



International
Labour
Office
Geneva

International
Training
Centre
Turin



EMPLOYERS' ORGANIZATIONS AND THE ILO SUPERVISORY MACHINERY



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International Labour Office
Geneva

International Training Centre,
Turin

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FOREWORD

Reality is sometimes surprising when seen in historical context. This publication shows that the concern of the International Labour Organization to promote and protect not only the rights of workers relating to freedom of association, but also those of employers, is more than justified. In the case of employers, this study shows that over the past 25 years, in a significant number of countries, employers organizations, their leaders and members have been the victims of attacks, some extremely serious, against the rights set out in ILO standards and, in particular, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), both of which are applicable to employers and their organizations. These attacks include the assassination of employers' leaders, death threats, arbitrary detention, the raiding of their headquarters, violations of due process and of the rights of expression, assembly and demonstration, a very varied range of reprisals for legitimate activities by employers' organizations, and violations of the right to establish organizations without interference by the authorities, to exercise their activities and formulate their programmes in full freedom and to bargain collectively, as well as of the principles of tripartite consultation.

In this context, employers' organizations, and very particularly the International Organization of Employers (IOE), have had recourse to the ILO's supervisory bodies to find solutions to unacceptable situations that are in violation of the underlying principles of tripartism. Without

freedom of association and the right to organize or, in other words, without independent and representative organizations of workers and employers which enjoy the necessary rights and guarantees so that they can promote and defend the rights of their members and further their common well-being, the principle of tripartism would be meaningless, or even a dead letter, and the real possibility of achieving greater social justice would be placed in serious jeopardy. The present study shows that, in most of the cases described, the employers' organizations concerned have been able to demonstrate that the violations of their rights were indeed real.

This publication includes, for information purposes, a description of the ILO's supervisory machinery, a summary of the complaints and representations made by employers' organizations, a description of the principles established by the supervisory bodies on the basis of their examination of the complaints brought before them, and an assessment of the use of the supervisory machinery by employers' organizations. It is accompanied by a CD-ROM containing the full text of the procedures of the technical supervisory bodies (the Committee of Experts, Commissions of Inquiry set up to examine complaints under article 26 of the Constitution and Fact-Finding and Conciliation Commissions on Freedom of Association) and of the tripartite supervisory bodies (the Conference Committee on the Application of Standards, the Committee on Freedom of Association and ad hoc committees set up to examine representations under article 24 of the Constitution). It also contains the reports of the ILO supervisory bodies which have examined complaints, representations and objections raised by employers, the various ILO instruments that are of interest to employers and the procedure of the Credentials Committee of the International Labour Conference.

One of the specific features of the ILO is that representatives of employers' organizations, when they become members of the ILO's tripartite supervisory bodies, participate as members of such bodies in the process of reaching decisions, which therefore incorporate values, principles and interests that are frequently very diverse. This confers upon the decisions that they adopt a very high level of legitimacy and balance, while at the same time offering the component of civil society most closely concerned the principal participatory role incumbent upon it. This specific role of employers' organizations, which is also shared by workers' organizations, cannot be fulfilled by any NGO in the world of

work and in the ILO supervisory system with the same level of legitimacy, and is instrumental in ensuring that the outcomes achieve broad general acceptance. In this respect, freedom of association and the right to organize throughout the world are essential and inescapable requirements for the International Labour Organization in view of its most fundamental structural feature, which is tripartism, and the important functions which, in accordance with the Constitution and ILO instruments, workers' and employers' organizations are called upon to play within the Organization, as well as in the various member States. It should, however, be emphasized that the rights conferred upon employers' organizations by ILO standards go well beyond those relating to freedom of association and that violations of all of these rights may give rise to complaints or representations to the ILO supervisory bodies.

This publication has been prepared by the International Labour Standards Department in close collaboration with the Bureau for Employers' Activities (ACT/EMP) and the Project on freedom of association and collective bargaining of the International Training Centre in Turin, which has been responsible for preparing and financing the publication.

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- Reports of the Credentials Committee (1994-2005) based in complaints and objections made by employers' delegations

-
- Representations made by employers' organizations under Article 24 of the ILO Constitution
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 - Some examples of how employers' organizations have combined various ILO procedures

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- Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
- ILO Declaration on Fundamental Principles and Rights at Work
- Digest of decisions of the Committee on Freedom of Association

Bibliography

1. INTRODUCTION

General information on the ILO

The International Labour Organization (ILO) was established by Part XIII of the Versailles Peace Treaty of 1919 as an inter-governmental organization of universal vocation and tripartite in structure, with the objective of promoting social justice and improving living and working conditions throughout the world. It is the only international organization that is tripartite in nature, with each member State participating in the Organization through delegates representing the government, employers and workers. It forms part of the United Nations family.

The ILO is composed of three bodies: the International Labour Conference, which is the supreme organ; the Governing Body, which is the executive body; and the International Labour Office, which is its permanent secretariat based in Geneva. The Conference is the annual assembly and the body that adopts international labour standards. Each member State is represented at the Conference by four delegates with the right to vote; two of them represent the government, one the employers and one the workers. All of them may be accompanied by advisers. The Employer and Worker delegates and technical advisers have to be appointed after consulting the most representative organizations in both sectors. The ILO currently has 178 member States. The Conference is a global forum for the discussion of social and labour issues. It approves

the Organization's programme and budget, adopts international labour standards, namely Conventions and Recommendations, and elects the Governing Body every three years. The latter is the executive body which meets three times a year to deal with political and programme-related matters. It is currently composed of 28 Government members,¹ 14 Employer members and 14 Worker members with the right to speak and to vote. Ten States of major industrial importance have permanent seats on the Governing Body, with the other Governments being elected every three years. There are also 28 Governments, 19 Employers and 19 Workers who are deputy members and who have the right to speak, but not to vote. The Governing Body supervises the activities of the International Labour Office and elects the Director-General.²

The strategic objectives identified by the ILO's constituents are: fundamental labour rights, employment generation, social security and social dialogue. In this respect, the ILO carries out standards-related activities, technical cooperation, training, information and research activities.

The international instruments adopted by the Conference are Conventions, Recommendations, Declarations and resolutions. The ILO's Conventions and Recommendations are the principal sources of international labour law. International labour Conventions are instruments intended to establish international obligations for ratifying States. Recommendations do not establish obligations, but serve exclusively to define standards intended to guide the action taken by Governments. Conventions are submitted to the competent authorities of member States, which have full freedom as to whether or not to ratify them. When

¹ The Government members are divided into two groups: ten are from countries considered to be of chief industrial importance, which are at present: Brazil, China, France, Germany, India, Italy, Japan, Russian Federation, United Kingdom and United States. The other 18 members are elected every three years by delegates to the International Labour Conference, although countries which are permanent members of the Governing Body in view of their industrial importance may not participate in their election. The Employer and Worker members are elected by the respective delegates.

² See Federico García Martínez, *Las organizaciones empresariales españolas en la Organización Internacional del Trabajo (OIT) y en la Organización Internacional de Empleadores (OIE) (1919-2002)*, Fundación CEIM, Madrid, 2003, pp. 9-10.

Conventions are ratified, their application is subject to supervision by the ILO's supervisory machinery.³

The International Labour Organization's standards-related activities, particularly in relation to international labour standards, have been central to its means of action since it was founded in 1919. In total, with a view to promoting social progress, the ILO has adopted over 370 international labour instruments (Conventions and Recommendations) and has created a wide-ranging supervisory system. The essential feature of the ILO's standards-related action is the Organization's tripartite structure, which implies the participation of employers.⁴

Tripartism and defending the interests of employers in the ILO

Employers' organizations play an essential role in the ILO. The ILO's tripartite composition implies that it is not only governments that are represented on its bodies, but also workers and employers through their representatives. This tripartite composition allows all the partners to speak and vote when decisions are taken by the Organization's various bodies. The Declaration of Philadelphia of 1944, which forms part of the ILO Constitution, determines the significance of tripartism and establishes among its fundamental principles that:

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.

³ See Nicolas Valticos, *Droit international du travail*, 2e édition, Dalloz, 1983.

⁴ See Alfred Wisskirchen and Christian Hess, *Employers' handbook on ILO standards-related activities*, ILO, Geneva, 2001, p. 1.

The Declaration of Philadelphia also provides, with regard to employers, that the ILO has the obligation to further among the nations of the world programmes which will achieve the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.

The underlying explanation for tripartism is the conviction that organizations of employers and of workers are the priority social actors at the international and national levels in the adoption of policy decisions relating to matters which are of concern to them, especially in economic and social affairs, with particular reference to labour issues. In this manner, the policies and decisions adopted by the ILO's bodies or by national bodies, through the involvement, not only of governments, but also of organizations of employers and workers, acquire greater authority and legitimacy, thereby facilitating compliance and implementation by those concerned. The tripartite composition of the ILO's bodies means that both employers and workers can express their points of view and ensure that they are taken into account, so that society can benefit from their knowledge and experience, as they are in practice the actors that are best placed to assess the changing needs of the world of work and contribute to finding the most appropriate solutions. Indeed, in view of the increasing complexity of society, industry and the activities of the State, the latter cannot claim to be the centre of all knowledge or assume that its proposals will necessarily achieve the intended objectives in a satisfactory manner. This approach, through which political, social, economic and labour decisions are based as far as possible on the broad consent and co-responsibility of the social partners, also results in harmonious labour relations, thereby contributing to social peace.

Tripartism presupposes representative, free, independent and democratic organizations of workers and employers which, although representing different viewpoints, share common interests in such fields as economic prosperity, the welfare of the community, employment and social peace in conditions of equality. Employers' organizations play an essential role in the establishment of the necessary conditions for the development of competitive and successful enterprises, which in turn provide the basis for employment and the improvement of living and

working standards through access to the benefits of economic growth and social progress. The ILO's tripartism constitutes a real force in view of the authority that it imparts to the decisions adopted by its bodies, which are generally taken with the majority support of the three sectors. Nevertheless, it involves the need to reach compromises, which frequently leads the partners to give ground with a view to ensuring rapid and effective action accepted by all parties. The development of the ILO demonstrates that tripartism is not only an essential component of its institutional structure, but that there is a constant concern to reaffirm tripartism and protect its application in practice. Employers' and workers' organizations have a special interest in strengthening this system and defending the independence of the respective groups within the Organization. In this respect, emphasis should be placed on the resolution on tripartism adopted recently (in 2002) by the International Labour Conference, which is reproduced below:

The General Conference of the International Labour Organization,

Recalling the Constitution of the International Labour Organization,

Recalling Conventions Nos. 87, 98, 144, 150, 151 and 154, and the Recommendations accompanying them as well as Recommendation No. 113,

Underlining the founding of the International Labour Organization in 1919 as a unique tripartite structure with the objective of "universal and lasting peace",

Reaffirming the importance of the tripartite nature of the International Labour Organization, which is the only international organization where governments and representatives of workers' and employers' organizations can freely and openly exchange their ideas and experiences and promote lasting mechanisms of dialogue and consensus building,

Stressing that among the strategic objectives of the International Labour Organization is the strengthening of tripartism and social dialogue,

Aware that social dialogue and tripartism have proved to be valuable and democratic means to address social concerns, build consensus, help elaborate international labour standards and examine a wide range of labour issues on which the social partners play a direct, legitimate and irreplaceable role,

Reaffirming that legitimate, independent and democratic organizations of workers and employers, engaging in dialogue and collective bargaining, bring a tradition of social peace based on free negotiations and accommodation of conflicting interests, therefore making social dialogue a central element of democratic societies,

Recalling the numerous challenges and opportunities facing the world of work in the framework of ongoing globalization and the importance of strengthening the collaboration between the social partners and governments in order to achieve appropriate solutions at national, regional and international levels and, most pertinently, in the International Labour Organization,

Recalling the essential role of the social partners in stable economic and social development, democratization and participative development and in examining and reinforcing the role of international cooperation for poverty eradication, promotion of full employment and decent work, which ensure social cohesion of countries,

Stressing that social dialogue and tripartism are modern and dynamic processes that have unique capacity and great potential to contribute to progress in many difficult and challenging situations and issues, including those related to globalization, regional integration and transition,

Emphasizing that the social partners are open to dialogue and that they work in the field with NGOs that share the same values and objectives and pursue them in a constructive manner; recognizing the potential for the International Labour Office to collaborate with civil society following appropriate consultations with the tripartite constituents,

Noting the valuable contributions of civil society institutions and organizations in assisting the Office in carrying out its work –

particularly in the fields of child labour, migrant workers and workers with disabilities; and recognizing that forms of dialogue other than social dialogue are most useful when all parties respect the respective roles and responsibilities of others, particularly concerning questions of representation;

1. Invites the governments to ensure that the necessary preconditions exist for social dialogue, including respect for the fundamental principles and the right to freedom of association and collective bargaining, a sound industrial relations environment, and respect for the role of the social partners, and invites governments as well as workers' and employers' organizations to promote and enhance tripartism and social dialogue, especially in sectors where tripartism and social dialogue are absent or hardly exist:
 - a) invites workers' organizations to continue to empower workers in sectors where representation is low in order to enable them to exercise their rights and defend their interests;
 - b) invites employers' organizations to reach out to sectors where representation levels are low in order to support the development of a business environment in which tripartism and social dialogue can flourish.
2. Invites the Governing Body of the International Labour Office to instruct the Director-General to ensure that the International Labour Organization and its Office within existing resources of the Organization:
 - a) consolidate the tripartite nature of the Organization – governments, workers and employers – legitimately representing the aspirations of its constituents in the world of work;
 - b) continue to this end their efforts to strengthen employers' and workers' organizations to enable them better to collaborate in the work of the Office and be more effective in their countries;
 - c) enhance the role of tripartism and social dialogue in the Organization, both as one of its four strategic objectives

and as a tool to make operational all strategic objectives, as well as the cross-cutting issues of gender and development;

- d) promote the ratification and application of ILO standards specifically addressing social dialogue, as set out in the preamble above and continue to promote the ILO Declaration on Fundamental Principles and Rights at Work;
- e) promote the involvement of the social partners in a meaningful consultative process in labour reforms, including dealing with the core Conventions and other work-related legislation;
- f) carry out in-depth studies of social dialogue in collaboration with the Organization's constituents with a view to enhancing the capacity of labour administrations and workers' and employers' organizations to participate in social dialogue;
- g) reinforce the role and all the functions of the Social Dialogue Sector within the Office and in particular its capacity to promote social dialogue in all the strategic objectives of the Organization, and recognize the unique functions and roles of the Bureaux for Employers' and Workers' Activities within the Office and strengthen their abilities to provide services to employers' and workers' organizations worldwide in order to enable them to maximize the outcome of the Office's work;
- h) promote and reinforce the tripartite activities of the Organization to determine its policies and work priorities, and further develop technical cooperation programmes and other mechanisms with the social partners and governments to help strengthen their capacities, services and representation;
- i) reiterate in headquarters and in the field the importance of strengthening the tripartite structure of the International Labour Organization and to ensure that the

Office works with and for the constituents of the Organization;

- j) ensure that the tripartite constituents will be consulted as appropriate in the selection of and relationships with other civil society organizations with which the International Labour Organization might work.

As they are closely related to tripartism, reference should be made to two fundamental ILO Conventions (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)), the content of which is analysed below. These Conventions determine the fundamental characteristics and rights of workers' and employers' organizations for the promotion and defence of the interests of their members. Violations of the principles contained in these Conventions may give rise to complaints to the ILO's supervisory bodies. Even when a State has not ratified these Conventions, complaints concerning violations of freedom of association and the right to organize may be made to the Committee on Freedom of Association or the Fact-Finding and Conciliation Commission on Freedom of Association.

Role of employers in ILO bodies and supervisory procedures

Each year the representatives of employers' organizations, as members of tripartite delegations to the International Labour Conference, participate in the discussions and decisions of the Conference, and more specifically in the following procedures: the discussion and adoption of international labour standards, supervision of the application of ratified Conventions, examination of the report of the Director-General (which provides an opportunity for delegates not only to discuss the social and economic situation of their countries, addressing certain subjects which are covered by the report, but also to express their points of view on the ideas set out in the report, with a view to guiding the

Governing Body and the Director-General in their task of opening the way for the achievement of new objectives),⁵ the adoption every two years of the Organization's Programme and Budget, which is financed by member States, the adoption of resolutions and the discussion of the specific items on the agenda. It should be recalled that the Conference works through committees which are of tripartite composition, with the exception of the Finance Committee, which is composed exclusively of Government members.

Employers' organizations also participate in the discussions and decisions of the Governing Body, the principal functions of which are to: supervise the activities of the International Labour Office, set the agenda of the Conference, appoint the Director-General of the International Labour Office, give the latter the necessary instructions to carry out her or his mandate, formulate the Organization's Programme and Budget, set up and be members of the commissions and committees that it considers to be necessary within or outside the Governing Body, determine the agenda of the various meetings that it convenes and examine the conclusions that they adopt, establish the technical cooperation policy and monitor the implementation of the respective programmes.⁶

It is important to emphasize that representatives of employers' organizations also participate in the ILO's supervisory bodies as members of such bodies in the case of tripartite bodies, such as the Committee on the Application of Standards of the International Labour Conference. They may also participate in the regular supervisory procedures, providing comments and information through the annual reports provided for examination by the Committee of Experts on the Application of Conventions and Recommendations. In addition, they can participate as parties in the context of complaints to the Committee on Freedom of Association, representations under article 24 of the Constitution and complaints under article 26 of the Constitution, with the latter giving rise

⁵ See Geraldo von Potobsky and Héctor Bartolomei de la Cruz, *La Organización Internacional del Trabajo: El sistema normativo internacional: Los instrumentos sobre derechos humanos fundamentales*, 1990, pp. 10-11.

⁶ *Ibid.*, p. 11.

to the establishment of a Commission of Inquiry. This publication will focus on the role of employers and their organizations, not as members of the supervisory bodies, but as complainants to the ILO's supervisory procedures. It also covers the rights of employers' delegates in the procedures of the Conference Credentials Committee.

The Bureau for Employers' Activities (ACT/EMP)

Within the International Labour Office, there is a Bureau for Employers' Activities (ACT/EMP), which is a specialized unit of the ILO Secretariat. The Bureau was established over 30 years ago at the request of the Employers' Group of the Governing Body, with the full support of the International Organization of Employers (IOE), with a view to supporting the efforts of national employers to establish and strengthen their organizations. One of its principal tasks is to maintain close relations with employers' organizations in the various countries, to make available to them the resources of the ILO and to keep the International Labour Office constantly aware of the concerns, priorities and views of employers. ACT/EMP is available, through national employers' organizations, as a gateway through which they can obtain ILO information, advice, assistance or training. The Bureau for Employers' Activities carries out its activities through a team operating at the ILO's headquarters in Geneva and a network of specialists in the ILO's multidisciplinary teams around the world.

The fundamental tasks of ACT/EMP include collaborating with and providing various types of support to the Employers' Group in the ILO, and ensuring that the ILO constantly takes into account the opinions, concerns and priorities of employers' organizations the world over. In this process, the International Organization of Employers (IOE) conveys to the Office the information received from its members.

The objectives of the ILO's programmes for employers' organizations, in the formulation of which ACT/EMP collaborates with the IOE, are the following:

-
- contribute to the existence of strong, free and independent employers' organizations;
 - strengthen the capacity of these organizations to address issues and objectives that arise at the national level;
 - improve the capacity of employers' organizations to influence socio-economic policy so as to ensure that it is conducive to the growth and development of enterprises;
 - develop the capacity of employers' organizations to play a more effective role in bipartite and tripartite action; and
 - associate employers' organizations with ILO activities.

In this context, it should be emphasized that the Bureau for Employers' Activities also runs a technical cooperation programme which provides assistance to employers' organizations in developing countries, transition countries and countries affected by crisis situations. The programme helps these employers' organizations to establish and develop services that are useful for their members based on an analysis of their specific needs.

Among the projects that are currently being undertaken, reference may be made to:

- the strengthening of employers' organizations in transition countries;
- the provision of assistance to employers' organizations in West Africa for the promotion of small enterprises;
- environmental management at the level of the enterprise;
- the improvement of productivity at the enterprise level.

The ILO's strategy, which consists of providing support for the development of employers' organizations, designing and improving services and attracting new members, places emphasis on strategic planning and meaningful dialogue to determine the priorities of each organization. The achievement of this objective is related to improving the management of employers' organizations, and the principal means of doing this consist of: developing strategic action plans; increasing the technical capacity, skills and knowledge base of organizations through training and further training for their staff; developing information systems and research; improving the services provided directly to the membership, which in turn generate income; providing support for the establishment

of networks with other employers' organizations for the sharing of information, the exchange of experience and the establishment of links; and strengthening the capacity of the organizations.

