebe was also forced to abandon another workers' meeting in Masvingo only a week before 5 August 2004.
- 1640.** The ICFTU added that on 6 August 2004, Mr. Gideon Choko, General Secretary of the Zimbabwe Amalgamated Railwaymen's Union (ZARU), a ZCTU affiliate, and eight other activists from Bulawayo were to appear in court concerning their participation in a demonstration, on 18 November 2003, against the high level of taxes. Also on 18 November 2003, 41 workers were suspended from their work at Colcom Pvt. Ltd., and two workers were dismissed at the David White Spinners Co. in Chegutu for attending that same demonstration.
- 1641.** The Netone company dismissed 56 workers who had taken strike action in June 2004 because management refused to negotiate with the workers. On 1 October 2004, an arbitration award in their favour ordered the company to reinstate the dismissed workers without loss of pay and benefits from the date of the illegal dismissal; the company challenged the award before the Labour Court. Meanwhile, the workers registered the award in the High Court and obtained an execution order, including seizure of Netone property; the company applied for a stay of the execution order; the court ultimately issued a temporary stay pending the hearing of the dispute in the Labour Court.
- 1642.** As regards the Zimbabwe Post (Zimpost) strike and the arrest of three trade unionists, the ICFTU stated that three members (Messrs. S. Khumalo, S. Ngulube and B. Munemo) of

the Communication and Allied Service Workers' Union of Zimbabwe (CASWUZ) were arrested on 11 October 2004 in Bulawayo, without any reason being given for their arrest. Messrs. Ngulube and Munemo were held at the Bulawayo central police station, but Mr. Khumalo was kept at an undisclosed location; the ZCTU was concerned that Mr. Khumalo was separated from the other workers since he had been a target of the police in 2003 where, during a ZCTU demonstration against high levels of taxation, he had been arrested and beaten up by police, who left him for dead.

- 1643.** These October 2004 arrests followed a week of strike by workers of the state-owned post and telecommunication firms, Zimpost and TelOne, over management's failure to pay salary increments awarded in March and June 2004 by arbitration, after protracted negotiations. The parties met four times to discuss the implementation of the March award; in the end, management decided unilaterally to pay less than half of the terms prescribed by the arbitration award and challenged its validity before the High Court. TelOne workers requested the intervention of the competent ministry, whose permanent secretary advised management to desist from the case and seek an out-of-court settlement. Management refused to do so, and even refused to participate in the regular negotiations that take place every three months. The workers consequently gave the 14-day legal notice and went on strike on 6 October 2004.
- 1644.** On 12 October, about 25,000 workers (half of the post and telecommunications industry labour force) joined the strike. On 21 October, the Government deployed armed personnel at major post offices and telecom exchanges nationwide, and began using its security apparatus to harass and intimidate strikers and the local union leadership. Mr. Sikosana (Provincial Vice-Chairman) was arrested in Bulawayo on 11 October; he had to plead guilty and pay a fine. Six other union members (V. Kufazvani, S. Hamadzripi, M. Kim, H.Kasipani, Z. Magama and C. Mweyezwa) were arrested in Gweru; they were released upon payment of a Z\$20,000 fine.
- 1645.** In Mutare, three workers (E. Mparutsa, T. Merekwi and R. Kaditera) were arrested and charged under the Miscellaneous Offences Act; in order to be released, they had to plead guilty and pay fines ranging from Z\$20,000 to Z\$40,000. On 6 October, four workers (P. Marowa, A. Mhike, J. Nhanhangwa and O. Chiponda) were arrested immediately after listening to an address by the union education officer, who encouraged them to continue the strike in spite of intimidation by the employer; they were later released without charge. The ICFTU added that management, assisted by the Central Intelligence Organization (CIO), had shown up at some of the workers' homes in order to coerce and intimidate them into resuming work. All striking TelOne workers were suspended as a result of their legitimate trade union action.
- 1646.** On 26 October 2004, a full bench of the Labour Court heard the TelOne case and ruled in favour of the union. Management refused to comply with the court decision (just as it had already refused to comply with the arbitration award); instead, it withheld workers' wages in October and November, and refused to deduct and transfer union dues to CASWUZ. ZIMPOST management also refused to comply with an agreement signed on 9 October at the National Employment Council of the Communications Sector; instead, it unilaterally started disciplinary procedures against striking workers. The CASWUZ asked the courts to make management abandon disciplinary hearings against its members and all workers who participated in the strike.
- 1647.** The ICFTU also stated that its affiliate organization, the Congress of South African Trade Unions (COSATU) was supposed to lead a one-week fact-finding mission in Zimbabwe starting 25 October 2004. The purpose of that mission was to meet with trade unions, different civil society organizations and government officials, to assess the factual situation in order to contribute to resolving some of the acute problems faced by Zimbabwe and its