Reference should also be made to the assistance and activities of the ILO to design and provide services which meet the needs of small and medium-sized enterprises and employers' organizations in relation to issues such as youth employment, the development of poverty reduction strategies and the provision of assistance to enterprises in the informal economy for their transition to the formal economy. Another aspect of this support, in relation to which employers' organizations can play an important role, concerns the social responsibility of enterprises, particularly in relation to labour standards, which have taken on special importance in the context of globalization and access to foreign markets. Moreover, effective representation by employers' organizations depends on them having adequate knowledge of the subject, information and the capacity to promote their interests and negotiate, as well as the existence of an effective process of consultation. The ILO therefore makes special efforts to provide assistance to employers' organizations on issues such as competitiveness, productivity, poverty reduction (including the Poverty Reduction Strategy Papers (PRSPs) produced by the World Bank and the International Monetary Fund), child labour, the informal economy, HIV/AIDS, equality of opportunity for women and fundamental labour principles and rights.

In the context of its role of providing services and ensuring that it can meet the expectations of enterprises, the Bureau for Employers' Activities offers programmes on topical issues, such as:

- human resources development
- industrial relations
- wage determination
- small enterprise development
- private sector development
- management development
- occupational safety and health
- drug and substance abuse
- environmental management
- productivity

-
- gender issues
 - labour standards and codes
 - child labour
 - strategic planning for employers' organizations
 - structure and financing of employers' organizations
 - job creation and employability.

2. THE IOE AND ITS MEMBER ORGANIZATIONS

The principal and most representative employers' organization in the world is the International Organization of Employers (IOE), established in 1920 as the International Organization of Industrial Employers (IOIE); in 1948, it adopted its present name. It is composed of central organizations of employers which address social policy matters in their national context. These associations have to be composed exclusively of employers or employers' organizations, defend the principles of free enterprise, be free and completely independent and not subject to control or interference of any kind from any external governmental authority or any outside body and, finally, in principle be in a member State of the ILO. The IOE is now composed of 140 employers' organizations from the five continents⁷ and is the sole representative organization of employers at the global level in relation to social policy matters. The IOE's mission is the promotion of private enterprise and the defence of employers and their organizations, especially in developing countries. It offers its members a unique and permanent forum to exchange ideas, pool experience and determine the attitude of enterprises towards major current issues. It is the acknowledged forum for the communication and

⁷ The IOE has 39 employers' organizations as members in Africa, 32 in the Americas, 27 in Asia and 39 in Europe.

promotion of employers' positions on social matters in relation to international organizations.⁸

The IOE supports voluntary initiatives by business which look to go beyond legal compliance in the social, economic and environmental areas. It looks to promote enterprise competitiveness through business activity within the context of good practice in corporate governance, ethical values and social responsibility. It is also present in international debates on corporate social responsibility, which it promotes as a voluntary, innovative, diverse and practical response by enterprises to the business environment of today; a response which recognizes the role of business and of other societal actors and that corporate social responsibility is not an alternative to appropriate national social regulation.

The International Organization of Employers, as the recognized organization representing the interests of employers in international social and labour policy matters, has the following objectives:

- to promote the economic and social policy environment necessary to sustain and develop free enterprise and the market economy;
- to provide an international forum to bring together, represent and promote the interests of national employers' organizations and their members throughout the world in all labour and socio-economic policy issues;
- to assist, advise, represent and provide relevant services and information to members, to establish and maintain permanent contact among them and to coordinate the interests of employers at the international level, particularly within the ILO and other international institutions;
- to promote and support the advancement and strengthening of independent and autonomous employers' organizations and to enhance their capabilities and services to members;
- to inform public opinion and promote understanding of employers' points of view;

⁸ See Frederico García Martínez, *op. cit.*, p. 11.

-
- to facilitate and promote the exchange and transfer of information, experience and good practice amongst its members.

The IOE's priority areas of action consist of the following global issues: corporate social responsibility, globalization, United Nations agencies and international financial institutions and international organizations.

In its relations with the ILO, the IOE's member federations nominate employer representatives to participate in all the debates at the ILO, and particularly in the Governing Body and the International Labour Conference. The priority areas for the IOE in the context of the ILO include the creation of productive employment opportunities and the promotion of entrepreneurship, youth employment, small and medium-sized enterprise development, relations with multinational enterprises and the promotion of an international standards framework that is conducive for the healthy development of industrial relations.

The IOE endeavours to promote the positive aspects of globalization and participates in debates relating to its objectives and opportunities both within the ILO and elsewhere. The IOE's aims are to:

- support the market economy;
- identify obstacles to economic integration;
- promote the establishment or reform of the institutions, political systems, practices and processes needed to overcome these obstacles;
- promote the creation or strengthening of market and non-market institutions to create the conditions to benefit from trade, investment and technology absorption and diffusion;
- promote the development of policies for, and investment in, education and skills development; and
- support joint efforts to create an appropriate environment to bring the benefits of globalization to those countries which wish to participate in it.

The IOE also follows closely the development of labour and social policy debates within United Nations agencies and the international financial institutions and promotes employers' positions in such debates with these institutions and with governments. The IOE collaborates with UNDP, UNAIDS and UNCTAD to assist in their work with member federations at the national level and looks for new opportunities to collaborate with other United Nations bodies. The IOE also participates in and supports the Global Compact.

Globalization requires a coherent and consistent response from the world business community. The IOE looks to strengthen relations with other representative business organizations at the international, regional and sectoral levels. Such interaction will assist in clarifying the mandates of the various actors and ensure that business speaks with one voice on key policy matters. Many of the issues arising in the labour and social policy field affect workers and employers equally. Where a commonality of interest exists, the IOE collaborates with the principal international trade union organization, the International Confederation of Free Trade Unions (ICFTU), at the international and regional levels to develop mutually beneficial responses, as appropriate. The IOE follows closely the influence of NGOs at the international level and, as appropriate, explores possible areas of common interest with representative groups.

The IOE has consultative status with the United Nations and the ILO⁹ and maintains working relations with many international governmental and non-governmental organizations dealing with issues that lie within its own field of competence. Its bodies are its General Council, Management Board and General Secretariat, which has its headquarters in Geneva. The importance and influence of the IOE have increased due

⁹ The following international employers' and workers' organizations have consultative status with the ILO: the International Organization of Employers (IOE), the International Confederation of Free Trade Unions (ICFTU), the World Federation of Trade Unions (WFTU), the World Confederation of Labour (WCL) and the Organization of African Trade Union Unity (OATUU).

to the fact that it has acted since its establishment as the Secretariat for the Employers' Group in all of the ILO's tripartite bodies.¹⁰

Finally, the IOE participates actively in the various meetings of the ILO's supervisory bodies and has submitted complaints and representations against certain governments for violations of ratified Conventions with a view to achieving compliance with the rights of national employers' organizations. Indeed, the IOE is the employers' organization which has made the greatest number of complaints to the ILO's supervisory bodies.

¹⁰ See Frederico García Martínez, *op. cit.*, pp. 11-12.

3. ILO SUPERVISORY MACHINERY

The underlying purpose of all of the ILO's supervisory machinery is to obtain an objective, independent and impartial view in cases in which governments or other public authorities have failed to comply with commitments deriving from membership of the ILO or the ratification of Conventions, to the prejudice of the rights of workers or employers and their respective organizations. The examination of the complaints or representations made by organizations, the replies from governments and the respective evidence by the technical or technical-tripartite supervisory bodies, which from their specific viewpoint provide added value to the knowledge of the situation, makes it possible to determine the extent to which ILO standards are given effect in law and practice. Compliance with these standards, and particularly with ratified Conventions, is an objective which is of concern not only to national organizations of employers and of workers, but also to all the member States of the ILO and, in the final analysis, to the international community, not only for reasons of social justice and stability, but also in relation to the basic rules of the game for international competition, without overlooking the fact that many ILO standards refer to fundamental human rights or are directly related to the essential requirements of the rule of law.

MEETINGS OF THE SUPERVISORY BODIES (SCHEDULE)	
Date	Body
March	<ul style="list-style-type: none"> ● Committee on Freedom of Association (tripartite) ** ● Ad hoc committees (article 24 of the Constitution) (tripartite) ** ● Governing Body (tripartite)
May-June	<ul style="list-style-type: none"> ● Committee on Freedom of Association (tripartite) ** ● Ad hoc committees (article 24 of the Constitution) (tripartite) **
June	<ul style="list-style-type: none"> ● Committee on the Application of Standards of the International Labour Conference (tripartite) * ● Credentials Committee (tripartite) ** ● Ad hoc committees (article 24 of the Constitution) (tripartite) ** ● Governing Body (tripartite)
November	<ul style="list-style-type: none"> ● Committee on Freedom of Association (tripartite) ** ● Ad hoc committees (article 24 of the Constitution) (tripartite) ** ● Governing Body (tripartite)
November-December	<ul style="list-style-type: none"> ● Committee of Experts on the Application of Conventions and Recommendations (not a tripartite body) *
No set date	<ul style="list-style-type: none"> ● Commissions of Inquiry (not tripartite) ** ● Fact-Finding and Conciliation Commission on Freedom of Association (not a tripartite body) ** ● Direct Contacts Missions by representatives of the Director-General (these are not supervisory mechanisms, but instruments in support of the regular supervisory machinery, the Committee on Freedom of Association or procedures relating to representations)
<p>* <i>regular supervisory machinery (automatic)</i></p> <p>** <i>procedure based on the presentation of complaints or representations</i></p>	

Some of the supervisory procedures of other international organizations, even though they have their specific characteristics, have been inspired by those of the ILO in view of the latter's coherence, forward-looking approach and effectiveness. The supervisory procedures of international organizations have the same objectives of compliance with international law, even though their structures, bodies, procedures and impact may differ.¹¹

Committee of Experts on the Application of Conventions and Recommendations

Interest for employers: it is the technical supervisory body through which employers' organizations can prompt an examination of the manner in which ILO standards are applied in practice at the national level. This examination is undertaken through written communications sent to the International Labour Organization. The participation of employers in this procedure may, for example, give rise to recommendations to amend the national legislation affecting employers in any of the fields covered by ILO Conventions.

In a resolution adopted by the International Labour Conference at its Eight Session (1926), the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards were given responsibility for the regular supervision of compliance by member States with their obligations deriving from the standards adopted by the ILO. The Committee of Experts began its work in 1927, examining the reports sent by governments on the application of ILO standards and facilitating the supervisory work carried out by the International Labour Conference through the Committee on the Application of Standards.

¹¹ For example, the ILO does not make use of special rapporteurs as the United Nations does for a country or a specific subject; however, in the context of the ILO, Commissions of Inquiry, Direct Contacts Missions and the General Surveys of the Committee of Experts on the situation with regard to the application in law and practice by member States of a group of instruments may have similar functions and objectives, despite the respective bodies, rules and procedures being totally different.

For the purposes of the present publication, it should be recalled that when an ILO Convention is ratified, member States, in accordance with article 22 of the Constitution, have to make an annual report on the measures taken to give effect to the Convention. These reports are submitted for examination by the Committee of Experts on the Application of Conventions and Recommendations. The Committee of Experts in turn prepares a public report, which it submits to the next session of the Conference, where it is subject to a dual examination: in the first place, by the Committee on the Application of Standards, and then by the Conference in plenary session. The Committee of Experts on the Application of Conventions and Recommendations and the Committee on the Application of Standards are two complementary supervisory bodies which were established to ensure that ratified Conventions are applied properly. The terms of reference of the Committee of Experts are to examine in particular whether the law and practice of member States are in conformity with the Conventions that have been ratified. It is a body composed of prestigious and independent jurists (magistrates, academics, etc). The function of the Committee on the Application of Standards, a tripartite body established each year by the International Labour Conference, is to establish dialogue with the governments of member States through a public and oral debate on the manner in which member States apply ILO standards in national law and practice. This dialogue is based on the reports of the Committee of Experts.

The members of the Committee of Experts are appointed by the Governing Body for a period of three years on the proposal of the Director-General. Their appointments may be renewed for successive three-year periods. Appointments are made in a personal capacity from among completely impartial persons of technical competence and independent standing. They are drawn from all parts of the world, so that the Committee may benefit from first-hand experience of different legal, economic and social systems. The Committee of Experts bases its work on the fundamental principles of independence, impartiality and objectivity in examining the extent to which the situation in each State appears to conform to the terms of the Conventions and the obligations accepted

under the ILO Constitution. The specific terms of reference of the Committee are to examine:¹²

- i. the annual reports under article 22 of the Constitution on the measures taken by Members to give effect to the provisions of Conventions to which they are parties, and the information furnished by Members concerning the results of inspection [the Committee prepares its report each year on the basis of this information];
- ii. the information and reports concerning Conventions and Recommendations communicated by Members in accordance with article 19 of the Constitution [based on this information, each year the Committee prepares its General Survey on specific Conventions and/or Recommendations];
- iii. information and reports on the measures taken by Members in accordance with article 35 of the Constitution [relating to non-metropolitan territories].

The Committee of Experts meets on the dates determined by the Governing Body; it currently meets at the end of November and the first two weeks of December.

The Committee of Experts elects its Chairperson and Reporter at its opening sitting. It meets in private and its working documents and deliberations are confidential. Although the conclusions of the Committee have traditionally represented unanimous agreement among its members, decisions can also be taken by a majority. Where this happens, it is the established practice of the Committee to include in its report the opinion of the dissenting members, if they so request, together with any response by the Committee as a whole. The report of the Committee of Experts is published at the end of March or the beginning of April in English, French and Spanish.

¹² Handbook of procedures relating to international labour Conventions and Recommendations, International Labour Standards Department, ILO, Geneva, 1998, para. 53.

The documentation available to the Committee of Experts includes the following: the information supplied by governments in their reports or in the Conference Committee on the Application of Standards; the texts of relevant legislation, collective agreements and court decisions; information supplied by States on the results of inspections; comments made by employers' and workers' organizations; reports of other ILO bodies (such as Commissions of Inquiry or the Governing Body Committee on Freedom of Association, etc.); and reports of technical cooperation activities.

The report of the Committee of Experts is submitted in the first place to the Governing Body. Part One of the report contains the general report of the Committee of Experts, in which it provides an overview of its work and draws attention to matters of general interest; Part Two contains individual observations on: (i) the application of ratified Conventions in member States; (ii) the application of Conventions in non-metropolitan territories for the international relations of which member States are responsible; and (iii) the submission of Conventions and Recommendations adopted by the ILO to the competent national authorities. Part Three contains a general survey of national law and practice in regard to the instruments on which reports have been supplied on unratified Conventions and on Recommendations, under article 19 of the Constitution (reports on unratified Conventions and Recommendations). Each year, the Committee of Experts prepares a general survey on the situation in law and practice in member States with regard to the application of a group of instruments determined by the Governing Body. In these general surveys, the Committee frequently draws attention to the general trends in national legislation on the matters under examination, identifies difficulties preventing their application or ratification by member States and the relevance (or lack of relevance) of these standards in the context of the modern world of work.

Together with the report of the Committee of Experts, the Office prepares an information document. The first part of this document provides general information on recent trends with regard to international labour standards, on constitutional or other procedures relating to the supervision of the application of standards, and on technical assistance in the field of standards; the second part includes, in tabular form, full

information on the ratification of Conventions and Protocols; the third part contains, in tables, country profiles containing information for each country on the ratification of Conventions, their application and the submission to the competent authorities of the instruments adopted by the International Labour Conference.

The comments of the Committee of Experts take the form of observations and direct requests.

The term observation is used for comments on countries which are published in the report of the Committee of Experts. Observations are used for more serious or long-standing cases of failure in implementing obligations. In particularly serious or important cases, the Committee of Experts may add a footnote requesting the government to supply full particulars to the Conference or to report in detail in one or two years, even though a detailed report is not due under the regular reporting system; the government may also be requested to do both of the above.

Direct requests are not published in the report of the Committee of Experts, but are communicated to governments by the International Labour Office on behalf of the Committee of Experts. They are made available to any person or organization having a justifiable interest in the subject. They may relate to matters of secondary importance or to technical questions, or they may seek clarification on certain points on which the information available is insufficient to permit a full assessment of the effect given to international standards. In the section on each family of Conventions, the report of the Committee of Experts indicates the countries to which direct requests have been sent. Normally, before problems are raised in the form of observations, they are addressed in a direct request for several years.

Acknowledgements: when a government has made a full reply to a direct request asking for further information, receipt of the government's reply is noted without comment by the Committee of Experts at the end of the part of the report dealing with the Convention concerned.¹³

By virtue of their constitutional obligations, all member States have to communicate to the representative organizations of employers and workers copies of:

- a) information communicated to the Office concerning measures taken to submit Conventions and Recommendations to the competent national authorities;
- b) reports on the application of ratified Conventions;
- c) reports on unratified Conventions and on Recommendations.

In addition, in accordance with the procedures in relation to these obligations, the Office ensures that national organizations receive copies of the relevant comments of the supervisory bodies and of requests for reports.

Convention No. 144 and Recommendation No. 152 provide for tripartite consultations on:

- a) government replies to questionnaires and comments on proposed new instruments to be discussed by the Conference;
- b) proposals to be made to the competent authorities when Conventions and Recommendations are submitted to them;
- c) questions arising out of reports on ratified Conventions;
- d) measures relating to unratified Conventions and Recommendations;
- e) denunciation of Conventions.

Whether or not they have received copies of government reports, any employers' or workers' organization may at any time transmit its

¹³ See ILO law on freedom of association: Standards and procedures, ILO, Geneva, 1995, pp. 149-152.

comments on any of the matters arising in connection with the above paragraphs. The Committee of Experts and the Conference Committee have emphasized the value of such comments as a means of assisting them in assessing the effect given to ratified Conventions.¹⁴ The number of comments made to the Committee of Experts by employers' organizations is constantly increasing (a number of examples are contained in annex to this publication) and, together with those of workers' organizations, they contribute considerable dynamism, thereby enriching the supervisory system.

Conference Committee on the Application of Standards

Interest for employers: the Conference Committee is one of the principal pillars of the ILO supervisory system, as the tripartite body in which employers participate on an equal footing with governments and workers in making a technical and political assessment of the application of ILO standards. The Conference Committee is frequently used as a platform to denounce alleged abuses and criticize unsatisfactory national policies.

The Conference Committee on the Application of Standards is set up under article 7 of the Standing Orders of the Conference. It is a tripartite Committee, composed of delegates to the Conference representing governments, employers and workers. The Committee elects a Chairperson and two Vice-Chairpersons, each chosen from one of the three Groups, and it also elects one or more Reporters. The Committee is composed of many delegates and examines the report of the Committee of Experts, and more specifically the most relevant individual cases relating to the application of Conventions ratified by ILO member States.

¹⁴ See Handbook of procedures relating to international labour Conventions and Recommendations, op. cit., paras. 59-61.

Following the independent, technical examination of documentation carried out by the Committee of Experts, the proceedings of the Conference Committee on the Application of Standards provide an opportunity for the representatives of governments, employers and workers to examine together the manner in which States are discharging their obligations under and relating to Conventions and Recommendations. In particular, governments are able to amplify the information supplied previously to the Committee of Experts with a view to demonstrating to the Committee on the Application of Standards that they are in compliance with their obligations, indicate further measures that they intend to take, draw attention to the difficulties encountered and seek guidance as to how to overcome them.

The officers of the Conference Committee on the Application of Standards (the Chairperson, the Employer Vice-Chairperson and the Worker Vice-Chairperson) prepare a list of observations contained in the report of the Committee of Experts in respect of which they consider it desirable to invite governments to supply information to the Committee with a view to their discussion. The list is submitted to the Conference Committee for examination, when changes can be proposed, and for approval. The Conference Committee usually follows the recommendations that are made by the Committee of Experts on an exceptional basis when it requests a specific government in a footnote to its report to supply full particulars to the Conference. Nevertheless, this is entirely optional for the Conference Committee in view of its role in the supervisory bodies.

The Governments concerned by the observations in the approved list have a further opportunity to submit written replies, the substance of which appears in an information document for the Conference Committee. The Committee may then decide whether or not it wishes to receive supplementary oral information from a representative of the government concerned.

The Conference Committee on the Application of Standards invites representatives of the governments concerned (particularly of the countries mentioned on the list) to attend one of its sittings to discuss the observations in question. Governments which are not members of the Committee are kept informed of its agenda and the date on which it

wishes to hear statements from their representatives through the Conference Daily Bulletin.

Following the statements made by the Government representatives, the members of the Committee may raise questions or make comments, and the Committee may reach conclusions on the case. In general, in its conclusions, the Conference Committee indicates the most important matters raised by the Committee of Experts, notes the most significant observations made and requests the Government to adopt certain measures or actions and to report on them. Where it considers it necessary to do so, the Committee emphasizes certain principles contained in ILO instruments. During the discussions, the Employer and Worker members make statements through their respective spokespersons, although this does not prevent individual members (Worker, Employer or Government) taking the floor if they so wish.

The appendix to the report submitted by the Committee on the Application of Standards to the Conference contains a summary of the statements made by governments and their examination by the members of the Conference Committee, together with its conclusions. In addition, the Committee includes in the body of its report information on its discussions in relation to compliance by particular States with specific obligations, including: the submission of instruments to the competent authorities; failure to comply with reporting obligations; reference to cases of progress, in which the Committee notes changes in law and practice which overcome difficulties previously discussed by it; paragraphs drawing the Conference's attention to discussions on certain special cases, as well as to cases discussed previously by the Committee where there has been continued failure over several years to eliminate serious deficiencies in the application of ratified Conventions; communication of copies of reports to employers' and workers' organizations; and participation in the work of the Committee. The methods of work of the Conference Committee in relation to special problems and cases are as follows: for cases in which governments appear to encounter serious difficulties in discharging their obligations, the Committee decided at the 66th Session of the Conference (1980) to proceed in the following manner:

1. Failure to supply reports and information

The various forms of failure to supply information will be expressed in narrative form in separate paragraphs at the end of the appropriate sections of the report, and indications will be included concerning any explanations of difficulties provided by the governments concerned. The following criteria were retained by the Committee for deciding which cases were to be included:

- none of the reports on ratified Conventions have been supplied during the past two years;
- first reports on ratified Conventions have not been supplied for at least two years;
- none of the reports on unratified Conventions and on Recommendations requested under article 19, paragraphs 5, 6 and 7, of the Constitution have been supplied during the past five years;
- no indication is available that steps have been taken to submit the Conventions and Recommendations adopted during the last seven sessions of the Conference to the competent authorities, in accordance with article 19 of the Constitution;
- no information has been received as regards all or most of the observations and direct requests of the Committee of Experts to which a reply was requested for the period under consideration;
- the government has failed during the past three years to indicate the representative organizations of employers and workers to which, in accordance with article 23(2) of the Constitution, copies of reports and information supplied to the ILO under articles 19 and 22 have been communicated;
- the government has failed, despite repeated invitations by the Conference Committee, to take part in the discussion concerning its country.

2. Application of ratified Conventions

The report will contain a section entitled “Application of ratified Conventions”, in which the Committee draws the attention of the Conference to:

- cases of progress, where governments have introduced changes in their law and practice in order to eliminate divergencies previously discussed by the Committee;
- discussions it had regarding certain cases mentioned in special paragraphs;
- continued failure over several years to eliminate serious deficiencies in the application of ratified Conventions which it had previously discussed.¹⁵

The report of the Committee on the Application of Standards is submitted to the Conference and discussed in plenary, which gives delegates a further opportunity to draw attention to particular aspects of the Committee’s work. The report is published in the Record of Proceedings of the Conference. It is also published separately for circulation to Governments. The attention of Governments is drawn to any particular points raised by the Committee for their consideration, and as well as to the discussion of individual cases, so that due account may be taken in the preparation of subsequent reports to the Committee of Experts.¹⁶

In general, through their presence and active participation in the International Labour Conference, and particularly in the Committee on the Application of Standards, delegates representing employers’ and workers’ organizations can raise matters of concern to them in connection with the discharge of obligations set forth in Conventions and Recommendations or related to them.¹⁷

¹⁵ See ILO law on freedom of association: Standards and procedures, *op. cit.*, pp. 169-170.

¹⁶ See Handbook of procedures relating to international labour Conventions and Recommendations, *op. cit.*, para. 58.

¹⁷ *Ibid.*, para. 62.

Finally, it should be emphasized that the work of the Conference Committee on the Application of Standards, which has been called the conscience of the Conference, is intended to overcome problems which arise in the application of Conventions, particularly by inviting governments to adopt practical measures and to give undertakings (draft legislation, the acceptance of Direct Contacts Missions or technical assistance, dialogue with the social partners, etc.). The impact of the Committee's decisions has not been covered by a specific study, but is doubtless enormous.

Ad hoc committees (article 24 of the Constitution)

Interest for employers: the procedure envisaged in article 24 of the ILO Constitution provides an opportunity for employers' organizations to make representations against their governments for failure to comply with obligations deriving from the ratification of ILO Conventions with a view to obtaining a tripartite recommendation from the Governing Body to resolve a specific situation.

Organizations of workers and employers may, under the terms of article 24 of the Constitution, make a representation to the ILO if “any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party”. This representation is communicated to the Governing Body of the ILO and is examined in the first place by a committee generally composed of three members of the Governing Body elected respectively from the representatives of governments, employers and workers.¹⁸

When the International Labour Office has acknowledged receipt of the representation and has informed the Governing Body, a recommendation is made to the Governing Body on the receivability of the

¹⁸ See Alberto Otero and María Marta Travieso, “Le Comité de la liberté syndicale (I): Origines et genPse”, op. cit., p. 161.

representation. If the representation is found to be receivable, an ad hoc tripartite committee examines the representation and submits a report to the Governing Body containing a summary of the allegations, the government's reply and conclusions for approval or adoption. The Governing Body may also decide to publish the representation.

The provisions of the ILO Constitution concerning representations made under article 24 read as follows:

Article 24 of the Constitution. Representations.

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

The Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the ILO, the most recent amendments to which were adopted by the Governing Body in November 2003 and by the International Labour Conference in June 2004, may be summarized as follows.

When a representation is made to the International Labour Office under article 24 of the Constitution of the Organization, the Director-General shall acknowledge its receipt and inform the government against which the representation is made.

The Director-General shall immediately bring the representation before the Officers of the Governing Body and the Officers shall report to the Governing Body on the receivability of the representation. The receivability of a representation is subject to the following conditions:

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- it must be communicated to the International Labour Office in writing;
 - it must emanate from an industrial association of employers or workers;
 - it must make specific reference to article 24 of the Constitution of the Organization;
 - it must concern a Member of the Organization;
 - it must refer to a Convention to which the Member against which it is made is a party; and
 - it must indicate in what respect it is alleged that the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention.

In reaching a decision concerning receivability on the basis of the report of its Officers, the Governing Body shall not enter into a discussion of the substance of the representation.

If the Governing Body decides, on the basis of the report of its Officers, that a representation is receivable, it shall set up a committee for the examination thereof, composed of members of the Governing Body chosen in equal numbers from the Government, Employers' and Workers' groups. No representative or national of the State against which the representation has been made and no person occupying an official position in the association of employers or workers which has made the representation may be a member of this committee.

When the Governing Body considers the reports of its Officers on the issue of receivability and of the committee on the issues of substance, the Government concerned, if not already represented on the Governing Body, shall be invited to send a representative to take part in its proceedings while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the Government.

Such a representative shall have the right to speak under the same conditions as a member of the Governing Body, but shall not have the right to vote.

The meetings of the Governing Body at which questions relating to a representation are considered shall be held in private.

If a representation which the Governing Body decides is receivable relates to a Convention dealing with trade union rights, it may be referred to the Committee on Freedom of Association for examination in accordance with articles 24 and 25 of the Constitution.

If a representation which the Governing Body decides is receivable relates to facts and allegations similar to those which have been the subject of an earlier representation, the appointment of the committee charged with examining the new representation may be postponed pending the examination by the Committee of Experts on the Application of Conventions and Recommendations of the follow-up given to the recommendations previously adopted by the Governing Body.

The meetings of the committee appointed by the Governing Body shall be held in private and all the steps in the procedure before the committee shall be confidential.

During its examination of the representation, the committee may:

- request the association which has made the representation to furnish further information within the time fixed by the committee;
- communicate the representation to the Government against which it is made without inviting that Government to make any statement in reply;
- communicate the representation (including all further information furnished by the association which has made the representation) to the Government against which it is made and invite the latter to make a statement on the subject within the time fixed by the committee;
- upon receipt of a statement from the Government concerned, request the latter to furnish further information within the time fixed by the committee;
- invite a representative of the association which has made the representation to appear before the committee to furnish further information orally.

The committee may prolong any time limit fixed, in particular at the request of the association or Government concerned.

If the committee invites the Government concerned to make a statement on the subject of the representation or to furnish further information, the Government may: communicate such statement or information in writing; request the committee to hear a representative of the Government; request that a representative of the Director-General visit its country to obtain, through direct contacts with the competent authorities and organizations, information on the subject of the representation, for presentation to the committee.

When the committee has completed its examination of the representation as regards substance, it shall present a report to the Governing Body in which it shall describe the steps taken by it to examine the representation, present its conclusions on the issues raised therein and formulate its recommendations as to the decisions to be taken by the Governing Body.

If the Governing Body decides to publish the representation and the statement, if any, made in reply to it, it shall decide the form and date of publication. Such publication shall close the procedure under articles 24 and 25 of the Constitution.

The International Labour Office shall notify the decisions of the Governing Body to the Government concerned and to the association which made the representation.

When a representation alleging that a Government has failed to secure effective observance of a Convention, within the meaning of article 24 of the Constitution of the Organization, is communicated to the Governing Body, the latter may, at any time in accordance with paragraph 4 of article 26 of the Constitution adopt, against the Government against which the representation is made and concerning the Convention the effective observance of which is contested, the procedure of complaint provided for in article 26 and the following articles.

In accordance with the procedure, in the case of a representation against a State which is no longer a Member of the Organization, in respect of a Convention to which it remains party, the procedure provided for in these Standing Orders shall apply in virtue of article 1, paragraph 5, of the Constitution.

When adopting new amendments to the Standing Orders concerning the procedure for the examination of representations, the Governing Body decided that the Standing Orders would be preceded by an Introductory Note. This Note summarizes the various stages of the procedure and indicates the options available to the Governing Body at each stage of the procedure in accordance with the Standing Orders, the information deriving from the preparatory work for these Standing Orders and the decisions and practice of the Governing Body.

Certain paragraphs of the Introductory Note are reproduced below, with particular emphasis on matters relating to receivability and certain aspects of the examination of the representation by the committee.

The representation must emanate from an industrial association of employers or workers (article 2, paragraph 2(b) of the Standing Orders)

The following principles may guide the Governing Body in its application of this provision:

- The right to make a representation to the International Labour Office is granted without restriction to any industrial association of employers or workers. No conditions are laid down in the Constitution as regards the size or nationality of that association. The representation may be made by any industrial association whatever may be the number of its members or in whatever country it may be established. The industrial association may be an entirely local organization or a national or international organization.
- The widest possible discretion should be left to the Governing Body in determining the actual character of the industrial association which makes the representation. The criteria to be applied in this connection by the Governing Body should be those which have up to the present guided the general policy of the Organization and not those laid down by the national legislation of States.

The Governing Body has the duty of examining objectively whether, in fact, the association making the representation is an industrial association of workers, within the meaning of the Constitution and the Standing Orders. It is the duty of the Governing Body to determine in each case, independently of the terminology employed and of the name that may have been imposed upon the association by circumstances or

selected by it, whether the association from which the representation emanates is in fact an “industrial association of employers or workers” in the natural meaning of the words. In particular, when considering whether a body is an industrial association, the Governing Body cannot be bound by any national definition of the term “industrial association”.

Moreover, the Governing Body might apply *mutatis mutandis* the principles developed by the Committee on Freedom of Association on receivability as regards a complainant organization that is alleging violations of freedom of association. Those principles are formulated as follows:

At its first meeting in January 1952, the Committee adopted the principle that it has full freedom to decide whether an organization may be deemed to be an employers’ or workers’ organization within the meaning of the ILO Constitution, and it does not consider itself bound by any national definition of the term.

The Committee has not regarded any complaint as being irreceivable simply because the Government in question had dissolved, or proposed to dissolve the organization on behalf of which the complaint was made, or because the person or persons making the complaint had taken refuge abroad.

The fact that a trade union has not deposited its by-laws, as may be required by national laws, is not sufficient to make its complaint irreceivable since the principles of freedom of association provide precisely that the workers shall be able, without previous authorization, to establish organizations of their own choosing.

The fact that an organization has not been officially recognized does not justify the rejection of allegations when it is clear from the complaints that this organization has at least a *de facto* existence.

In cases in which the Committee is called upon to examine complaints presented by an organization concerning which no precise information is available, the Director-General is authorized to request the organization to furnish information on the size of its membership, its statutes, its national or international affiliations and, in general, any other information calculated, in any examination of the receivability of the complaint, to lead to a better

appreciation of the precise nature of the complainant organization.

The Committee will only take cognizance of complaints presented by persons who, through fear of reprisals, request that their names or the origin of the complaints should not be disclosed, if the Director-General, after examining the complaint in question, informs the Committee that it contains allegations of some degree of gravity which have not previously been examined by the Committee. The Committee can then decide what action, if any, should be taken with regard to such complaints.

The representation must indicate in what respect it is alleged that the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention (article 2, paragraph 2(f), of the Standing Orders)

In examining this condition of receivability, particular importance is attached to article 2, paragraph 4, of the Standing Orders, which provides that in reaching a decision concerning receivability on the basis of the report of its Officers, the Governing Body shall not enter into a discussion of the substance of the representation. It is important however that the representation be sufficiently precise for the Officers of the Governing Body to be able to legitimately substantiate their proposal to the Governing Body.

Examination of the representation by the committee

Under article 6, the tripartite committee charged with examining a representation must present its conclusions on the issues raised in the representation and formulate its recommendations as to the decisions to be taken by the Governing Body. The committee examines the merits of the allegation made by the author of the representation that the Member concerned has failed to secure effective observance of the Convention or Conventions ratified by the Member and indicated in the representation.

The powers of the tripartite committee during its examination of the representation are laid down in article 4. Article 5 concerns the rights of the Government concerned if the committee invites it to make a statement on the subject of the representation. Moreover, the committee may apply, *mutatis mutandis*, two principles developed by the Committee on Freedom of Association:

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- in establishing the matters on which the representation is based, the committee may consider that, while no formal period of prescription has been fixed for the examination of representations, it may be very difficult – if not impossible – for a Government to reply in detail regarding matters which occurred a long time ago.
 - in formulating its recommendations as to the decision to be taken by the Governing Body, the committee may take into account the interest that the association making the representation has in taking action with regard to the situation motivating the representation. Such interest exists if the representation emanates from a national association directly interested in the matter, from international workers' or employers' associations having consultative status with the ILO, or from other international workers' or employers' associations when the representation concerns matters directly affecting their affiliated organizations.

Consideration of the representation by the Governing Body

On the basis of the report of the tripartite committee, the Governing Body considers the issues of substance raised by the representation and what follow-up to undertake.

The Governing Body may decide to refer issues concerning any follow-up to the recommendations adopted by the Governing Body to be undertaken by the Government concerned to the Committee of Experts on the Application of Conventions and Recommendations. That Committee shall examine the measures taken by the Government to give effect to the provisions of the Conventions to which it is a party and with respect to which recommendations had been adopted by the Governing Body.

Representations against non-member States

Article 11 of the Standing Orders stipulates that a representation against a State which is no longer a Member of the Organization may also be examined in accordance with the Standing Orders, in virtue of article 1, paragraph 5, of the Constitution, which provides that the withdrawal

of a Member of the Organization shall not affect the continued validity of obligations arising under or relating to Conventions that it had ratified.

Employers' organizations have made representations under article 24 of the ILO Constitution alleging failure to secure effective observance of Conventions in relation to various countries (see Chapter 8). Almost all these representations have been related to violations of the Conventions on freedom of association and the right to organize of employers and have been referred to the Committee on Freedom of Association.

Commissions of Inquiry

Interest for employers: under the terms of the procedure established by article 26 of the ILO Constitution, employers can request the ILO to establish a high-level commission to visit a specific country so that it can undertake a first-hand investigation of alleged violations of international obligations deriving from the ratification of ILO Conventions. This procedure is initiated by a complaint filed against a government and is perceived by the international community as an alarm signal concerning very serious situations which may affect the business world.

In addition to the regular supervisory system, the Constitution provides, in the event of allegations of violations of a ratified Convention, for the procedures set out in articles 24 and 26, which are based respectively on the filing of representations (examined in the previous section) or complaints. This system of supervision established by the Constitution has been accepted by the member States of the International Labour Organization, which implies that they may be subject to this procedure every time a Convention is adopted, ratified or enters into force. The principal limitation lies in the fact that supervision under these provisions is only possible in the case of ratified Conventions. There are normally three members of a Commission of Inquiry (one of whom is the Chairperson) and they are appointed by the Governing Body on the proposal of the Director-General of the ILO, once the complaint has been found receivable by the Governing Body. It is a

supervisory procedure which in practice is reserved for cases of considerable gravity.

Article 26 provides that a member State may file a complaint against another Member if it is not satisfied that it “is securing the effective observance of any Convention which both have ratified”. The complaint procedure may also be initiated by the Governing Body either of its own motion or on receipt of a complaint from a delegate to the Conference. When a complaint is filed, the Governing Body may communicate the complaint in the first place to the government in the manner envisaged for representations or, if it does not think it necessary to communicate the complaint to the government, or if it has not received any satisfactory reply within a reasonable time, it may appoint a Commission of Inquiry to consider the complaint and to report thereon.¹⁹

Articles 26 to 28 of the ILO Constitution on Commissions of Inquiry contain provisions respecting the parties (parties which may initiate the procedure, obligations of the government in question) and the report of the Commission of Inquiry.

¹⁹ Ibid., p. 161.

Article 26

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.
2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24 [representation procedure].
3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.
4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.
5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

Article 27

The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint.

Article 28

When the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

The ILO Constitution also contains provisions on further measures relating to the report of the Commission of Inquiry, the decision of the government concerned as to whether or not it accepts its recommendations, the possibility for the latter to refer the complaint to the International Court of Justice and the functions of that Court, and the measures to be taken in the event of failure to carry out the recommendations of the International Court of Justice or the Commission of Inquiry.

Article 29

1. The Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published.
2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice.

Article 31

The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of article 29 shall be final.

Article 32

The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry, if any.

Article 33

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

Finally, the Constitution contains special provisions concerning cases in which the government concerned reports the adoption of the steps necessary to achieve compliance with the recommendations of the Commission of Inquiry or the International Court of Justice.

Article 34

The defaulting government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Inquiry or with those in the decision of the International Court of Justice, as the case may be, and may request it to constitute a Commission of Inquiry to verify its contention. In this case the provisions of articles 27, 28, 29, 31 and 32 shall apply, and if the report of the Commission of Inquiry or the decision of the International Court of Justice is in favour of the defaulting government, the Governing Body shall forthwith recommend the discontinuance of any action taken in pursuance of article 33.

Apart from the provisions of the ILO Constitution referred to above, there are no rules concerning the procedures of Commissions of Inquiry. In all cases in which issues have been submitted to a Commission of Inquiry, the Governing Body has allowed the Commission itself

to determine its procedure in accordance with the Constitution and the usual practice followed by this type of Commission. Usually, at the first session of the Commission of Inquiry, its members make a solemn declaration in the presence of the Director-General of the ILO, in which they undertake to perform their duties honourably, faithfully and impartially. The Commission of Inquiry sets the date for its next sessions and undertakes a complete investigation of the complaint. It has full freedom to decide upon the institutions (governments, intergovernmental organizations, trade unions, employers' organizations, enterprises, NGOs, etc.), or persons whose evidence it wishes to hear, whether or not they are parties to the procedure. There have been cases in which persons who have given evidence to a Commission of Inquiry have suffered reprisals by the authorities. For this reason, Commissions of Inquiry request Governments to provide guarantees that witnesses will benefit from full protection against any type of measures taken against them by reason of their participation in the Commission's procedures and the statements made to it;²⁰ on occasions, Commissions of Inquiry have received requests to maintain the confidentiality of certain witnesses and have decided to do so. Commissions of Inquiry follow the traditional procedural guarantees, including those relating to the hearing of witnesses, and generally visit the country concerned, provided that they obtain the authorization of the respective government. The procedure is relatively long (lasting about one year) and has the effect of suspending other ILO supervisory procedures (Committee of Experts, Committee on the Application of Standards, Committee on Freedom of Association, committees set up under article 24 of the ILO Constitution) in relation to the Conventions on which the allegations are based. When it has finished its work, the Commission of Inquiry submits a report setting out the text of the complaint, the rules of procedure followed, the reply from the Government, the activities undertaken, the information gathered, its conclusions and recommendations. The follow up of these

²⁰ See, for example, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the Observance by the Government of the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), para. 54.

recommendations is entrusted, depending on the case, to the Governing Body (which can make recommendations directly to the International Labour Conference), the Committee of Experts, the Committee on the Application of Standards or the Committee on Freedom of Association.

If one or more delegates to the International Labour Conference, which meets each year in the month of June, present a complaint, the Governing Body normally decides upon its receivability at its November session. If it is found receivable, the Governing Body may request the Government to provide its observations and then decide whether or not to establish a Commission of Inquiry in March or at a subsequent session. In certain cases, this decision may be taken over several sessions (in certain cases, years) for various reasons: because the Governing Body is seeking consensus in its decisions; because the Government announces positive measures in the meantime; because negotiations are opened between the parties; because the Governing Body decides to send a Direct Contacts Mission; or because alternative measures are available. For example, in the case of Colombia, on the proposal of the Director-General, the Governing Body, before voting on whether or not to establish a Commission of Inquiry, appointed a special Representative of the Director-General for a certain period, opened an office in Bogotá and initiated a special technical assistance programme with substantial resources to help resolve the problems raised. In the case of Myanmar, in the context of the follow-up of the recommendations of the Commission of Inquiry on the application of the Conventions on forced labour, the Governing Body appointed a Liaison Officer and opened an office in the country.