trade union movement; the mission also wanted to address the economic crisis that adversely affected workers in the country. The authorities wrote to COSATU on 22 October to inform it that that mission was “unacceptable” since some of the civil society organizations that COSATU had planned to meet were “critical of the Government” and that the mission was “predicated in the political domain”. Despite the Ministry’s letter, COSATU decided to send a 14-member delegation, led by COSATU Deputy President Violet Seboni, which was met upon arrival by officials, who told it to refrain from meeting a number of organizations (Zimbabwean Crisis Coalition; Zimbabwe Council of Churches; National Constitutional Assembly; Zimbabwe Election Support Network; Zimbabwe Lawyers for Human Rights) because the Government believed these were linked to political opposition. The delegation refused to make such a promise but was nevertheless allowed into the country.

- 1648.** On 26 October, the delegation held its first meeting with the ZCTU at the latter’s headquarters, hosted by ZCTU General Secretary Wellington Chibabe and his deputy Collen Gwiyo; the police invaded the building and interrupted the meeting in progress. The COSATU delegation was told that the Government had decided that their mission had come to an end and that they should leave the country immediately. About 40 police officers and security guards escorted the delegation to their hotel to collect their belongings and then directly to the airport, where they were held by armed guards until 11 p.m., when they were ordered into a bus and driven to Beitbridge, a city on the border between Zimbabwe and South Africa, about 600 km. south of Harare, where they arrived around 5 a.m. and were left to organize their own trip back to Johannesburg.
- 1649.** The ICFTU stated that, as a consequence of that failed COSATU mission, on 31 October, three armed police officers accompanied by three interrogators searched the home of Mr. Gwiyo in Chitungwiza, a suburb of Harare, and ransacked it; as he was absent, they left a message ordering him to report to the Chitungwiza police station. Mr. Gwiyo suspected that the search was linked to the COSATU visit since the house search was made only a few days after it, and he had been part of the ZCTU group that hosted the mission. Furthermore, ZimOnline (an online newspaper) reported that the Government might want to punish ZCTU officials who had invited the mission despite its objections. On 1 November, Mr. Gwiyo was picked up by police and interrogated on his role in inviting COSATU and about the use of violence against ZANU PF (the ruling party) activists. He was not charged for his role concerning the COSATU mission but was charged with violence against ZANU PF activists; the arresting officer did not appear at the hearing on 5 November, and the case was withdrawn.
- 1650.** According to the ICFTU, the Embassy of Zimbabwe to Kenya also tried to justify the deportation of the COSATU mission to the Central Organization of Trade Unions of Kenya (an ICFTU affiliate) on the grounds that the mission was political and that the Government itself wanted to accept an invitation from the South African Minister of Labour to organize a meeting between the two Governments, COSATU and ZCTU, which the latter allegedly refused. However, the ICFTU indicated that it could not see how this could justify the deportation of a trade union mission providing solidarity to a sister organization.
- 1651.** On 2 February 2005, a second COSATU delegation attempted to visit the ZCTU, to discuss matters of interest to Zimbabwe workers. It was stopped at Harare airport even before entering the country, and ordered to return immediately to South Africa.