By way of illustration, and with a view to describing more effectively the functioning of Commissions of Inquiry, the procedure decided upon by the Commission of Inquiry on Myanmar in 1997 is reproduced below:²¹

²¹ See ILO documents GB.267/16/2, GB.268/14/8 and GB.268/15/1.

1. *Solemn declaration made by the members of the Commission*

- The Commission held its First Session in Geneva on 9 and 10 June 1997. At the beginning of its First Session, on 9 June 1997, each member of the Commission made a solemn declaration in the presence of the Director-General of the International Labour Office.
- The members of the Commission then each made the following declaration:

I solemnly declare that I will honourably, faithfully, impartially and conscientiously perform my duties and exercise my powers as a member of the Commission of Inquiry appointed by the Governing Body of the International Labour Office at its 268th Session (March 1997) under article 26 of the Constitution of the International Labour Organization to examine the observance of the Forced Labour Convention, 1930 (No. 29), by Myanmar.

2. *Adoption of the procedure to be followed by the Commission*

- The ILO Constitution does not lay down rules of procedure to be followed by a Commission of Inquiry appointed under article 26. When the Governing Body decided in March 1997 to refer the complaint to a Commission of Inquiry, it also specified that the Commission was to determine its own procedure in accordance with the provisions of the Constitution and the practice followed by previous commissions of inquiry.
- In determining its procedure, the Commission recalled certain elements which characterized the nature of its work. As earlier commissions of inquiry had stressed, the procedure provided for in articles 26 to 29 and 31 to 34 of the Constitution was of a judicial nature. Thus, the rules of procedure had to safeguard the right of the parties to a fair procedure as recognized in international law.
- Furthermore, the Commission considered that its role was not to be confined to an examination of the information furnished by the parties themselves or in support of their contentions. The Commission would take all necessary measures to obtain as complete and objective information as possible on the matters at issue.
- Finally, the Commission was aware that its procedure had to ensure that the complaint would be examined expeditiously, avoiding undue delay and thereby ensuring a fair procedure.

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- Bearing these considerations in mind, the Commission adopted the rules of procedure which it intended to follow during the Second Session for the hearing of witnesses. These rules were brought to the attention of the Government of Myanmar and the complainants.

3. Communication of additional information

- The Commission examined the information submitted by the complainants and by the Government of Myanmar and took a series of decisions on the procedural arrangements for the examination of the questions at issue.
- It decided to invite the complainants to communicate to it, before 15 August 1997, any additional information or observations, including any information on developments subsequent to the submission of the complaint. The Commission also invited the Government of Myanmar to communicate before 30 September 1997 any written statement it might wish to present. The Government and the complainants were informed that the substance of all information submitted to the Commission would be communicated to the other party to the proceedings.
- Pursuant to article 27 of the ILO Constitution and in accordance with the practice of earlier commissions of inquiry, the Commission invited the governments of countries located in the South-East Asian region or having economic relations with Myanmar to make available to it any information in their possession bearing upon the subject matter of the complaint.
- Furthermore, the opportunity of presenting information relevant to the matters raised in the complaint was also offered to several intergovernmental organizations, to international and national workers' and employers' organizations, as well as to a number of non-governmental organizations operating in the legal and human rights spheres. In addition, companies mentioned in the complaint were also given the opportunity to submit information on the subject matter of the complaint.
- The Commission notified the governments, organizations and companies concerned that the substance of the information submitted by them would be transmitted to the Government of Myanmar and the complainants.

Finally, as regards any material submitted by governments, organizations or individuals that had not been invited to do so, the Commission requested its Chairperson to decide on a case-by-case basis the measures to be taken.

4. *Measures adopted with a view to the Second Session and the subsequent work of the Commission*

- The Commission decided to hold its Second Session in Geneva from 17 to 20 and 25 to 26 November 1997.
- In communications dated 13 and 16 June 1997, the Commission invited the Government of Myanmar and the complainants to communicate before 30 September 1997 the names and description of any witnesses whom they wished the Commission to hear with an indication of the points on which it was desired to adduce evidence of each of the persons concerned. The Commission informed the parties that on the basis of the information thus obtained, it would decide whether to hear each of the witnesses in question.
- In addition, the Commission drew the complainants' and the Government's attention to the fact that information about each witness would be disclosed to the other party in the absence of an application requesting confidentiality pursuant to Rule 7 of the Rules for the hearing of witnesses. If such an application were filed, it would be heard at the beginning of the Commission's hearing of witnesses. In the meantime, the points of evidence would nevertheless be disclosed to the other party. The Government of Myanmar was requested to assure in all cases that it would not obstruct the attendance and giving of evidence by witnesses and that no sanction or prejudice to witnesses or their families would occur as a consequence of them appearing or giving evidence.
- The Commission asked the Government of Myanmar and the complainants to designate representatives to act on their behalf before the Commission. The complainants were also requested to consider the possibility of a joint representation.
- Finally, the Commission authorized its Chairperson to deal on its behalf with any questions of procedure that might arise between sessions, with the possibility of consulting the other members whenever he might consider it necessary.

Another example illustrating the rules established by a Commission of Inquiry with regard to the hearing of the representatives of the parties and international organizations is to be found in the Report of the Commission of Inquiry of 1991 (Nicaragua), which reads as follows:

- The Commission will hear at all times in private sittings the representatives of the parties, on the one hand, and, on the other, the representatives of the ICFTU, WCL and IOE - organizations having consultative status with the ILO - which have submitted complaints to the Committee on Freedom of Association regarding this matter. The information and evidence presented to the Commission therein will be treated as fully confidential by such representatives.
- The Government of Nicaragua will be invited to appoint a representative to act on its behalf before the Commission. This representative, as well as the representatives of the complainants under article 26 of the Constitution, or their respective substitutes, will be expected to be present throughout the hearings and will be responsible for the general presentation of their case.
- The purpose of the Commission is to verify the information necessary to ascertain the matters submitted to it for investigation by the Governing Body of the International Labour Office. It is not, however, competent to deal with issues of a purely political nature and bearing no relation to the matters it has to examine, and it will therefore only accept information and statements referring to the exercise of trade union rights and the standards laid down in Convention No. 144. The Commission will not authorize statements on matters outside its terms of reference.
- The Commission or any member of the Commission may question the representatives of the parties or of the organizations referred to above at any stage in the hearing.

The Commission may authorize the representatives of the parties to question one another and to put questions to the representatives of the ICFTU, WCL and IOE.*

*ILO, Official Bulletin, Supplement 2, Vol. LXXIV, 1991, Series B, p. 27.

It should be emphasized that in practice the Governing Body has established Commissions of Inquiry in cases in which the practical or legal difficulties relating to allegations concerning violations of Conventions were fairly important, persistent or serious, partly in view of the high financial cost of Commissions of Inquiry and partly because of the significant political and media impact involved in this procedure. Up to now, employers' organizations have made two complaints under article 26 of the Constitution of the ILO concerning Nicaragua (1990) and Venezuela (2004), respectively. In both cases, these were complaints relating

to violations of Conventions on freedom of association. In the first case, a Commission of Inquiry was established; in the second, the Governing Body has decided on the receivability of the complaint and a decision is awaited in November 2005 on whether or not to establish a Commission of Inquiry.

As noted above, when it has completed its work, a Commission of Inquiry has to submit a report indicating its findings on all questions of fact relevant to determining the issue between the parties, and any recommendations as it may think proper concerning the measures to be taken and the time within which they should be taken. Each of the governments concerned is obliged to indicate within three months whether or not it accepts the recommendations of the Commission of Inquiry and, if not, whether it wishes to refer the matter to the International Court of Justice. This latter Court is the final instance. If a member State does not comply within the required time with the recommendations of the Commission of Inquiry or the International Court of Justice, the Governing Body may recommend to the International Labour Conference measures that it considers appropriate to ensure compliance with these recommendations.²² In the context of the follow-up of the recommendations of the Commission of Inquiry on Myanmar, the Governing Body gave instructions for the suspension of technical assistance to the country (except with regard to matters covered by the recommendations) and recommended that Governments, employers and workers examine, in the light of the recommendations of the Commission of Inquiry, the relations that they could maintain with the country.

In several reports which, with one exception, were adopted unanimously, Commissions of Inquiry, after indicating that various measures had been adopted to eliminate divergences after the complaint had been presented, made a number of recommendations to the governments concerned. These recommendations were accepted by both parties in

²² Nicolas Valticos, *Droit international du travail*, op. cit., para. 656.

each case and the parties subsequently took various legislative and administrative measures to give them effect to a greater or lesser extent.²³

Nevertheless, the role of Commissions of Inquiry is not confined to monitoring legal measures. Once the level of legal compliance in the situation under examination has been ascertained, they also endeavour to find a solution to the problems and make detailed recommendations on the measures to be taken to eliminate the divergences identified. In this way, they endeavour to achieve the final outcome through persuasion, rather than compulsion, namely the implementation of the Organization's standards.²⁴

Klaus Samson has written an interesting and detailed article on the Commission of Inquiry on the observance by Germany of Convention No. 111.²⁵

²³ Ibid., para. 657.

²⁴ Ibid., para. 658.

²⁵ See Klaus Samson, "The 'Berufsverbot' problem revisited: Views from Geneva and Strasbourg", in *Les normes internationales du travail: Un patrimoine pour l'avenir: Mélanges en l'honneur de Nicolás Valticos*. ILO, Geneva, 2004, pp. 21-46.

Committee on Freedom of Association (CFA) and Fact-Finding and Conciliation Commission on Freedom of Association

Interest for employers: through the procedure followed by the Committee on Freedom of Association, employers' organizations can denounce to the Governing Body of the ILO the attitudes of governments or laws and policies that are hostile to employers, violate their freedom of association or their rights as representative organizations of employers.

The Committee on Freedom of Association (CFA) was established by the Governing Body of the ILO in 1951.²⁶ The Committee is composed of nine regular members and nine substitute members from the Governing Body (nominated by the Government, Employer and Worker groups) who act in a personal capacity and meet three times a year in the International Labour Office. It is a specialized ILO body which examines complaints containing allegations of violations of the Conventions on freedom of association and the right to organize of employers, regardless of whether or not the countries concerned by the complaints have or have not ratified the respective Conventions. The consent of the governments concerned is not required for complaints to be examined. The legal basis for this concept resides in the Constitution and the Declaration of Philadelphia, under which member States are bound to respect the fundamental principles contained in the Constitution by virtue of their membership of the Organization.²⁷

²⁶ On the origins of the Committee, see Alberto Otero and María Marta Travieso, “Le Comité de la liberté syndicale (I): Origines et genèse”, op. cit., pp. 159-194.

²⁷ As pointed out by Nicolas Valticos, over the course of the years the feeling has progressively emerged that the member States of the ILO are, by the mere fact of their participation in the Organization, under certain obligations concerning respect for certain fundamental standards envisaged in general terms in the Constitution of the ILO, even if they have not ratified the Conventions which address these subjects in greater detail. This concept is based, in the first place, on the Preamble to the Constitution of the ILO and the Declaration of Philadelphia, which was subsequently incorporated into the ILO Constitution, and which enumerate the objectives established for the member States of the Organization. It is based more generally on the concern of the Organization as the “mouthpiece of the

The Committee on Freedom of Association was set up to carry out the preliminary examination of complaints relating to freedom of association and the observations of the Governments concerned with a view to their possible referral to the Fact-Finding and Conciliation Commission on Freedom of Association, a body composed of independent persons and created in 1950 by agreement between the Governing Body of the ILO and the Economic and Social Council of the United Nations. The Committee on Freedom of Association essentially examined whether cases were deserving of examination by the Governing Body, reported to the Governing Body if a case did not call for further examination (for example because cases did not refer to violations of freedom of association, or because the complainants had not offered sufficient evidence) and submitted a progress report to the Governing Body, in certain cases recommending the necessary measures to be taken.

Shortly afterwards, in view of the evident need, and based on the new rules of procedure approved by the Governing Body, the Committee on Freedom of Association was called upon to undertake a full examination of the substance of complaints so that it could give its view on the action to be taken upon them. Since its creation, the Committee on Freedom of Association has examined over 2400 cases and has revised its procedure on various occasions.²⁸

The principal functions of the Committee on Freedom of Association are to examine complaints relating to violations of the rights of freedom of association and eventually to refer them to the Fact-Finding and Conciliation Commission on Freedom of Association. It is not a judicial body, even though many consider it to be quasi-judicial, particularly in view of the measures adopted to ensure its impartiality: its procedure provides, among other guarantees, that its working documents are confidential, its meetings held in private and persons of the nationality of the case or who occupy an official position in the

social conscience of humanity” to promote actively the implementation of certain essential principles. See Nicolas Valticos, *op. cit.*, para. 630.

28 See Alberto Otero and María Marta Travieso, “Le Comité de la liberté syndicale (II): Composition, procédure et fonctionnement”, in *Les normes internationales du travail: Un patrimoine pour l’avenir: Mélanges en l’honneur de Nicolas Valticos*. ILO, Geneva, 2004, p. 195.

organization filing the complaint are not allowed to be present during the procedure. The purpose of the Committee is to promote respect for freedom of association. The Committee has therefore emphasized that the function of the International Labour Organization in regard to the right of association is to contribute to the effectiveness of the general principle of freedom of association as one of the primary safeguards of peace and social justice. Its function is to secure and promote the right of association of workers and employers; it does not level charges against, or condemn governments.²⁹

The Committee on Freedom of Association has a Chairperson who, until 1978, was a Government member of the Governing Body, but who has ever since been an independent person. Its proceedings are essentially written, although in certain circumstances it may hear the parties and a Direct Contacts Mission may visit the country to interview the parties concerned. The Committee meets three times a year and in adopting its conclusions and recommendations always endeavours to reach unanimous decisions. Its reports have therefore generally been adopted by consensus which, taking into account the diversity of its composition, has clearly given special weight to its conclusions. It should be emphasized that consensus is not a procedural rule, but is adopted in practice. The Committee's procedure also applies to States which have not ratified the Conventions on freedom of association, as the Committee can examine complaints relating to the Constitution, the Declaration of Philadelphia and the recognized principles of freedom of association.³⁰

The Committee on Freedom of Association confines itself to making specific recommendations intended to resolve situations in which violations of the principles of freedom of association by States have been found. The fact that the Committee has taken similar decisions based on the examination of analogous cases has made it possible to establish principles so that it can maintain a unity of criteria on which its conclusions are based.

²⁹ Ibid., pp. 195 and 196.

³⁰ Ibid., p. 196.

The rules of procedure of the Committee on Freedom of Association, which are not complex, allow the Committee, through the rapid communication of comments by the government concerned, to examine cases between two and seven months after the filing of the complaint. The date of the filing of the complaint to a certain extent determines the time that it will take before the Committee examines the case, as the periods between the sessions of the Committee are not of the same duration. The great effectiveness of its procedure is based on the relative rapidity of its examination of cases and the high level of application of its recommendations. The Committee has acquired great authority over the 54 years of its existence, particularly as a result of its independence and the guarantees of impartiality afforded by its procedure. A study commemorating its 50 years of existence has illustrated the extraordinary impact of its decisions.³¹

Complaints can only be filed by governments or employers' or workers' organizations. These organizations have to belong to one of the following categories: national organizations directly interested in the matter; international organizations having consultative status with the ILO; or other international organizations where the allegations relate to matters directly affecting their affiliated organizations.³²

Complaints must be presented to the Committee on Freedom of Association in writing, duly signed by a representative of the organization presenting them. Complaints are made against governments, even where the allegations relate to attacks against leaders of organizations by trade unions or employers. When the Committee receives a complaint, it forwards it to the government so that it can make its comments, and it also requests the complainant to send any additional information that it considers necessary.

³¹ Ibid., p. 197. See, in this respect, Eric Gravel, Isabelle Duplessis and Bernard Gernigon, *The Committee on Freedom of Association: Its impact over 50 years*. ILO, Geneva, 2001.

³² See "Procedures of the Fact-Finding and Conciliation Commission and the Committee on Freedom of Association for the examination of complaints alleging violations of freedom of association", Annex I, in *Digest of decisions and principles of the Freedom of Association Committee*, ILO, 1996.

When examining complaints, the Committee makes conclusions and recommendations as follows: (1) the complaint does not call for further examination as the alleged facts would not constitute an infringement of trade union rights, or the allegations made are purely political in character or are too vague; (2) the government should be requested in a final report to take the necessary measures to resolve the discrepancies identified or certain principles brought to its attention; or (3) more information is required from the government or the complainants, or the government is requested to take certain measures to resolve a specific situation and to provide information in this respect (an interim report). An interim report may accordingly contain certain definitive conclusions and certain interim conclusions while awaiting information or the action that the government is requested to take.

In certain cases, the Committee on Freedom of Association may recommend the referral of the complaint to the Fact-Finding and Conciliation Commission on Freedom of Association, for which the approval of the Governing Body is required. In such cases, if the Governing Body so decides and the government concerned has not ratified the Conventions on freedom of association, the consent of the government is also required. If the Government refuses its consent or does not reply within four months, the Committee may recommend alternative action to the Governing Body to publicize the charges made in the complaint, the comments made by the respective government and its refusal to consent to the investigation of the facts. The procedure followed by the Fact-Finding and Conciliation Commission is similar to the rules usually followed by Commissions of Inquiry (see previous section).

The Committee on Freedom of Association fairly regularly refers the legislative aspects of the cases that it examines to the Committee of Experts on the Application of Conventions and Recommendations.

In accordance with its procedure, the Committee on Freedom of Association may request its Chairperson to establish contact with Government representatives attending the International Labour Conference to discuss with them the reasons for delays in transmitting the observations requested on the cases under examination. The Committee may also recommend such contacts to express its concern at certain

situations, draw attention to the seriousness of certain difficulties and consider means to resolve the situation.

At its session in March 2002, the Committee on Freedom of Association adopted the following decisions in relation to its procedure:³³

For the first time since 1979, the Committee had an in-depth discussion of its procedure taking into account the historical antecedents. It thus touched upon a number of subjects and methods in the light of past experience, both in respect of its procedure strictly speaking and its practice. It made a series of proposals keeping in mind the following objectives:

- to improve the effectiveness and transparency of the procedure;
- to speed up as much as possible the examination of complaints;
- to improve the Committee's working methods;
- to strengthen and improve the follow-up action on its recommendations.

The Committee agreed that several aspects of the procedure and its practice have proven to be globally satisfactory and do not call for major changes. This is the case, in particular, for the applicable rules concerning: receivability of complaints; most of the communications with the parties; length of the procedure; hearing of parties; and on-the-spot missions. It was, nevertheless, the Committee's opinion that a greater effort should be made in respect of the use of preliminary missions and of follow-up missions.

The Committee expressed its desire that certain improvements be made in the presentation of its reports with the aim of facilitating the examination of cases by the Governing Body.

The Committee also considered that greater publicity should be given to its conclusions and recommendations, particularly in cases that are of a particularly grave nature. It requested that the relevant services of the Office follow up upon the wish thus expressed, including with the use of new communication technology.

³³ See 327th Report, paras. 17-26.

The Committee spent a great deal of time on a series of questions justifying, in its view, new proposals of a procedural nature and putting them into practice in order better to achieve the abovementioned objectives.

As concerns the composition of the Committee, it was recalled that the current rules created an imbalance in respect of the Workers' and Employers' groups, the substitute members of which cannot participate, by right, in the work of the Committee, and thus do not receive the various corresponding indemnities. The problem has worsened over recent years due to the increase in the number of complaints and their increasing complexity. It would therefore recommend that the appropriate remedial measures be put in place rapidly, enabling all of the substitute members to participate by right in the work of the Committee. This decision would imply financial consequences (the payment of a per diem to substitute Worker and Employer members) which, in the opinion of the Committee, should be examined by the Programme, Financial and Administrative Committee and by the Governing Body.

As concerns the Government members, the Committee considers that, bearing in mind the rule that its members participate in their personal capacity, it would be desirable for the nominations by the governments of their members to be made by name, which would help to ensure a relative continuity on the Government bench.

In order to ensure some coherence with the rule that nationals of countries concerned by a complaint do not participate in the discussion of these cases, it is proposed that the documents concerning these cases not be communicated to them.

According to an existing rule, the Committee may invite its Chairperson to hold consultations with a governmental delegation during the International Labour Conference, to draw their attention to the seriousness of some problems and to discuss the various means that would allow their resolution. It is proposed to extend this possibility to all sessions of the Governing Body.

The Committee also examined ways to secure, through the intermediary of the Government, information from all the parties affected by the allegations in appropriate cases. The Committee agreed to adopt on a trial basis a procedure which would allow

seeking, as the case may be, the comments of all the parties affected, so that the Government may transmit to the Committee the most exhaustive reply possible. The practical application of this new rule of procedure should not result in a delay concerning recourse to urgent appeals made to governments nor in the examination of cases.