C. The Government's new reply

- 1652.** In its communication of 16 February 2005, the Government provided information on the cases of Messrs. Matombo, Nkala, Chizura and Munandi (which will be dealt with by the Committee as part of Case No. 2328).
- 1653.** Concerning the arrests of four trade union leaders (Ms. Matibenga, Mr. Chibebe, Mr. Machinda and Mr. Kondo) on 5 August 2004, the Government replied that the meeting in question had nothing to do with legitimate trade union business. It reiterated its position that there were individuals in the ZCTU who mischievously use the banner of trade unionism to pursue their selfish and misdirected goals. The persons in question had called this meeting to agitate on the political front on behalf of the Movement for Democratic Change (MDC), an oppositional party. The ICFTU and the ZCTU have singled out ZCTU membership as a license to violate the legal provisions governing the convening of political gatherings. The Government therefore submitted that political activists who happened to be trade unionists were ostensibly engaged in political "activities in an abusive manner" by promoting essentially political interests without adhering to the rules governing such conduct. The Government stated further that it had no information on the workers' meeting in Masvingo, which Mr. Chibebe was allegedly forced to abandon.
- 1654.** Concerning the dispute at the Netone company, the Government stated that the courts were handling the alleged unfair dismissal of the workers concerned; it was better to let the courts decide and give a ruling and the individuals concerned would be better advised to follow the legal remedies available in the judiciary system.
- 1655.** As regards the dispute between CASWUZ and Zimpost management, the Government pointed out that the union involved had initiated legal proceedings against the employer, and that it had no case to answer over a dispute which was before the courts.
- 1656.** The Government stated that it would appreciate being given actual details and more information concerning the arrest of three trade unionists on 11 October 2004, as part of the ZIMPOST strike. It emphasized, however, that trade unionists were not infallible and that they were expected to respect the law of the land, irrespective of their status.
- 1657.** As regards the COSATU missions, the Government finds it quite disturbing that a trade union movement of another country has the audacity to write to the President of the country, informing him that they had resolved at their own meeting to send a "fact-finding" mission, to investigate and involve themselves into the political affairs of Zimbabwe. The COSATU mission was indeed political, given that they had drawn up a list of organizations to visit; these organizations agitated in the political arena for the unconstitutional removal of the legitimate Government of Zimbabwe, which had exercised its right to protect its territorial integrity and sovereignty, notwithstanding the perceived rights to solidarity by political activists who masqueraded as trade unionists. For the Government, trade union solidarity was no license for trade unions freely to associate in order to unseat national governments.
- 1658.** Pointing out that Mr. Collen Gwiyo is a MDC councillor in Chitungwiza, the Government suspected that this was a case of political contestation given his political standing in that city and also due to the fact that Mr. Gwiyo faced allegations of political violence, which the Government did not tolerate, irrespective of party affiliations. It was unfortunate that the ICFTU decided to ignore the allegations levelled at Mr. Gwiyo and to draw a link with the COSATU story.

D. The Committee's conclusions

- 1659.** *The Committee notes that the new allegations in this case concern: dismissals for trade union activities; arrest and detention of trade union leaders who had exercised legitimate trade union activities (trade union workshop; demonstration); dismissal of 56 workers who had participated in a strike at the Netone company; intimidation and arrest of striking workers and trade union leaders during a major strike in the telecommunications sector at the Zimbabwe Post (Zimpost) and TelOne; suspension of all striking workers at the TelOne company; expulsion of a fact-finding mission of the Congress of South African Trade Unions (COSATU) and refusal to accept a second mission into the country; searching and ransacking the home of the Deputy Secretary-General of the Zimbabwe Congress of Trade Unions (ZCTU). The Government replies that most of these disputes are pending before the courts, and that many of the events which gave rise to arrests, as well as the two COSATU missions, were politically motivated rather than legitimate trade union activities.*
- 1660.** *The Committee will deal with the information provided by the Government concerning the cases of Messrs. Matombo, Nkala, Chizura and Munandi, in its next examination of Case No. 2328.*
- 1661.** *As regards the arrest of four ZCTU trade union leaders on 5 August 2004 (Ms. Lucia Matibenga, Mr. W. Chibebe, Mr. Sam Machinda and Mr. Timothy Kondo) the Committee notes that, according to the complainant organization, all these leaders were arrested for attending a ZCTU workshop held in Gweru to discuss various subjects: the high level of taxation; the Tripartite Negotiating Forum; social security and the National Social Security Authority (NSSA); AIDS; and feedback on the June 2004 ILO Conference. The Government replies that the meeting in question had nothing to do with legitimate trade union business, and reiterates its previous position that there are individuals in the ZCTU who use the banner of trade unionism to pursue their own goals and agitate on the political front on behalf of the Movement for Democratic Change (MDC), an oppositional party. Noting that most of the issues discussed at the Gweru ZCTU workshop did concern trade union matters, and noting further that the initial charges (organizing the meeting without police clearance) were subsequently changed (to "conducting a riot, causing disorder and intolerance") and ultimately dropped, the Committee recalls once again, as it did at its March 2005 meeting in connection with the present case [see 336th report, para. 910] 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 [Digest of decisions and principles of the Freedom of Association Committee, 1996, 4th edition, paras. 454-455]. The Committee requests the Government to ensure that these principles are complied with in future.*
- 1662.** *The Committee further notes that the Government has not directly replied to the allegations that charges were brought against Mr. Choko and eight other trade unionists on 18 November 2003 in Bulawayo, and that within the context of a massive strike in the post and telecommunications sector, Mr. Sikosana (Provincial Vice-Chairman) was arrested in Bulawayo on 11 October 2004, and six other union members were arrested in Gweru, all of whom were released only after having paid a fine. In addition, no reply was received from the Government concerning the allegations that Messrs. Mparutsa, Mereki and Kaditera were arrested in Mutare, and that Messrs. Marowa, Mhike, Nhanhangwa and*