The role of employers' organizations in the procedure

As indicated above, in March 2002, the Committee on Freedom of Association examined ways of obtaining information from all the parties affected by allegations in appropriate cases, through the intermediary of the Government, and agreed to adopt on a trial basis a procedure which would allow it to seek the comments of all the parties affected (particularly enterprises) so that the government can transmit to the Committee the most exhaustive replies possible. Nevertheless, the practical application of this new rule of procedure should not result in delay in having recourse to urgent appeals made to governments nor in the examination of cases.³⁴ In accordance with the new rule of procedure, when a complaint is received by the International Labour Office containing allegations concerning an enterprise, the letter by which the Office transmits the complaint to the government includes a paragraph encouraging it to contact the national organization of employers so as to obtain the view of the enterprise concerned. Similarly, when the Committee examines a case in which it notes that the government has not requested the views of the enterprise involved in the allegations through the employers' organization concerned, the Committee frequently requests the Government to obtain information from the employers' organization so that it can obtain its point of view on the matters at issue, as well as those of the enterprises which have not yet provided information.³⁵

The origin of this new rule corresponds to the desire expressed by various employers' organizations that the rules of due process be

³⁴ See 327th Report, para. 26.

³⁵ See, for example, 333rd Report, Case No. 2275 (Nicaragua), para. 787; and 336th Report, Case No. 2259 (Guatemala), para. 46.

followed properly, with particular reference to the right of defence of the enterprises concerned by the allegations in any case. In practice, this new rule or practice corresponds to unsatisfactory situations, as occurred in a case relating to Colombia, in which the Committee examined the case without having received the Government's observations, even though it had postponed the examination of the case on three occasions, and called for the reinstatement of a substantial number of dismissed workers. The Constitutional Court of Colombia subsequently found the decisions of the ILO's supervisory bodies to be binding and the enterprise concerned had to reinstate the many workers dismissed without being heard during the Committee's procedure.

Another antecedent for the new rule of procedure was the case of Lan Chile (shortly before the adoption of the new rule), in which the Government's reply omitted certain essential elements relating to the issues raised. The enterprise concerned subsequently provided its views on the facts and supplied new information through its employers' organization and the Government, which made it possible for the Committee to take these new elements into account in its conclusions when re-examining the case.

A further antecedent for the new rule was a case filed by trade union organizations against the Government of Guatemala concerning alleged violations of trade union rights in certain ranches. The Committee had already examined the case when the employers' federation of Guatemala filed a new case as a means of putting forward its viewpoint, in which the Committee addressed from another point of view certain of the matters raised in the case lodged by the trade union organizations.

A number of examples are annexed of enterprises which have forwarded their comments to the Committee on Freedom of Association through the Government on complaints in which they were involved. As may be noted from these examples, the Committee has taken duly into account in its conclusions the information and comments provided by such enterprises.

The complete procedure of the Committee on Freedom of Association and of the Fact-Finding and Conciliation Commission on Freedom of Association is also annexed.

4. DIRECT CONTACTS AND OTHER MISSIONS

Direct Contacts Missions

Direct Contacts Missions are undertaken in support of the procedures of the supervisory bodies (Committee of Experts, Committee on the Application of Standards, Committee on Freedom of Association and ad hoc committees established under article 24 of the Constitution). They consist of sending a representative of the ILO Director-General to a country involved in a supervisory procedure with a view to seeking a solution to the difficulties encountered in relation to the application of ratified Conventions or other ILO standards, including the Constitution, or compliance with the recommendations of the supervisory bodies. When the issues raised concern questions of practice, the Direct Contacts Mission focuses in particular on determining the situation in practice. Direct contacts have also been used on many occasions to provide countries with technical assistance in the form of advice on the type of measures to be taken and assistance in the drafting of amendments to the national legislation, as well as in the establishment of procedures to facilitate compliance with the obligations deriving from the ILO's standards-related activities. Over 100 Direct Contacts Missions have been undertaken since they began to be carried out in 1969. The representative of the Director-General may be an ILO official or an independent person appointed by the Director-General (magistrates of

supreme courts, professors, a member of the Committee of Experts, etc.) and her or his mission consists of ascertaining the facts, especially where the problems under examination relate to the application in practice of national and international standards or allegations of violations of trade union rights, as well as examining on the spot the possibilities for resolving the problems in question. In especially difficult cases, Direct Contacts Missions have been led by the Director-General in person. Where necessary, the authorities are requested to ensure that the persons heard are not victims of reprisals due to the statements that they make. The representative of the Director-General and the composition of the Mission have to give all the necessary guarantees of objectivity and impartiality and, following the completion of the Mission, a report has to be submitted to the corresponding supervisory body. Once this body has examined the report and reached its conclusions, the report of the Mission may be forwarded to the government and to the confederations of workers and employers.

It should be noted that Direct Contacts can only be established at the invitation of the government concerned, or at least with its consent. The government may request them directly, or they may be proposed by the supervisory bodies. The representative of the Director-General must be able to interview freely all the parties concerned, including for example trade unionists in prison or persons who could provide evidence, so as to be fully and objectively informed of all the aspects of the case or the situation in question. The principal counterpart of the Mission is normally the Ministry of Labour and the confederations of workers and employers, although with a certain regularity, and depending on the nature of the problems raised, the Mission may interview the legislative authorities, the judicial authorities or even the Head of State. The Direct Contacts procedure has proven to be a valuable tool for achieving progress in the application of international labour standards.³⁶ In many cases, where the legislation is incompatible with ratified Conventions, it is

³⁶ See ILC, 73rd Session, Report III (Part 4A), of the Committee of Experts on the Application of Conventions and Recommendations, paras. 28-30 and Digest of decisions and principles of the Freedom of Association Committee of the Governing Body, Fourth (revised) edition, 1996, Annex I, paras. 65 and 65bis.

discussed with the Government and draft amendments are prepared to resolve the problems. The national organizations of employers and workers are also associated with this process through interviews with the Mission, as well as through a tripartite meeting. The draft texts or proposals prepared by the Mission are often discussed by the respective parliamentary commissions.

In many cases, Direct Contacts Missions, particularly in cases of important collective disputes or problems relating to the violation of trade union rights that have been referred to the Committee on Freedom of Association, have the objective of achieving reconciliation between the parties (the government, workers and employers). For this purpose, the Mission endeavours, on the basis of the ILO's standards and principles, to propose acceptable solutions on which consensus can be reached between the parties.

With regard to the question of whether Direct Contacts Missions result in a suspension of the examination of a case by the supervisory bodies, and more particularly whether they prevent the discussion of a case by the Conference Committee on the Application of Standards, it should be noted that, in the first place, the Committee of Experts on the Application of Conventions and Recommendations, when it first established the direct contacts method, envisaged that the supervisory bodies would interrupt their examination of the case for a certain reasonable period of time to take into account the results of the Mission. Nevertheless, this rule has never been applied in the field of freedom of association. It should also be noted that the suspensive effect on the procedures does not arise if the government requests the Mission a sufficient period before the session of the respective supervisory body. The problem may arise, however, where a government requests that the mission be held after the session of the Committee of Experts. Taking into account the practice followed in recent years when cases have been referred to the Committee on the Application of Standards, even where Direct Contacts Missions have been carried out recently, it would appear that the rule respecting their suspensive effect has fallen into abeyance. Another situation arises when a government informs the Committee of Experts that a Direct Contacts Mission will be held shortly, in which case the Committee may decide, if it considers it appropriate, not to make

comments concerning the country concerned, or merely to make an observation recalling the outstanding points.

Direct Contacts are an effective means of dialogue, negotiation and establishing the facts, without amounting to a form of international inquiry in which the representatives of the ILO play the role of inspectors. The objective is to create a climate of confidence so as to be able to find a rapid and positive solution to the problems. The duration of the Direct Contacts Mission depends on the type of problems to be examined; it may last several days, one week or in certain specific cases even longer.

In brief, recourse to Direct Contacts Missions has considerably strengthened the ILO's supervisory procedures and helped to make them more effective.³⁷

Other missions

Some missions have the objective of determining the extent to which a particular country is in a position to ratify a specific ILO Convention. This consists of determining the aspects of national law and practice which are in conflict with the provisions of the Convention concerned so that the authorities can adopt the necessary corrective measures for its ratification. Nevertheless, there is no obligation for the law to be in conformity with a Convention that a country is intending to ratify. There are many examples of countries in which the provisions of the Constitution or of laws were in contradiction with the provisions of

³⁷ Most of the information and ideas contained in this section are drawn from the following publications: Bernard Gernigon, "La liberté syndicale et les missions sur place de l'OIT", pp. 107-120, and Alberto Odero and María Marta Travieso, "Le Comité de la liberté syndicale (II): Composition, procédure et fonctionnement", pp. 195-216, both in *Les normes internationales du travail: Un patrimoine pour l'avenir: Mélanges en l'honneur de Nicolas Valticos*, ILO, Geneva, 2004; Nicolas Valticos, "Une nouvelle forme d'action internationale: Les contacts directs de l'OIT en matière d'application de conventions et de liberté syndicale", in *Annuaire français du droit international*, Vol. 27, 1981, pp. 477-489; and Geraldo von Potobsky, "On-the-spot visits: An important cog in the ILO's supervisory machinery", in *International Labour Review*, Vol. 120, 1981, pp. 581-596.

ratified Conventions and which then proceeded to make the necessary modifications. There are countries which choose to ratify an instrument when they have overcome all the problems of compatibility, while others leave the amendment of incompatible national provisions until after ratification.

Other types of missions are technical cooperation missions. These are missions through which, based on collaboration between the government authorities and a representative of the ILO, it is attempted to resolve legislative or other problems encountered by States. These missions provide an opportunity for the various contributions to be pooled with a view to achieving solutions, for example by providing information on comparative legislation, on the opinions of the supervisory bodies in relation to certain subjects, or on the advantages of certain techniques for resolving problems.

In 1999, a new formula for contacts with governments was initiated in relation to the Republic of Korea. Instead of appointing an independent person as the representative of the Director-General, the Governing Body decided to send a high-level tripartite mission composed of a Government representative, an Employer representative and a Worker representative who were members of the Governing Body, with the latter two also being members of the Committee on Freedom of Association. The mission was appointed in the context of a complaint filed against the country alleging violations of freedom of association. The objective was to achieve a solution to serious problems of multiple origins in which the presence of representatives of employers and workers could be useful.

In 1999, once again in Korea, a follow-up mission to the high-level tripartite mission was undertaken, and on this occasion the mission was led by the Chairperson of the Committee on Freedom of Association. The objective was to assess the progress achieved in the application of the recommendations of the Committee on Freedom of Association, taking into account the conclusions of the above tripartite mission, as well as to assist the Government to explore ways and means of overcoming obstacles to the application of those recommendations.

Finally, it should be emphasized that the procedure of the Committee on Freedom of Association provides for preliminary contacts in particularly serious cases. When a complaint containing allegations of an especially serious nature has been received, and with the prior approval of the Chairperson of the Committee, the Director-General may appoint a representative with the mandate to carry out preliminary contacts for the following purposes: to convey to the competent authorities in the country the concern to which the events described in the complaint have given rise; to explain to the authorities the principles of freedom of association involved; to obtain from the authorities their initial reaction, as well as any comments and information with regard to the matters raised in the complaint; to explain to the authorities the special procedure in cases of alleged infringements of trade union rights, and in particular, the direct contacts method; and to request and encourage the authorities to communicate as soon as possible a detailed reply containing the government's observations on the complaint.

5. INTERVENTIONS BY THE DIRECTOR-GENERAL IN RELATION TO GOVERNMENTS

When governments and employers' and workers' organizations send communications to the ILO signed by authorized representatives denouncing presumed violations of ILO standards that affect them and requesting the Director-General to contact the government concerned regarding such questions, if the Director-General considers it appropriate to do so, he addresses the government concerned, sends it a copy of the communication received in order to obtain comments and, as the case may be, expresses concern about the events denounced, recalls some of the Organization's basic principles and suggests taking measures to remedy the situation. When the Director-General receives the government's response, he then sends it to the organization or government which raised the matter. Although this is not a supervisory procedure for the application of ILO Conventions and Recommendations, but rather an informal procedure without publicity, the ILO's interventions in relation to governments can be of great utility and effectiveness, especially in emergency situations (death sentences, disappearances, detentions of trade union or employers' leaders in relation to their activities as such, etc.). As no particular formalities are required, the Director-General can

intervene quickly and it is guaranteed that the matter in question will be known formally in the international sphere.³⁸ The International Organization of Employers and other employers' organizations have sought the intervention of the Director-General in relation to a number of governments with a certain frequency. On occasions, such interventions have given rise to missions by a representative of the Director-General, or even by the Director-General himself.

A successful example of intervention by the Director-General occurred in relation to the President of Chile in 1973 with regard to the threat of the dissolution of two important employers' organizations (please consult the relevant documentation on the CD-ROM appended to this publication). Some years later, similar interventions led to the release of employers' leaders and the cessation of hostile acts against leaders of employers' organizations in Nicaragua.

³⁸ ILO law on freedom of association: Standards and procedures, *op. cit.*, p. 125.

Examples of successful interventions by the Director-General of the ILO for the benefit of employers' organizations

Chile: In October 1972, the Government issued a Decree annulling the legal personality and ordering the dissolution of certain employers' organizations, and in particular of the Confederation of Production and Commerce (CPC) and the Manufacturing Promotion Society (SOFOFA). The reason given for such an annulment was the alleged grave failure of these institutions to comply with their strictly occupational objectives, accompanied by acts of sedition. This led employers to wonder whether freedom of association as proclaimed by the ILO did not afford as much protection to employers as to workers. Is it legitimate to annul the legal personality of employers' organizations by administrative authority? The President of the IOE, Gullmar Bergenström, made an urgent appeal to the then Director-General of the ILO, Wilfred Jenks, who interceded with President Allende concerning the possible annulment by administrative authority of the legal personality of these prestigious Chilean employers' organizations. The Director-General informed the Chilean authorities that the principles of freedom of association also protect employers. The consequence of this intervention was the suspension of any action for the annulment of the legal personality of the CPC and SOFOFA.

Nicaragua: During the 1980s, the IOE made many complaints to the Committee on Freedom of Association concerning violations of the rights of employers in Nicaragua. On various occasions, it sought the urgent intervention of the Director-General of the ILO, Francis Blanchard. Emphasis should be given to the intervention of Mr Blanchard on the occasion of the detention of Mr Enrique Dreyfus, President of the peak employers' organization in Nicaragua (COSEP) and its Vice-Presidents, Gilberto Cuadra, Benjamin Lanzas and Enrique BolaZos. In view of the gravity of the situation described by the IOE, Mr Blanchard rapidly contacted the Government of Nicaragua requesting it to indicate the measures taken for the immediate release of the detained employers' leaders. A little later, a further communication from Mr Blanchard urged the Government to accept a visit by a high-level ILO official to discuss the conditions of the detention of these employers' leaders. Partly as a result of this intervention, and the international pressure exerted by the IOE, the employers' leaders concerned were released a few weeks later.

6. THE CREDENTIALS COMMITTEE

Interest for employers: this procedure provides an opportunity for Employer delegates to raise objections or make complaints when Employer delegates to the International Labour Conference appointed by the government have not been nominated with the agreement of the most representative employers' organizations or when member States do not pay the travel expenses of Employer delegates or technical advisers.

The credentials of delegates and technical advisers to the International Labour Conference are examined by the Credentials Committee of the Conference, which is composed of three members (one Government, one Employer and one Worker).

The Credentials Committee submits reports to the Conference on objections which have been raised and the Conference takes the final decision on whether “objections” relating to the credentials of delegates (an issue that is very frequently related to the representativeness of the national organizations of which they are members) are well founded.³⁹ The Credentials Committee also examines “complaints”, particularly when the government has not paid the travelling and subsistence

³⁹ Nicolas Valticos, *Droit international du travail*, op. cit.

expenses of Employer or Worker delegates or technical advisers. It also addresses situations of serious and clear numerical imbalances between the technical advisers of employers and workers, on the one hand, and those of Government delegates, on the other. It is not common, even where serious problems arise, for the Credentials Committee to recommend that the Conference should refuse admission to delegates or technical advisers. Nevertheless, its reports are very clear, and often energetic, requesting governments to resolve the situation by the next Conference, particularly in cases where Employer or Worker delegates are not appointed with the agreement of the most representative organizations, and it decides when measures have to be taken on the problems arising in relation to a country.

The relevant provisions of the ILO Constitution and the Standing Orders of the Conference relating to the Credentials Committee are set out below.

ILO CONSTITUTION

Article 3

1. The meetings of the General Conference of representatives of the Members shall be held from time to time as occasion may require, and at least once in every year. It shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members.
2. Each delegate may be accompanied by advisers, who shall not exceed two in number for each item on the agenda of the meeting. When questions specially affecting women are to be considered by the Conference, one at least of the advisers should be a woman.
3. Each Member which is responsible for the international relations of non-metropolitan territories may appoint as additional advisers to each of its delegates:

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- a) persons nominated by it as representatives of any such territory in regard to matters within the self-governing powers of that territory; and
 - b) persons nominated by it to advise its delegates in regard to matters concerning non-self-governing territories.
4. In the case of a territory under the joint authority of two or more Members, persons may be nominated to advise the delegates of such Members.
 5. The Members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries.
 6. Advisers shall not speak except on a request made by the delegate whom they accompany and by the special authorization of the President of the Conference, and may not vote.
 7. A delegate may by notice in writing addressed to the President appoint one of his advisers to act as his deputy, and the adviser, while so acting, shall be allowed to speak and vote.
 8. The names of the delegates and their advisers will be communicated to the International Labour Office by the government of each of the Members.
 9. The credentials of delegates and their advisers shall be subject to scrutiny by the Conference, which may, by two-thirds of the votes cast by the delegates present, refuse to admit any delegate or adviser whom it deems not to have been nominated in accordance with this article.

Article 13

1. The International Labour Organization may make such financial and budgetary arrangements with the United Nations as may appear appropriate.
2. Pending the conclusion of such arrangements or if at any time no such arrangements are in force:
 - a) each of the Members will pay the travelling and subsistence expenses of its delegates and their advisers and of its representatives attending the meetings of the Conference or the Governing Body, as the case may be;
(...)

Standing Orders of the International Labour Conference

These standing orders, with the amendments made in 2004, contain the following provisions relating to the Credentials Committee.

The Conference shall, on the nomination of the Selection Committee, appoint a Credentials Committee consisting of one Government delegate, one Employers' delegate and one Workers' delegate. The Credentials Committee shall examine: the credentials of persons accredited to the Conference; any objection relating to the credentials of delegates and their advisers or to failure to deposit credentials of an Employers' or Workers' delegate; any complaint of non-observance of paragraph 2(a) of article 13 of the Constitution; the monitoring of any situation with regard to observance of the provisions of article 3 or article 13, paragraph 2(a), of the Constitution about which the Conference has requested a report.

The credentials of delegates and their advisers and of all other accredited members of the delegation of a member State shall be deposited with the International Labour Office at least 15 days before the date fixed for the opening of the session of the Conference.

A brief report upon these credentials shall be drawn up by the Chairman of the Governing Body. It shall, with the credentials, be made available for inspection on the day before the opening of the session of the Conference and shall be published on the day of the opening of the session.

The Credentials Committee appointed by the Conference in pursuance of Article 5 of the Standing Orders of the Conference shall consider the credentials, as well as any appeal, objection, complaint or report concerning them.

Objections

An objection shall not be receivable in the following cases:

- if the objection is not lodged with the Secretary-General within 72 hours from 10 a.m. of the date of publication of the official list of delegations on the basis of which the objection to the inclusion or exclusion of the name and function of a person is submitted. If the objection is based on a revised list, the time limit shall be reduced to 48 hours;
- if the authors of the objection remain anonymous;
- if the author of the objection is serving as adviser to the delegate to whose nomination objection is taken;
- if the objection is based upon facts or allegations which the Conference, by a debate and a decision referring to identical facts or allegations, has already discussed and recognized to be irrelevant or devoid of substance.

The procedure for the determination of whether an objection is receivable shall be as follows:

- the Credentials Committee shall consider in respect of each objection whether on any of the grounds set forth the objection is irreceivable;
- if the Committee reaches a unanimous conclusion concerning the receivability of the objection, its decision shall be final;
- if the Credentials Committee does not reach a unanimous conclusion concerning the receivability of the objection, it shall refer the matter to the Conference which shall, on being

furnished with a record of the Committee's discussions and with a report setting forth the opinion of the majority and minority of its members, decide without further discussion whether the objection is receivable.

The Credentials Committee shall consider whether every objection deemed to be receivable is well founded and shall as a matter of urgency submit a report thereon to the Conference.

If the Credentials Committee or any member thereof submits a report advising that the Conference should refuse to admit any delegate or adviser, the President shall submit this proposal to the Conference for decision, and the Conference, if it deems that the delegate or adviser has not been nominated in conformity with the requirements of the Constitution, may, in accordance with paragraph 9 of article 3 thereof, refuse by two-thirds of the votes cast by the delegates present to admit the delegate or adviser. Delegates who are in favour of refusing to admit the delegate or adviser shall vote "Yes"; delegates who are opposed to refusing to admit the delegate or adviser shall vote "No".

Pending final decision of the question of his admission, any delegate or adviser to whose nomination objection has been taken shall have the same rights as other delegates and advisers.

If the Credentials Committee considers unanimously that the issues raised by an objection relate to a violation of the principles of freedom of association which has not already been examined by the Governing Body's Committee on Freedom of Association, it may propose referral of the question to that Committee. The

Conference shall decide, without discussion, on such proposals for referral.⁴⁰

When, in the light of the examination of an objection, the Credentials Committee unanimously considers that it is necessary to monitor the situation, it may propose this to the Conference, which shall decide, without discussion, on the proposal. If it is so decided, the Government concerned shall report on such questions that the Credentials Committee judges necessary to the subsequent session of the Conference when it submits the delegation's credentials.

Complaints

The Credentials Committee may consider complaints that a Member has failed to comply with paragraph 2(a) of article 13 of the Constitution where: the Member is alleged to have failed to pay the travelling and subsistence expenses of one or more of the delegates that it has nominated in accordance with article 3, paragraph 1, of the Constitution; or the complaint alleges a serious and manifest imbalance as between the number of Employer or Worker advisers whose expenses have been covered in the delegation concerned and the number of advisers appointed for the Government delegates.

⁴⁰ At its session in March 2004, the Committee on Freedom of Association adopted the following text: The Committee noted that the Credentials Committee found itself before a particularly disturbing situation: the circumstances in which governments nominated Employers' and Workers' delegates appeared to reveal serious breaches of the independence of employers' or workers' organizations. The Committee equally noted that during the discussion of this question within the LILS Committee in November 2003 (see document GB.288/10/1, paragraphs 65-69), a great majority of Committee members were in favour of the Credentials Committee referring cases to the Committee on Freedom of Association subject to the following conditions:

- the case should not yet have been examined by the Committee on Freedom of Association;
- the decision by the Credentials Committee to refer a case should be unanimous;
- the referral proposal should be endorsed by the Conference.

Taking into account these elements, the Committee decided that it would examine on an experimental basis any objection raising questions which have not yet been examined by the Committee, relates to a violation of freedom of association principles and has been referred to it by the Conference pursuant to a unanimous proposal by the Credentials Committee. The text of the objection thus referred would be sent to the government for its observations prior to any examination (see 333rd Report of the Committee on Freedom of Association, paras. 11-13).

A complaint shall not be receivable if the complaint is not lodged with the Secretary-General of the Conference before 10 a.m. on the seventh day following the opening of the Conference and the Committee considers that there is insufficient time to deal with it properly; or if the complaint is not lodged by an accredited delegate or adviser alleging non-payment of travel and subsistence expenses in the circumstances set out under (a) or (b) of paragraph 1 or by an organization or person acting on his or her behalf.

The Credentials Committee shall, in its report, present to the Conference any conclusions that it has unanimously reached on each complaint considered by it.

When, in the light of the examination of an objection, the Credentials Committee unanimously considers that it is necessary to monitor the situation, it may propose this to the Conference, which shall decide, without discussion, on the proposal. If it is so decided, the Government concerned shall report on such questions that the Credentials Committee judges necessary to the subsequent session of the Conference when it submits the delegation's credentials.

Monitoring

The Credentials Committee also monitors any situation relating to respect by a member State for the provisions of articles 3 or 13(2)(a) of the Constitution with regard to which the Conference has requested the government concerned to report. With this objective, the Committee shall report to the Conference on the evolution of the situation.

Finally, it should be noted that an explanatory note has been published on the rules governing the credentials of delegates to the Conference, which is appended to this publication. The reports of the Credentials Committee for the past five years concerning objections and complaints made by Employer delegates are also appended.

7. SUMMARY OF COMPLAINTS AND REPRESENTATIONS MADE BY THE IOE AND ITS MEMBER ORGANIZATIONS TO THE ILO SUPERVISORY BODIES AND THE CONCLUSIONS ADOPTED

Cases submitted to the Committee on Freedom of Association

Albania

Case No. 2345

The complaint was presented by the Council of Employers' Organizations (KOP) on 11 May 2004.

The complainant alleged that the Government interfered in its activities by trying to set up and actively supporting a competing organization which used the same name, thus leading to the refusal of its registration as a confederation by the Tirana Court of Justice and the granting of registration to the new organization.

In the Committee's view, this case turned on a conflict between two rival executive committees of the same organization. It related to allegations of government interference in the conflict by favouring one executive committee over another; as a result, the executive committee allegedly favoured by the Government obtained the registration of the KOP as a confederation, to the detriment of the other committee (the complainant).

The Committee recalled that when two executive committees each proclaim themselves to be the legitimate one, the dispute should be settled by the judicial authority or an independent arbitrator and not by the administrative authority. In the case of internal dissension within one and the same [employers'] federation, by virtue of Article 3 of Convention No. 87, the only obligation upon the Government is to refrain from any interference which would restrict the right of occupational organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes, and to refrain from any interference which would impede the lawful exercise of that right. The Committee therefore considered that it should be up to the courts to decide the question of the leadership and representation of KOP, taking into account the result of the elections which took place during the general assembly of the KOP in January 2004, and it requested the Government to refrain from any action which could give rise to interference in this framework.

Argentina

Case No. 1455

The complaint was presented by the Industrial Union of Argentina on 9 June 1988.

The allegations referred to the alleged violation by Act No. 23551 of the requirements of ILO Convention No. 87, to the prejudice of the necessary balance between the social partners, thereby resulting in discrimination against employers.

The complaint listed a series of provisions which, in the view of the complainant organization, were contrary to the Convention. The law compromised the rights of organization and management, prejudiced the efficiency and productivity of enterprises, and particularly small and medium-sized enterprises, and the growth of production, without in so doing benefiting the workers; established privileges for trade union representatives which were converted into real trade union inviolability, thereby undermining the right of equality before the law not only in relation to the enterprise, but also the other workers; it did not envisage the imperious need to modernize the provisions governing industrial relations, nor did it contribute to effective dialogue between the representatives of the factors of production, maintaining systems which were outdated in the modern world and which constituted real obstacles to the normal functioning of working life, and overlooking the manner in which modern legislation contributed to social peace, growth and redistributive justice.

In a communication dated 4 July 1988, the Argentine Chamber of Construction also presented a complaint relating to the same legislation.

The Government provided a reply, but it was not examined as to the substance. The Committee noted from the report of the Direct Contacts Mission carried out from 19 to 23 March 1990 that, upon its arrival in Buenos Aires, it was informed that a document had been signed on 16 March 1990 in which the Industrial Union of Argentina called on the ILO to suspend proceedings with respect to the complaints it had presented (Case No. 1455), and the Ministry of Labour and Social Security undertook to support this request as it was intended to lead the way to the direct settlement of the issues raised by the parties concerned (through a special joint committee), without prejudice to the right of the parties to inform the ILO of the outcome.⁴¹

⁴¹ See 274th Report, paras. 2-20.

Australia

Case No. 1559

The Confederation of Australian Industry (CAI) presented a complaint against the Government of Australia on 22 November 1990 and the International Organization of Employers (IOE) expressed its support for the complaint in a letter dated 26 November 1990.

The allegations related to two aspects of the Industrial Relations Legislation Amendment Bill, passed by the Australian Parliament on 20 December 1990. The complainant employers' association alleged that the 10,000 membership requirement for the registration of employers' and workers' organizations contained in section 189 of the federal Industrial Relations Act was too high a threshold and infringed the principles of freedom of association. It also alleged that the discretion envisaged in sections 193 and 193A to allow the continued registration of an already registered, but "small", organization was not a sufficient guarantee of freedom of association. In addition, it pointed to the difficulties that it, as an employer body, would have in working under these new provisions in practice.

The Government affirmed that the legislation was optional and, if organizations could not meet its requirements, they were entirely free to operate outside the federal industrial relations system.

The Committee concluded that the 10,000 member threshold for federal registration could influence unduly the workers' free choice of union to which they wished to belong. It considered that an which had been registered at the federal level, in the same way as one which had not, should benefit from the same guarantees and asked the Government to take measures so that it was not a requirement that a union have 10,000 members or demonstrate special circumstances to claim access to the benefits deriving from registration under the federal system.

Finally, the legislation was amended to provide for new criteria for federal registration: the minimum requirement for the registration of an

employee association was reduced to a membership of 100. The Committee took note of this information with interest.⁴²

Bosnia and Herzegovina

Case No. 2140

The complaint was presented by the Employers of the Federation of Bosnia and Herzegovina and the Employers' Confederation of Republika Srpska (SAVEZ POSLODAVACA) in communications dated 14 and 19 June 2001.

The complainants alleged that employers' confederations could not obtain registration and did not engage in consultations and that they did not engage in collective bargaining at the level of the Republic.

The Government did not provide its observations on this case, but even so the Committee requested it to initiate discussions with the complainants (Employers of the Federation of Bosnia and Herzegovina and the Employers' Confederation of Republika Srpska) as soon as possible with a view to finalizing the registration process for both organizations under a status conducive to the full and free development of their activities as employers' organizations. The Committee also requested the Government to bring its legislation concerning the registration of employers' organizations into conformity with Convention No. 87, to take all necessary measures urgently to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers' and workers' organizations, in conformity with Convention No. 98, and it drew the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case.⁴³

⁴² See 281st Report, paras. 326-364; 284th Report, paras. 200-263; and 292nd Report, para. 16.

⁴³ See 329th Report, paras. 282-298. The Committee of Experts noted in particular that it was impossible to obtain the registration and legal recognition of employers' confederations throughout the Republic

Brazil

Case No. 2427

The complaint was presented by the National Confederation of Tourism by a communication in June 2005.

The allegations refer to the lack of recognition of the National Confederation of Tourism by the authorities as the highest level entity in the tourism and hotel sector.

The complaint had not yet been examined by the Committee on Freedom of Association when the present study was finalized.

Former Yugoslav Republic of Macedonia

Case No. 2133

The complaint was presented by the Union of Employers of Macedonia (UEM) on 11 June 2001.

The complainant alleged that it could not obtain registration or engage in collective bargaining. The complainant stated that legislation in the area of industrial relations did not provide any indication on the registration of employers' organizations. In the absence of registration, the complainant was unable to operate as an employers' organization. Moreover, it was not invited by the Government to attend seminars organized in cooperation with the ILO.

of Bosnia and Herzegovina. Moreover, the Committee of Experts noted that in the Federation of Bosnia and Herzegovina and the Republika Srpska, employers' confederations could only register as "citizens' associations", which seriously hindered the commencement of their activities. The Committee of Experts recalled that the Convention covers both employers and workers and that, under Article 2, employers shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. The Committee of Experts requested the Government to take all necessary measures urgently to amend the legislation so as to guarantee that employers' confederations were able to register under a status conducive to the full and free development of their activities as employers' organizations in both the Republic of Bosnia and Herzegovina and in its two Entities. The Committee also requested the Government to indicate the current status of the Employers of the Federation of Bosnia and Herzegovina and the Employers' Confederation of Republika Srpska (SAVEZ POSLODAVACA).

In relation to this case, the Committee requested the Government to initiate discussions with the complainant with a view to finalizing the registration process of the complainant under a status that corresponded to its objectives as an employers' organization. The Committee also requested the Government to take all the necessary measures to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers' and workers' organizations in conformity with Convention No. 98 and it drew the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the case. In the follow-up to the Case, the Government provided information indicating that draft legislation was under preparation for the recognition of employers' organizations and that a founding assembly had been held and a request submitted for registration in the register of associations of citizens and foundations. The application was approved by the competent authority. The Committee requested the Government to indicate whether this registration referred to the complainant, as it had not specified in its communications whether the authorization referred to the UEM. It once again requested the Government to take all necessary measures to ensure the exercise of the right to collective bargaining.⁴⁴

Guatemala

Case No. 2021

The complaint was presented by the International Organization of Employers (IOE), also acting on behalf of the Coordinating Committee of Agricultural, Industrial and Financial Associations (CACIF), on 21 April 1999.

⁴⁴ See 329th Report, paras. 535-546; 333rd Report, paras. 56-60; and 335th Report, paras. 88-92.

The complainants alleged that the Government had permitted the occupation of, and damage to, three banana plantations by workers and other persons led by the trade union SITRABI, who had used force and coercion, taking possession of vehicles and installations of two plantations (Mopá and Panorama), invaded another (Paraíso), meeting with the resistance of the workers, who were harassed and threatened and not allowed to leave, as the intruders had closed off the access roads, and that these incidents had caused major damage to private property. They also alleged that the Government had not respected the orders to evacuate the occupied plantations, with the exception of one instance in which there were an insufficient number of police officers present and the necessary reinforcements had not been requested, and that hundreds of people had become unemployed, private property rights violated, as well as freedom of movement and of work, with a consequent loss of income for the country amounting to millions of dollars.

The Committee deplored the general climate of violence in this dispute. It reminded the Government that, by virtue of Article 8, paragraph 1, 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.” In these circumstances, the Committee profoundly deplored the action taken by certain workers which, according to the complainant, constituted criminal acts against individual freedoms, property rights and the freedom to work, together with threats and coercion. The Committee recalled 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.” The Committee considered that the occupation of plantations by workers and other persons, particularly where acts of violence were involved, was contrary to Article 8 of Convention No. 87.

The Committee requested the Government in future to enforce the evacuation orders pronounced by the judicial authorities whenever criminal acts were committed on plantations or at places of work in connection with industrial disputes.⁴⁵

⁴⁵ See 323rd Report, paras. 310-326.

Case No. 2167

The complaint was presented by the International Organization of Employers (IOE) on 21 December 2001.

The complainant alleged, on behalf of itself and the Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations (CACIF), that the Government of Guatemala had taken repressive measures against Guatemalan employers and their leaders, with a view to intervening in, restricting and hindering the freedom of association of employers in defence of their interests and in exercise of the right to peaceful demonstration. The repressive measures included the physical and psychological harassment of Guatemalan employers, targeting their leaders in particular. In particular, the complainant alleged a lack of dialogue by the Government with employers in official forums on matters such as the determination of the minimum wage in agriculture, the examination of the draft code of labour procedure (both of which had been the subject of agreements between workers and employers) and the refusal of the Government to endeavour to reach a consensus on taxation policies.

The Committee emphasized that employers' and workers' organizations should be consulted fully by the authorities on matters of mutual interest, including the preparation and application of legislation affecting their interest and the determination of minimum wages. This helped to give the laws, programmes and measures adopted or applied by public authorities a firmer justification and to ensure that they were well respected and successfully applied. The Committee indicated that the Government should seek general consensus as much as possible, given that employers' and workers' organizations should be able to share in the responsibility of securing the well-being and prosperity of the community as a whole. This was particularly important in view of the growing complexity of the problems faced by societies. No public authority could claim to have all the answers, nor assume that its proposals would fully achieve all of its objectives.

The Committee further emphasized the importance of consultations taking place in good faith, confidence and mutual respect, and of the parties having sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise. The Committee requested the Government to take these principles into account in relation to social and economic matters, particularly with regard to setting

minimum wages, drafting the code of labour procedure and developing tax laws, and to ensure that it attached the necessary importance to agreements reached between workers' and employers' organizations. The Committee underlined the importance that it attaches to the principle of consultation and cooperation between public authorities and employers' and workers' organizations at the industrial and national levels and drew attention to the provisions of the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113).

With regard to the acts of harassment and repression of employers due to the stoppage of activity in the manufacturing sector (the Minister of Labour's accusation against the executive committee of CACIF of the crime of insurrection; the IOE sent press cuttings to support its allegation in this respect), the Committee noted the Government's observations on the various aspects of the complaint (accusation of CACIF leaders of the crime of insurrection, labour inspections of enterprises, a smear campaign against the employers' leader Mr. Briz, harassment of Mr. Briz), but observed that they diverged from the allegations.

Nevertheless, the Committee noted that the complainant had transmitted a resolution of the Human Rights Procurator finding that there had been violations of the human rights of dignity and security resulting from abuse of authority and threats and intimidation against the President of the Chamber of Commerce of Guatemala, Mr. Jorge Eduardo Briz Abularach, and the flyers and posters distributed to the Guatemalan people with a view to damaging his image. The Committee awaited the findings of the judicial authorities on these issues. The Committee deplored the harassment and intimidation of employers and drew the Government's attention to the fact that employers' and workers' organizations must be allowed to conduct their activities in a climate that is free from pressure, intimidation, harassment, threats or action to discredit them or their leaders, including the adulteration of documents. The Committee requested the Government to ensure respect for this principle in future.

Finally, the Committee requested the Government to keep it informed of any judicial decisions taken with regard to this case.⁴⁶

Iraq

Case No. 1556

The complaint was presented by the Trade Unions International of Public and Allied Employees in communications dated 17 September and 23 October 1991. The International Organization of Employers (IOE) presented a complaint alleging violations of freedom of association in a communication dated 8 January 1991.

The allegations related to: (a) the dissolution of all workers' and employers' organizations in the country, with the consequence that their leaders were forced to flee or work clandestinely; (b) the occupation and/or destruction of the premises of occupational organizations (including the Workers' Education Institute), their property and assets, the confiscation of union bank accounts and the banning of union publications; (c) the deaths of three trade union leaders (Messrs. Ali Mahdi Al Ajami, Nasser Moubarak Al Faraj and M. Ramadan Al Arbi); and (d) the arrest and/or disappearance of a total of 23 named trade unionists (three listed in a letter of 18 December 1990, three listed in a letter of 28 December 1990 and 17 in a communication of 25 January 1991).

Neither of the Government's replies provided specific responses to the detailed allegations concerning named union leaders and members.

At the outset, the Committee expressed regret that, apart from these brief communications suggesting that the case need no longer be discussed in view of the Iraqi withdrawal from Kuwait, the Government had not sent detailed responses to the many serious allegations listed by both the Kuwait workers' and employers' organizations and the Kuwait Government itself. The Committee recalled the importance for

⁴⁶ See 328th Report, paras. 265-304; and 330th Report, paras. 100-102.

governments of formulating full and detailed replies so as to allow a thorough examination of the allegations brought against them.

The Committee emphasized the seriousness of the allegations made in this case.

The Committee noted that, according to the complainants, all workers' and employers' organizations in Kuwait were dissolved after the invasion and their leaders forced to flee the country or to work clandestinely. The Government was silent on this issue. However, it appeared that following the end of hostilities, the organizations of the country had been able to resume functioning and return to the territory. The Committee drew the attention of the Government of Iraq to the principle that measures of suspension or dissolution by the administrative authority constitute serious infringements of the principles of freedom of association.

Finally, with regard to the various allegations of destruction of property, premises and equipment and the confiscation of the financial assets of workers' and employers' organizations in Kuwait, the Committee recalled the 1970 resolution on trade union rights and their relation to civil liberties, which indicates that the right to adequate protection of trade union property is one of the civil liberties that are essential for the normal exercise of trade union rights. The Committee accordingly requested that, where identification of confiscated documents, equipment and monies was possible, the Iraqi authorities restore such property to the workers' and employers' organizations to which it rightly belonged and that, where such identification was not possible, the Iraqi authorities should provide just compensation.⁴⁷

Kenya

Case No. 2220

⁴⁷ See 279th Report, paras. 37-63; 283rd Report, para. 22; 286th Report, para. 22; 291st Report, para. 18; and 302nd Report, para. 22.

The complaint was presented by the International Organization of Employers (IOE) on 24 September 2003.

The allegations consisted principally of the unlawful arrest, harassment and detention of the leader of an employers' organization resulting from a statement made in that capacity during the meeting of a tripartite body.

The Committee recalled the following principles of freedom of association. The arrest, even if only briefly, of leaders of workers' and employers' organizations for activities in connection with the exercise of their right to organize is contrary to the principles of freedom of association. Such arrest may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities; all the more so when it occurs in an arbitrary manner outside any regular legal procedure. The Government should take steps to ensure that the authorities responsible receive appropriate instructions to eliminate the danger which arrest for trade union activities implies.

The Government undertook to ensure that all social partners, including employers' representatives, fully enjoyed the exercise of civil liberties.

The Committee considered that the Government had taken the appropriate steps to remedy the violation of the principles of freedom of association that had occurred to the detriment of the FKE Chairman. Noting the solemn statements made by the Government to the Committee in respect of compliance with the principles of freedom of association and their application, the Committee trusted that the Government would effectively ensure that arbitrary arrest and detention of any person by reason of her or his activities as representatives of a workers' or an employers' organization were averted. Finally, the Committee noted the Government's indication that the court proceedings initiated by the NSSF against the persons responsible for the irregular investment were likely to lead to the identification and punishment of the persons responsible for Mr. Mukuria's arrest. The Committee requested the Government to keep it informed in this respect.

The Committee noted the national Federation's intention not to pursue the matter following the Government's full written apology and

undertaking to ensure respect for freedom of association. It further noted the information submitted by the Government that no similar incidents had occurred since.⁴⁸

Nicaragua

Case No. 1007

The complaint was presented by the International Organization of Employers (IOE) in a communication dated 20 November 1980.