Chiponda were arrested on 6 October 2004, and later released without charges. The Committee requests the Government to provide detailed information on the reasons for the arrests of the abovementioned individuals and the charges ultimately brought against them, and to provide a copy of the court judgement in relation to the participation of Mr. Choko and eight other trade unionists in a demonstration on 18 November 2003.

- 1663.** *While noting the Government's indication that it would need more information in order to reply to the allegations of arrest of Messrs. Khumalo, Ngulube and Munumo on 11 October 2004 for participation in a demonstration, also in Bulawayo, the Committee trusts that, given that the allegations refer to the name, date, city and context, leading to these arrests, the Government will be in a position to inquire into the reasons for these arrests, whether the workers in question are still being detained, and whether any charges have been brought against them. The Committee requests the Government to keep it informed in this respect.*
- 1664.** *On a more general note, the Committee recalls once again that the arrest, even if only briefly, of trade union leaders and trade unionists for exercising legitimate trade union activities constitutes a violation of the principles of freedom of association [Digest, op. cit., para. 70] and that 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 [Digest, op. cit., para. 71]. The Committee therefore once again urges the Government to abstain in future from resorting to measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities.*
- 1665.** *As regards the situation of the 56 workers dismissed by the Netone company for taking part in strike action following management's refusal to negotiate, the Committee notes that the dispute is currently pending before the Labour Court. Recalling that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests [Digest, op. cit., para. 475], the Committee requests the Government to keep it informed of developments, and to provide it with any judgement handed down in this respect.*
- 1666.** *The Committee requests the Government to keep it informed of developments on the situation at Zimpost and at the TelOne company, including as regards the cases of workers who have been disciplined, suspended or dismissed, and to provide it with any judgement handed down in this respect by the competent jurisdiction.*
- 1667.** *As regards the COSATU missions, whilst taking note of the political qualification given by the Government to expel the first mission and to refuse allowing the second one into the country, the Committee notes the complainant's explanations as to the context and purpose of these missions, which in its opinion fall within regular and legitimate trade union activities. Taking particularly into account the severe difficulties faced by the trade union movement in Zimbabwe, the Committee considers that it is a fully legitimate trade union activity for that trade union movement to seek advice and support from other well-established trade union movements in the region to assist in defending or developing the national trade union organizations, even when the trade union tendency does not correspond to the tendency or tendencies within the country, and that visits in this respect represent normal trade union activity, subject to provisions of national legislation with regard to the admission of foreigners; the corollary of that principle is that the formalities to which trade unionists and trade union leaders are subject in seeking entry to the territory of a State, or in attending to trade union business there, should be based on objective criteria and be free of anti-union discrimination. The Committee therefore requests the Government to allow in future such mutual support missions into the country, subjecting any approval to objective criteria only, without any anti-union discrimination.*

1668. As regards the related incidents involving Mr. Gwiyo, the Committee notes that the Government denies any link between the COSATU visit and the search and ransacking of Mr. Gwiyo's house, and refers rather to his political activities. The complainant organization refers however to the role he played in the ZCTU group that had hosted the mission, which took place just a few days before, and to the fact that he was interrogated by the police about his role in inviting that mission. While noting that Mr. Gwiyo was not charged in this connection (although other charges were pressed and then withdrawn), the Committee recalls the principles set out in the paragraph above and requests the Government to ensure in future that national trade union leaders and members are not subjected to harassment and arrest for simply hosting an exchange with a neighbouring trade union.