The complainant alleged that on 17 November 1980 Mr. Jorge Salazar Argüello, Vice-President of the Higher Council of Private Enterprise (COSEP), while unarmed, was shot down by the police during an ambush, a few moments after presiding over a meeting of COSEP. According to the complainant, no serious argument was advanced in support of the accusations made by the Government against Mr. Salazar (transporting of weapons, membership in an insurgent movement aiming to re-establish the Somoza regime, and procurement of aid from abroad for this purpose).

The complainant argued that the Government had decided that the murder of Mr. Salazar, categorized as having occurred during "an armed conflict", could not be reported by any media (press, radio, etc.) without a prior veracity check by government services, as provided for in Decree No. 511 of 10 September 1980.

The IOE cited the imprisonment of various leaders of private enterprises and indicated that section 51 of the Decree on the rights and guarantees of Nicaraguans denied the right of habeas corpus for certain crimes ("alleged or real crimes committed during the Somoza period").

The IOE also alleged that the Government tolerated and favoured the pressure brought by the FSLN (National Sandinista Liberation Front) to force the major independent trade unions to join the single central trade union.

The IOE further alleged that the FSLN, with the Government's support, was trying to divide the COSEP by organizing small and medium-sized enterprises, and was doing the same with independent professions. Finally, the IOE alleged that under Decree No. 530, of 24 September 1980, the negotiation and approval of collective agreements required the Ministry of Labour's approval.

⁴⁸ See 331st Report, paras. 559-578; and 335th Report, paras. 121-123.

In the Committee's opinion, the fact that the COSEP did not have the status of a trade union organization in the eyes of the Nicaraguan legislation did not dispense the Government from the obligations arising from its ratification of Convention No. 87, in particular, to respect the freedom of employers in Nicaragua to establish organizations of their own choosing, to organize their administration and activities and to formulate their programmes without interference from the public authorities.

The Committee noted that the Government had accused Mr. Jorge Salazar Argüello in its communication of having conspired against the Government in an armed group. It observed that while such information referred to alleged conspiratorial activities, it did not provide sufficient detail regarding the motives and circumstances of the activities carried out by the police which resulted in the death of Mr. Salazar, in relation to which, according to the information available to the Committee, the Government had formally acknowledged that he was not armed at that time. In this respect, the Committee noted that the report of the interrogation by the public prosecutor of the Assistant Director of the State Security Services did not contain a reply to question No. 45 concerning the circumstances of Mr. Salazar's death. The Committee also noted that, although the text of the decision sent by the Government made reference to the judicial proceedings carried out by the Second Criminal Tribunal to investigate Mr. Salazar's death, which included testimony regarding his death, the Committee had not received a report of these proceedings. In these circumstances the Committee urgently requested the Government to undertake an independent judicial inquiry as soon as possible with a view to elucidating the facts in full, determining responsibilities and punishing the guilty parties, and to provide the results of this inquiry.

In the judgment in question, the Committee noted the staying of the case concerning the alleged offence of homicide against Jorge Salazar Argüello, with which Javier del Carmen González García, Francisco Javier Rodríguez Díaz and Pedro José Andino Villalobos, soldiers on active service, were charged, since it had been proved that they were fulfilling their duty and legitimately exercising a right, authority or duty, and furthermore acting in legitimate self-defence.

The Committee noted that it appeared from the judgment that Mr. Salazar, in order to conceal criminal actions against the Revolutionary State, had fired against the patrol vehicle of the State security forces which had arrived when Mr. Salazar was transferring firearms (six M-16 rifles) from his truck to Mr. Moncada Lau's car; the members of the patrol repulsed this attack, killing Mr. Salazar in the exchange of fire which ensued. These events occurred on 17 November 1980 in front of the ESSO petrol station at El Crucero.

The Committee noted that the judicial military authorities had concluded that there were grounds justifying the soldiers' action in killing Mr. Salazar, especially in view of the fact that the latter had started the exchange of fire, and that this was corroborated by the version of the events given by Mr. Moncada Lau, the person accompanying Mr. Salazar at the time of his death.

Nevertheless, the Committee pointed out that, in its communication of 3 December 1981, the Government stated that "it is not certain that Mr. Salazar died as a result of an ambush set by the police. He was killed when he was about to be captured with his companion, who shot first with a firearm at the authorities who were proceeding to arrest him; thus an exchange of fire was started resulting, unfortunately, in the death of Mr. Salazar Argüello". It also noted that, in its communication of 7 September 1982 (received by the ILO on 12 October 1982), the Government's statement that "even if it was certain that Jorge Salazar was unarmed at the time of the events, as acknowledged by Commander Tomás Borge, the truth is that six M-16 automatic weapons were in his truck which were intended for Moncada Lau (...)".

In view of the contradiction between the judgment of the Military Court of First Instance of the Sandinista Armed Forces of 1 March 1982 (according to which Mr. Salazar opened the exchange of fire) and the above communications from the Government (in which it both implicitly and explicitly recognized that Mr. Salazar was unarmed at the time of the events), one of which was dated before and the other after the judgment, the Committee expressed surprise at this discrepancy and urged the Government to provide explanations, particularly as it noted that the judgment of 1 March 1982 had only been transmitted with a

communication dated 27 February 1984, that is almost two years after being handed down.

So as to be in a position to reach conclusions on the outstanding allegation in full knowledge of the facts, the Committee requested the Government to indicate whether the judgment of 1 March 1982 was considered final and whether there was a possibility to appeal against this decision, or whether it was subject to automatic review.

The Committee noted that the Government, in its reply of January 1985, fully endorsed the version of the circumstances surrounding the death of Mr. Jorge Salazar Argüello, Vice-President of COSEP, accepted by the judicial authority in its judgement of 18 March 1982, namely that Mr. Salazar was the first to fire against the State security patrol, following which he lost his life. The Committee also observed that the Government provided a contradictory version of the facts originally given by it, according to which Mr. Salazar was unarmed at the time the events took place, stating that the comments of a government official, even a minister, could not be regarded as incontrovertible evidence, and still less be compared with the legal force of a judgement handed down by a court.

With regard to the Government's statement that it was not for the Committee to examine whether Mr. Salazar was armed or unarmed, the Committee emphasized that an examination of the circumstances surrounding this death was essential to determining the facts with precision and to reaching a fully informed decision on the allegations made.

The Committee noted and expressed surprise that the Government had retracted its statements previously made by the Minister of the Interior regarding the circumstances surrounding the death of Mr. Salazar. The Committee also deplored the fact that the Government had not given any reasons for the long delay in sending the judgement of 1 March 1982 respecting the death of Mr. Salazar Argüello (which the Government had only provided almost two years after it had been handed down). In these circumstances, the Committee considered that the continuing climate of uncertainty and doubt regarding the circumstances surrounding the death of Mr. Salazar was bound to have a detrimental influence on labour relations and on the trust which must

prevail among occupational organizations if freedom of association was to be exercised.

Finally, the Committee noted that the possibility of appealing against the judgement of 1 March 1982 existed, but that since the defendant had made no use of this possibility the judgement remained final.

With regard to the allegation concerning the arrests and prison sentences of employers' leaders, the Committee noted with interest that, according to information obtained by the representative of the Director-General during his meeting with the President of the Supreme Court of Justice, the public prosecutor did not present any criminal grounds for investigating the crime to which his attention had been drawn by the Court and no case was opened. The Committee also noted that all the persons involved were at liberty and, according to the President of the Supreme Court of Justice, the matter was therefore closed. The Committee recalled that the preventive detention of leaders of workers' and employers' organizations for activities connected with the exercise of their rights was contrary to the principles of freedom of association.

In relation to Decree No. 530, of 24 September 1980, which required approval of collective agreements by the Ministry of Labour, the Committee drew the Government's attention to the fact that the requirement of approval or acknowledgement by a government authority for an agreement to be valid was not in full conformity with the principles of voluntary collective bargaining established by Convention No. 98. In similar cases, the Committee had recommended the establishment of procedures, such as the creation of consultative bodies designed to ensure that the parties to collective bargaining had regard voluntarily in their negotiations to considerations relating to the economic or social policies of the Government and the safeguarding of the national interest, and that in any case persuasion should be used without recourse to measures of compulsion, while conserving the freedom of both parties with regard to the final decision.

In relation to the allegation concerning the Bill on trade union associations, the Committee noted that, according to the Government, it had been drawn up privately by an official of the Ministry of Labour, who had handed copies to certain persons for their opinion, and was not

therefore an official Bill. In this respect, taking account of the Government's statements and considering that since the complainant had formulated this allegation (9 January 1981) the Bill in question did not appear to have reached the competent authorities for adoption, the Committee considered that this allegation did not require further examination.

Concerning the efforts of the National Sandinista Liberation Front (FSLN), supported by the Government, to divide COSEP, the Committee noted that, according to the complainant, the Government did not allow pluralism to develop within employers' organizations, but set up its own organizations dependent on it, as shown by FSLN interference through the promotion of parallel pseudo-official organizations which it endeavoured to substitute for the organizations of the private sector.

The authorities indicated to the representative of the Director-General that the question of the representation of the various organizations on the Council of State was a political issue. The Committee was able to examine the text of the Fundamental Statute of the Republic and the Revised Fundamental Statute of 2 May 1981 (included among the documents appended to the report of the representative of the Director-General), of which sections 16, 17 and 18 established the composition and functions of the Council of State. A comparison of the text of the Statute and its revised version of 2 May 1981 showed that the number of members of the Council of State (belonging to political, people's, trade union, cooperative and social organizations or private enterprises) had increased from 23 to 51; furthermore, the Confederation of Professional Associations of Nicaragua (CONAPRO) was no longer represented by virtue of the reform, while two additional members of the Council of State had taken its place, namely the National Confederation of Professional Associations, Heroes and Martyrs, and the National Union of Farmers and Stockbreeders. In accordance with sections 17 and 18 of the Statute, the Council of State was empowered to make legislative proposals to the Junta of the Government and to draw up a draft political Constitution. Furthermore, section 9 of the Statute stipulated that the Junta of the Government, the Council of State and the law courts were State authorities. In these circumstances, the Committee considered that the participation of workers' and employers'

organizations in this Council should not infringe the principles of freedom of association, which implied the strict application of criteria according to which the representativity of these organizations was to be determined. Moreover, the participation of these organizations in the Council should not deprive other organizations of the right to defend the interests of their members.

With respect to the violations of freedom of information, the Committee observed that the complainant referred to Decree No. 511, a communiqué of the Ministry of the Interior ordering that, before disseminating news about the armed confrontation in which Mr. Jorge Salazar Argüello was killed, the sources stipulated in Decree No. 511 had to be consulted, and the closure on five occasions of the newspaper “La Prensa”, which frequently echoed the views expressed by COSEP.

With regard to Decree No. 511, the Committee considered that its application to the dissemination of news concerning the armed confrontation in which Mr. Salazar Argüello, Vice-President of COSEP, was killed, as well as the retaliatory measures taken against the newspaper “La Prensa” which reported the news, had restricted the exercise of trade union rights. The Committee recalled that the publication and dissemination of news and information of trade union interest constituted a legitimate trade union activity and the application of measures for their control could constitute serious interference by the administrative authorities. The Committee also drew the Government’s attention to the importance that it attached to the Resolution on trade union rights and their relation to civil liberties, adopted by the International Labour Conference at its 54th (1970) Session.

With regard to the pressure exerted on independent trade unions to destroy them and force them to join a single trade union confederation, the Committee observed that, although the complainant had referred to discrimination, violent attacks on trade union leaders, assaults on trade union confederation premises and against trade union meetings, it had not cited any specific cases of such violations of freedom. The

Committee therefore considered that they did not call for further examination.⁴⁹

Case No. 1084

The complaint was presented by the International Organization of Employers (IOE) on 21 October 1981.

The complainant alleged that Messrs. Dreyfus, BolaZos, Cuadra and Lanzas, President and Vice-Presidents respectively of COSEP, had been arbitrarily and unjustly arrested on 21 October 1981, received inhumane treatment during their detention and were later sentenced, with the exception of Mr. BolaZos (who had been acquitted as there was no case for him to answer) to seven months' imprisonment and compulsory labour for having signed and given wide publicity to a letter addressed to Commander Daniel Ortega, Coordinator of the Junta of the Government of National Reconstruction, which denounced the Government's Marxist-Leninist trend and which reflected the general opinion of the Nicaraguan private sector.

In view of the gravity of the allegations, the Director-General of the ILO firstly sent a telegram to the Government on 23 October 1981 requesting it to communicate whatever steps had been taken for the rapid release of the prisoners, and then addressed a further telegram on 30 October 1981 to the Government expressing the wish to send a high-ranking official to Nicaragua at a near date to discuss this matter with the Government authorities. In a communication of 13 November 1981, the Government stated that it accepted the sending of a mission, which took place from 29 November to 4 December 1981.

In this connection, the Committee noted the Government's statement that the COSEP employer leaders in question had been released on 14 February 1982 and that, in referring to the release of these persons, the IOE had expressed its deep gratitude to the ILO for the efforts made for their release. In this respect, the Committee hoped that the release of these leaders would contribute positively to the restoration of a climate

⁴⁹ See 208th Report, paras. 371-391; 218th Report, paras. 437-466; 233rd Report, paras. 214-317; 234th Report, paras. 418-431; and 238th Report, paras. 94-105.

of dialogue rather than confrontation between the authorities and employers. Nevertheless, the Committee considered that, even though the allegations concerned the imprisonment of the COSEP employer leaders, who are now free, it would have to examine the substance of the allegations in so far as they could be considered violations of freedom of association.

The Committee observed that the COSEP employer leaders had been arrested because they had signed and given broad publicity to a letter on 19 October 1981, this being alleged by the Public Prosecutor to be grounds for charges under section 4(c)(1), (2), (3) and (4) of the Act on the maintenance of public order and security and under section 3(c) and (h) of the Act declaring a state of economic and social emergency. In this connection, after having carefully examined the Act declaring a state of economic and social emergency, the Committee considered that several of its provisions involved serious restrictions on freedom of association, and specifically on the freedom of action of the workers' and employers' organizations. Similarly, some of the types of crimes set out in the Act on the maintenance of public order and security were worded in very general terms which could give rise to broad interpretations contrary to the full respect of the principle of legal security, which is a fundamental objective of all legal systems, with this danger being reinforced by the description given of the types of crimes in section 4(c)(1), (2), (3) and (4) by the Appeal Court in its decision of 26 November 1981 sentencing the COSEP employer leaders, in which the crimes are listed as "crimes of abstract danger" in that, according to the decision, "for the completion of the crime, it is sufficient that the acts of propaganda or diffusion laid down in the Act be carried out, without it being necessary that the actions of diffusion in writing of unlawful statements and manifestos whose distribution is prohibited produce any real damage to the juridically protected object". The Committee further noted that the mission considered that the legislation imposed serious restrictions on the right to express opinions freely through the press or otherwise, thereby severely restricting one of the essential elements of trade union rights. Accordingly, taking into account their consequences for the exercise of trade union rights and the civil liberties which are related to these rights, in particular the right to express and disseminate ideas and opinions, the Committee recalled that, in accordance with to Article 8(2) of

Convention No. 87, “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 this Convention.” It requested the Government to take steps for the prompt amendment of these legislative provisions in accordance with the principles contained in Convention No. 87 and the Resolution on trade union rights and their relation to civil liberties (adopted by the International Labour Conference in 1970) and drew this aspect of the case to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

With regard to the sentencing of the COSEP employer leaders to seven months’ imprisonment and compulsory labour for violating section 4(c) (1), (2), (3) and (4) of the Act on the maintenance of public order and security, the Committee noted that the judgement handed down by the Criminal Court of First Instance on 29 October 1981 cited the following opinions expressed in the letter signed and published on 19 October 1981 as a basis for the sentence:

“Our national economy is collapsing; there are no signs of a production revival; social peace is still not a reality; our foreign debts are increasing daily (...) and the mixed economy, which the Government continues to say it advocates, is undermined as private property is taken over by the State, to the ignorance of the people (...). We see a very clear Marxist-Leninist trend, which is furthermore confirmed in the statements made by leaders of the Government (...). It is necessary to understand that those whom you consider reactionaries on the domestic or international scene are not against the people of Nicaragua; they are opposed to the Marxist-Leninist programme you are imposing without the knowledge of the people. If other nations cut us off, it is for this reason (...). We are almost at the point of no return, when the Government will have difficulty in claiming legitimacy in respect of the people (...). What is worse is that we can only interpret these statements as the preparation of a new wave of genocide in Nicaragua, the victims of which will be all those who exercise their right to disagree (...).”

In this connection, the Committee noted that the mission had stated that it was understandable that the Government had resented the accusations regarding a new wave of genocide, but the strong language used by the employers should be seen as their understandable reaction to

a statement made a few days earlier by the Minister of Defence, Commander Humberto Ortega, according to which the nation must establish a list of potentially counter-revolutionary individuals “who will be the first to be left hanging in the streets”. In these circumstances, the Committee, taking into account the telegram sent by the Director-General to the Government on 23 October 1981 requesting the leaders to grant an early release to the prisoners, and in view of the above comments on the Act on the maintenance of public order and security, upon which the sentences were based, in particular the comments made by the mission to the effect that serious restrictions had been placed on the right to express opinions freely, could only express its deep regret at the conviction and detention, as well as the length of time the employer leaders would spend in prison.

Finally, with regard to the alleged inhumane treatment suffered by the COSEP employer leaders while in detention, the Committee noted that they themselves had told the mission that during the first 11 days of detention they had been kept in isolation from each other in minute cells with little or no light, enduring food and hygiene deficiencies as well, and that they had stated that they had only rarely been able to see their defence counsel. In this connection, while noting that after the first 11 days the conditions of detention had become more tolerable, the Committee drew the Government’s attention to the importance which it attaches to the fact that preventive detention should be accompanied by a set of safeguards and limitations to ensure that it cannot be used for purposes other than that for which it is intended, and in particular to afford protection against situations in which the detention is unsatisfactory from the point of view of sanitation, unnecessary hardship or the right to defence.⁵⁰

Case No. 1114

The complaint was contained in communications from the International Organization of Employers (IOE) dated 16 February and 25 October 1982.

⁵⁰ See 216th Report, paras. 5-39.

The main allegation was that on 11 February 1982 Enrique BolaZos Gayer, acting President of the Higher Council of Private Enterprise (COSEP), was prevented from boarding a flight to Panama en route for Caracas, where the following day he was to participate in a forum on economic cooperation between the Nicaraguan and Venezuelan sectors. According to the complainant, his passport was confiscated and he was summoned to appear before the Minister of the Interior.

The IOE added that the Sandinista Government had, on various occasions, prohibited employer leaders from travelling abroad, in some cases denying them a visa and in others despite their having a visa. The IOE indicated that Enrique Dreifus, President of COSEP, Ismael Reyes, Vice-President of COSEP, William Báez, Assistant Director of INDE, Rosendo Diaz, Executive Secretary of the Union of Agricultural Producers, and Alejandro Burgos, Executive Director of COSEP, had been subjected to travel bans on various occasions.

The Committee noted that, according to the Government, the fact that the acting President of COSEP, Mr. BolaZos Gayer, had been prevented from boarding a flight to Panama en route for Caracas, where he was due to participate in a forum on economic cooperation, had been caused by a misunderstanding on the part of the emigration authorities at the Augusto César Sandino Airport. The Committee also noted that, once the misunderstanding had been cleared up, Mr. BolaZos had been able to make his journey without any problem.

The Committee noted that the Government denied the allegation that it had prohibited the employer leaders, Messrs. Dreifus, Reyes, Báez and Burgos, from making journeys and that it had forwarded an extensive list with the dates on which, for various reasons, these leaders had travelled abroad.

The Committee observed, however, that the Government had not provided specific information on the prohibition or prohibitions on leaving the country to which, according to the complainant organization, Mr. Rosendo Diaz, Executive Secretary of the Union of Agricultural Producers, was alleged to have been subject. In these circumstances, the Committee recalled that representatives of workers and employers should enjoy appropriate facilities for carrying out their functions,

including the right to leave the country when their activities on behalf of the persons they represent so require.⁵¹

Case No. 1317

The complaint was presented by the International Organization of Employers (IOE) on 19 December 1984.

The allegations related principally to the existence of arbitrary restrictions on the right to leave Nicaragua freely. In particular, the complainant referred, firstly, to the case of Mr. BolaZos Geyer, President of COSEP, who was unable to attend a seminar organized by the ILO owing to the removal of some pages from his passport and, secondly, to the case of 23 persons calling themselves “captive leaders”, among whom it referred especially to six leaders of employers’ organizations.

The Committee observed that the complainant had not indicated the dates on which the six leaders of employers’ organizations had been prevented from leaving the country, nor whether such restrictions had obstructed or prevented the pursuit of activities by those persons in their capacity as leaders of employers’ organizations.

The Committee noted the Government’s statement that it had imposed no gratuitous restrictions on any employer for travel abroad and that the only restrictions in existence in Nicaragua in that connection were those explicitly laid down in the provisions of law.