1669. The Committee requests the Government to provide its observations on the previous recommendations that remain pending, including as regards the cases of Mr. Takaona and Mr. Mangezi.

1670. Before concluding, the Committee is bound to note with deep concern that the trade union situation in Zimbabwe has not evolved, and may even have worsened, since its last examination of the case, where it made the following comments [see 336th Report, para. 913]:

From a more general perspective, the Committee observes that some of the incidents alleged in the present case follow similar events: (a) in March 2002, as a result of which the Committee requested the Government to exercise great restraint in relation to interventions in the internal affairs of trade unions [Case No. 2184, 329th Report, para. 831]; (b) in December 2002, where it reiterated its call to the Government to refrain from interfering in ZCTU trade union activities and from arresting and detaining trade union leaders and members for reasons connected to their trade union activities [Case No. 2238, 332nd Report, para. 970]; and, (c) in October-November 2003, where it once again urged the Government not to resort to measures of arrest and detention of trade union leaders and members for reasons connected to their legitimate trade union activities [Case No. 2313, 334th Report, para. 1121].

That being so, the Committee must reiterate its deep concern with the extreme seriousness of the general trade union climate in Zimbabwe, and once again calls the Governing Body's special attention to the situation.

The Committee's recommendations

1671. In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:

- (a) The Committee once again urges the Government to abstain in future from resorting to measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities.
- (b) The Committee requests the Government to ensure in future that trade union organizations are allowed to publicly express their opinions on issues going beyond strictly occupational matters and which affect workers, such as economic and social policies.
- (c) The Committee requests the Government to keep it informed on developments concerning the dismissal of 56 workers at the Netone company, and to provide it with any judgement handed down in this respect.

- (d) *The Committee requests the Government to keep it informed of developments on the situation at Zimpost and at TelOne company, and to provide detailed information on the reasons for the arrest of the following trade union leaders and members: Mr. Sikosana, arrested in Bulawayo on 11 October 2004, and six other union members arrested in Gweru; Messrs. Mparutsa, Mereki and Kaditera, arrested in Mutare; Messrs. Marowa, Mhike, Nhanhangwa and Chiponda, arrested on 6 October 2004; Messrs. Khumalo, Ngulube and Munumo, arrested on 11 October 2004.*
- (e) *The Committee requests the Government to provide it with a copy of the judgement handed against Mr. Choko and eight other trade unionists, for their participation in a demonstration on 18 November 2003 in Bulawayo.*
- (f) *The Committee requests the Government to allow in future mutual support missions into the country by neighbouring workers' organizations, subjecting any approval only to objective criteria, without any anti-union discrimination.*
- (g) *The Committee requests the Government to ensure in future that trade union leaders and members are not subject to harassment and arrest for simply hosting an exchange with a neighbouring trade union.*
- (h) *The Committee requests the Government to provide its observations on its previous recommendations that remain pending, as regards the cases of Mr. Takaona and Mr. Mangezi.*
- (i) *Reiterating its deep concern with the extreme seriousness of the general trade union climate in Zimbabwe, the Committee once again calls the Governing Body's special attention to the situation.*

Geneva, 3 June 2005.

(Signed) Professor Paul van der Heijden,
Chairperson.

<i>Points for decision:</i>	Paragraph 213;	Paragraph 636;	Paragraph 1136;
	Paragraph 240;	Paragraph 715;	Paragraph 1149;
	Paragraph 248;	Paragraph 770;	Paragraph 1201;
	Paragraph 263;	Paragraph 793;	Paragraph 1222;
	Paragraph 342;	Paragraph 854;	Paragraph 1273;
	Paragraph 360;	Paragraph 872;	Paragraph 1377;
	Paragraph 407;	Paragraph 893;	Paragraph 1389;
	Paragraph 424;	Paragraph 917;	Paragraph 1499;
	Paragraph 450;	Paragraph 1046;	Paragraph 1603;
	Paragraph 488;	Paragraph 1057;	Paragraph 1632;
	Paragraph 551;	Paragraph 1112;	Paragraph 1671.
	Paragraph 595;	Paragraph 1123;	