With reference to Mr. BolaZos Geyer, President of COSEP, the Committee noted that, according to the Government, section 16 of the Migration Act had been applied to this employers’ leader, who had left the country 18 times between 1981 and 1985, and that this section provided that “No passport or identity and travel document which exhibits alterations or corrections and from which pages or covers are missing shall be valid (...)”. In this connection, the Committee regretted that the Government had confined itself to mentioning section 16 of the Migration Act, omitting to comment on the complainant organization’s assertion that migration officials had removed the sheets bearing pages

⁵¹ See 222nd Report, paras. 63-72.

11 and 12 and pages 21 and 22 from the passport on 17 November 1984 and then cancelled the passport. The Committee also observed that the Government had not referred to the complainant's assertion that on 16 November 1984, the day before Mr. BolaZos proposed to leave the country, two notaries had ascertained that his passport was intact.

The Committee strongly deplored the fact that, after the incident affecting Mr. BolaZos on 17 November 1984, the authorities did not act on the request made by the Director-General of the ILO on 20 November 1984 that Mr. BolaZos's departure from the country should be facilitated in order to enable him to participate in the seminar organized by the ILO, which was to be held in Mexico from 3 to 7 December, that is to say a sufficient number of days after the date on which the incident in question occurred.

The Committee concluded that the Government had not justified the illegal measures, involving the removal of pages from Mr. BolaZos' passport, which had prevented him once again from leaving Nicaragua to attend the seminar organized by the ILO in Mexico. In these circumstances, and also having regard to the fact that the Government had not referred specifically to other leaders of employers' organizations being forbidden to leave the country or obstructed in doing so, even though the complainant had not emphasized that these cases were connected with the pursuit of activities in their capacity as leaders of employers' organizations, the Committee drew the Government's attention to the principle that representatives of workers and employers should enjoy appropriate facilities for carrying out their functions, including the right to leave the country when their activities on behalf of the persons they represent so require, and that the free movement of these representatives should be ensured by the authorities.

The Committee also requested the Government to take steps to ensure that the appropriate authorities did not hinder the participation by leaders of workers' or employers' organizations in activities intended to promote and defend the interests of their members.⁵²

⁵² See 241st Report, paras. 292-311.

Case No 1344

The complaint was presented by the International Organization of Employers (IOE) in a communication dated 16 July 1985.

The allegations may be summarized as follows:

- *in 1982, confiscation of the assets and expulsion from the country of Mr. Frank BendaZa, Vice-President of COSEP and President of UPANIC;*
- *in 1983, confiscation of the lands belonging to Mr. Ramiro Gardián, Vice-President of COSEP and President of UPANIC;*
- *in 1983, confiscation of the enterprises of Mr. Ismael Reyes, Vice-President of COSEP, President of the Chamber of Industry and Employer delegate to the International Labour Conference;*
- *in 1983, imprisonment without trial and subsequent release of Mr. Douglas Reyes, son of Mr. Ismael Reyes, during the International Labour Conference, in June 1983;*
- *in 1983, confiscation of the ranch of Mr. Benjamín Lanzas, Vice-President of COSEP and President of the Chamber of Construction;*
- *in 1984, instigation of disorder in the BolaZos-Saimsa enterprise, where there was no labour dispute, by outside workers employed by the Ministry of Agrarian Reform, on 14 February 1984, and by workers of the INCA and CELCALZA State enterprises, on 16 February of the same year. The workers in question were alleged to have used vehicles belonging to the Sandinista armed forces for this purpose;*
- *in 1985, arbitrary confiscation, without complying with the legal regulations established by the agrarian reform Acts, of the lands of Mr. BolaZos on 14 June 1985 and defamatory and slanderous statements made against him by Commander J. Weelock, Minister of Agrarian Reform, as well as by the official radio;*
- *de facto confiscation on 28 June 1985, without an expropriation order, of the industrial enterprise BolaZos-Seimsa and its equipment;*
- *prohibition by the Directorate of Communication Media (Ministry of the Interior) of the publication in "La Prensa", the only independent newspaper in Nicaragua, of an open letter from COSEP dated 29 December 1984 to the Coordinator of the Government Junta, entitled "And why not try freedom?";*
- *prohibition by the censorship authorities of the publication in "La Prensa" of the replies by Mr. BolaZos to Commander Weelock. Only the Sandinista newspapers, radio and television were able to publish his account and comments on the expropriation of the lands belonging to Mr. BolaZos. The censored press articles referred to the abusive expropriation suffered by Mr. BolaZos and in which the latter maintained that the proceedings in the court which was competent to examine any appeal against the expropriation of his lands offered no guarantee of impartiality in his case since the President of the court had publicly acknowledged that the court had based its decision (a decision which could not be appealed) on the opinion expressed by the Ministry of Agrarian Reform, that is, the body which had ordered the expropriation measures;*

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- *detention and torture by Commander Lenin Cerda, a subordinate official of the Minister of the Interior, of Mr. Tomás Borge, president of the parents' association whose families attended private religious schools, and which was affiliated to the Confederation of Independent Occupations (CONAPRO) and a member of COSEP, for having publicly expressed his opinions on the educational reforms recommended by the Sandinista National Liberation Front.*

With regard to the expropriation of the lands and assets of the leaders of COSEP, the Committee noted the Government's explanation that most of these measures corresponded to the needs of agrarian reform. Although aware that the persons mentioned in the IOE's complaint could not take advantage of their position as COSEP leaders to evade the consequences of an agrarian reform policy, the Committee nevertheless pointed out with concern that these measures had allegedly affected a large number of leaders of the employers' organization in a discriminatory fashion. It expressed the hope that the persons in question would be fairly compensated for their losses, as provided for by law. The Committee noted the information provided by the Government on the decrease in the number of these measures since 1986, and the statement by the President of the Republic to the effect that no more land would be confiscated.

The Committee noted that, according to the Government's statements, there was no trace of any expulsion order against Mr. Frank BendaZa, the Vice-President of COSEP. Given the contradiction between the complainants' version of the facts and that of the Government, the Committee recalled in general terms that the expulsion of leaders of employers' or workers' organizations from the country for having exercised activities linked to their position is not only contrary to human rights, but also interferes in the activities of the organizations to which they belong.

The Government did not make a specific reply to the requests for information concerning the house arrest of the President of the COSEP during Private Enterprise Day. It confined itself to stating that no citizen had been deprived of liberty on that occasion. The Committee noted this information, but regretted that the authorities had banned the holding of Private Enterprise Day.

The Committee noted that the newspaper “La Prensa” was once again being published and disseminated freely and expressed the hope that this measure would be definitive. It recalled that the right of an employers’ or workers’ organization to express its opinions uncensored through the independent press should in no way differ from the right to express opinions in exclusively occupational or trade union journals.⁵³

Case No. 1351

The complaint was presented by the International Organization of Employers (IOE) on 17 October 1985.

The allegations recalled that, on 7 September 1985, some 2,000 employers were due to meet in Managua at the invitation of the Executive Board of the Higher Council of Private Enterprise (COSEP). This meeting, which had been prepared by regional assemblies held in the weeks before in three major cities of the country, had been convened to allow the participants to determine the policies of private enterprise in the industrial, commercial and agricultural sectors as a whole in the light of the serious economic problems affecting the country. COSEP had declared 7 September a “Private Enterprise Day”. On 6 September, the day before the meeting, the leaders of COSEP had been compelled manu militari to go to the Ministry of the Interior and informed that the meeting had been prohibited. The following day, all the access routes to Managua were blocked for delegates due to participate in the Private Enterprise Day and the President of COSEP was placed under house arrest.

The complainant also alleged that on 15 October 1985 the Government, citing the hostile attitude of the “right”, the “left” and the Catholic Church, “inspired by the United States of America”, had suspended or limited, by a decree to remain in force for one year, the rights of assembly, expression, association, to strike and habeas corpus, the freedom of the press, the right of free movement, the right to appeal against the State (appeal for protection) and judicial guarantees.

With regard to the prohibition of the meeting of 7 September 1985, the Committee noted that, according to the Government, it had been suspended: (1) because, as COSEP had planned to pay homage that day to Jorge Salazar in the form of a “Private Enterprise Day”, the

⁵³ See 246th Report, paras. 197-265; 255th Report, paras. 4-68; 261st Report, paras. 2-48; and 264th Report, paras. 2-24.

Government could not permit a public honour to be paid to the memory of the counter-revolutionary who had endeavoured to overthrow the legitimate Government of Nicaragua by the force of arms; (2) at no time had COSEP applied to the legislative bodies to hold a national employers' day. The Committee also noted that COSEP had been informed that the Government had no objection to the holding of such a day on any other date, subject to advance notice being given and compliance with the existing regulations.

In this respect, the Committee referred to the fundamental principles which it has established with regard to the right of assembly of workers' organizations and which it considers also applicable to employers' organizations. The Committee considered, in particular, 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 that the public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof, unless public order is disturbed thereby or its maintenance seriously and imminently endangered.

The Committee considered that the question of the determination of "Private Enterprise Day" by a central employers' organization is a matter which should be decided freely by the occupational organization concerned and that there should be no need for an administrative authorization for this kind of commemoration or the fixing of its date. The Committee also believed that the specific case of the homage to be paid by COSEP to the memory of a deceased official of this organization fell fully within the scope of its activities as an employers' organization, provided that a ceremony of this nature in exercise of its right of assembly did not disturb the public order or seriously or imminently endanger it. With regard to the Government's statement that J. Salazar Argüello, acting President of COSEP, at the time of his violent death in November 1980, was a "counter-revolutionary" killed during the course of violence intended to overthrow the revolution, the Committee referred to the conclusions it had reached previously concerning this matter. The Committee deplored that the authorities had prevented the holding of Private Enterprise Day on 7 November 1985 and expressed the hope that in

future COSEP would be able to establish without any interference whatsoever the date and activities of Private Enterprise Day.

With regard to the suspension or restriction of certain basic rights for one year by virtue of the Decrees which established the period of application of the state of national emergency (Decree No. 128 of 15 October 1985, as amended by Decree No. 130 of 31 October 1985), the Committee observed that the Committee of Experts on the Application of Conventions and Recommendations, at its session of March 1986, had examined these decrees in connection with its observation on the application of Convention No. 87 by Nicaragua. On that occasion, the Committee of Experts had expressed the hope that the Government would lift, as rapidly as circumstances allowed, the restrictions on civil and trade union liberties resulting from the state of national emergency as contained in the Decrees of 15 and 31 October 1985. The Committee on Freedom of Association also recalled that the Committee on the Application of Standards of the 72nd Session of the International Labour Conference had regretted in paragraph 105 of its report that, despite repeated invitations, the Government of Nicaragua had refrained from participating in the discussions on the observations of the Committee of Experts. The Committee on Freedom of Association trusted that such restrictions would not be imposed again and requested the Government to furnish information on this subject.⁵⁴

Case No. 1361

The complaint was presented by the International Organization of Employers (IOE) on 12 February 1986.

⁵⁴ See 246th Report, paras. 197-265; 248th Report, paras. 421-436; and 255th Report, paras. 4-68.

The complaint related principally to the allegation that, on 16 January, the Communications Board of the Ministry of the Interior banned the daily newspaper “La Prensa” from publishing, at the request of the Higher Council of Private Enterprise (COSEP), the recommendations of the Committee on Freedom of Association on Case No. 1317, approved by the Governing Body. This Case concerned the ban imposed on the President of COSEP from attending a seminar organized by the ILO in Mexico in December 1984 and the removal of pages from his passport for this purpose.

According to the IOE, the Government’s repeated interferences illustrated the lack of importance it attached to freedom of information, which COSEP should enjoy, and to the conclusions of the Committee on Freedom of Association and the Governing Body.

The Committee deeply regretted that the Government had not communicated its observations in spite of the requests and the urgent appeal made to it for a reply to the allegations made by the complainant organization.

In this respect, the Committee was of the opinion that the cooperation of governments in shedding light on the issues brought before the Committee by complainants could only serve to strengthen the full respect of freedom of association and the normal development of employers’ and workers’ organizations.

In the present case, the Committee noted that, according to the allegations, the Government had banned the daily newspaper “La Prensa” from publishing, at COSEP’s request, the recommendations adopted by the Committee on Freedom of Association on Case No. 1317.

In the absence of a denial from the Government concerning this allegation, and having examined a document issued by the Communications Board of the Ministry of the Interior in Managua on 16 January 1986, attached to the complaint, in which the Board requested the newspaper “La Prensa” not to publish the article entitled “The ILO asks for guarantees for workers” in its daily issue, the Committee deeply regretted the censorship imposed by the Government.

The Committee considered it necessary to draw the Government’s attention once again to the fact that workers’ and employers’

organizations can only develop in a system which respects and guarantees basic human rights. Consequently, the Committee urged the Government to take steps to guarantee fully the right of employers' and workers' organizations to publish and distribute their information.⁵⁵

Case No 1372

The complaint was presented by the International Organization of Employers (IOE) on 8 July 1986.

The complainant alleged that the Government had ordered the closure, for an undetermined period, of the daily newspaper "La Prensa", which was used regularly by COSEP to disseminate information concerning employers and the problems encountered by them and their organizations.

At its session in May 1987, the Committee had addressed an urgent appeal to the Government to supply its observations on this case.

The Committee subsequently noted that the newspaper "La Prensa" was once again circulating freely and expressed the hope that this measure would be definitive. It recalled that the right of an employers' or workers' organization to express its opinions uncensored through the independent press should in no way differ from the right to express opinions in exclusively occupational or trade union journals.⁵⁶

Case No. 1454

The complaint was presented by the International Organization of Employers (IOE) in a communication dated 7 June 1988.

The allegations principally concerned the confiscation of property belonging to COSEP leaders and the conviction of the employer leader Mr. Alegría.

⁵⁵ See 251st Report, paras. 95-107.

⁵⁶ See 255th Report, paras. 4-68.

With regard to the confiscation of the lands of employers' leaders, the Committee was convinced, in the light of information gathered during the mission, that the actual possibilities for the persons concerned of appealing against these measures to the courts were relatively limited and that there was either no compensation for these confiscations (in the case of land that was unused, unprofitable or abandoned), or inadequate compensation (agrarian reform "bonds"). The Committee therefore considered that all the provisions concerning compensation for land expropriation should be reviewed to ensure that there was real and fair compensation for the losses thus sustained by the owners, and that the Government should reopen the compensation files if so requested by persons who considered they had been prejudiced in the agrarian reform process.

With regard to the allegations concerning the conviction of Mr. Alegría, the Committee noted the information gathered by the mission on the case of Mr. Alegría, and in particular the text of the judgement sentencing him to 16 years imprisonment.

The Committee noted from this judgement that Mr. Alegría had been sentenced for having bought from government officials economic information which, because the country was in a state of war, was secret, and then passing this information on to a foreign diplomat.

The Committee recalled that the duties entrusted to Mr. Alegría in a COSEP institute consisted of undertaking economic research and studies, for which he needed to have access to information. It appeared furthermore from the text of the judgement that the information obtained by Mr. Alegría was the subject of a study being undertaken by the institute he directed. Moreover, according to various sources, the information was widely known to the public.

The Committee also noted with concern that the charge was based mainly on a video recording containing statements made by accused persons recorded on the premises of the State security offices. Furthermore, in view of the extreme harshness of the sentence of the court of first instance, the Committee expressed the firm hope that the Court of Appeal in Managua, which had Mr. Alegría's case before it, would re-examine the matter with all the requisite care and impartiality. The

Committee requested the Government to furnish a copy of the decision of the Court of Appeal as soon as it was available.⁵⁷

Case No. 1700

The complaint was presented by the International Organization of Employers (IOE) on 7 December 1992.

The allegations concerned the assassination of the Vice-President of the Higher Council of Private Enterprise (COSEP), Mr. Arges Sequeira, the death threats made against the COSEP President, Mr. Ramiro Guardián, and the attack against COSEP headquarters.

With regard to the assassination of Mr. Sequeira, the Committee regretted the return to a climate of violence and deeply deplored the murder of the leader of an employers' organization. It noted the information supplied by the Government that judicial proceedings were being pursued against those responsible for this murder (three former members of the military). It expressed the firm hope that the judicial proceedings under way would result in the guilty parties being identified and severely punished. In these circumstances, the Committee requested the Government to keep it informed of the outcome of the trial and send it the text of the ruling.

With reference to the death threats made against the COSEP President, Mr. Ramiro Guardián, the Committee observed that in December 1992 the Government had taken the necessary measures to protect this employers' leader and his residence. The Committee requested the Government to continue providing such protection for as long as his life was in danger.

In relation to the bomb attack against COSEP headquarters on 2 December 1992, the Committee noted that an inquiry was under way. The Committee pointed out that a climate of violence, such as one in which the premises and property of workers' and employers'

⁵⁷ See 261st Report, paras. 2-48; 264th Report, paras. 2-42; 267th Report, paras.2-36; and 269th Report, paras. 2-35.

organizations were attacked, was a serious obstacle to the exercise of their rights, and that such acts required severe measures to be taken by the authorities. The Committee therefore requested the Government to step up the inquiry under way and to inform it of its outcome.

The Committee expressed its concern regarding the acts of violence alleged in this case and drew 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 these organizations' leaders and members, and that it is for governments to ensure that this principle is respected. The Committee expressed the firm hope that the Government would take all possible measures to ensure respect of this principle. The Government subsequently indicated that the courts had handed down severe sentences against those responsible for the murder of Mr. Sequeira, in particular one sentence of 20 years imprisonment. The Committee noted this information and trusted that the Government would provide, as soon as possible, information on the outcome of the inquiry under way into the bomb attack against COSEP headquarters.⁵⁸

New Zealand

Case No. 1334

The complaint was presented by the New Zealand Employers' Federation (NZEAF) on 3 May 1985.

The complaint related to changes made to the Industrial Relations Act of New Zealand by amending legislation (known as the Union Membership Bill) which became law on 1 July 1985. It would appear that the legislation was designed inter alia to restore union security arrangements of a kind similar to the unqualified preference system which had existed in New Zealand prior to the enactment in 1984 of a system of voluntary trade union membership. The principal issues raised by the complaint concerned:

⁵⁸ See 291st Report, paras. 298-311; and 294th Report, para. 24.

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- a) *the statutory insertion for an interim period of 18 months of a union membership clause (requiring all workers in the industry covered by an agreement or award to become members of a union) into all awards and collective agreements which previously contained an unqualified preference clause;*
 - b) *the system instituted by the legislation whereby decisions in the period thereafter are to be taken by workers as to whether to have a union membership clause; and*
 - c) *the alleged absence of any effective choice under the system introduced as to the union to be joined by workers.*

The Committee noted the views expressed by the Committee of Experts on the Application of Conventions and Recommendations concerning union security clauses in general, and in particular in relation to the union security arrangements prevailing in New Zealand at the time of its General Survey, that is the unqualified preference clause. It also had the opportunity to consult the report submitted by the Government of New Zealand for consideration by the Committee of Experts under article 19 of the ILO Constitution in relation to that Survey.

In this regard, the Committee noted in the first place that the Committee of Experts had stated that the principle established by Article 2 of Convention No. 87 leaves it to “the practice and regulations of each State to decide whether it is appropriate to guarantee the right of workers not to join an occupational organization or (...) to authorize and, where necessary, regulate the use of union security clauses in practice”. Secondly, the Committee of Experts provided information concerning several different kinds of union security clauses (including the variety which existed in New Zealand as the unqualified preference clause) and the manner in which they operated. Thirdly, the Committee drew attention to the emphasis placed by the Committee of Experts on the distinction between union security clauses allowed by law (including the particular variety operating in New Zealand as the unqualified preference clause) and those which are imposed by legislation. The Committee of Experts considered that the latter were similar in their effects to establishing a trade union monopoly and not compatible with the right of workers to establish and join organizations of their own choosing. According to the

Committee on Freedom of Association, it was necessary to consider whether (and, if so, to what extent) the changes brought about by the 1985 legislation in New Zealand regarding union membership clauses involved statutory imposition of a system in a manner which would, in effect, amount to the institution of something akin to a trade union monopoly.

The Committee noted the information provided by the Government concerning the possibility which existed under the legislation for the unions affected to ballot their members on the union membership clauses, even during the initial period of statutory imposition, and of the fact that one union federation comprising seven unions had in fact sought to hold such a ballot. At the same time, the Committee noted that it was no longer possible in New Zealand for a binding award to be made on such clauses through compulsory arbitration in the absence of an agreement between the parties, and that the principal source of authority for the implementation of such clauses in the interim period under consideration is therefore their statutory imposition.

It accordingly appeared to the Committee that, with regard to this interim period, this measure conflicted with the principle enunciated by the Committee of Experts as it effectively obliged all workers in an industry to belong to the union which, up to 1984, enjoyed unqualified preference, but in respect of which no such arrangement was in force in the period immediately prior to the enactment of the legislation. This measure was taken in the absence of any negotiation between or agreement by the parties concerned, and to that extent involved a measure of legislative intervention in imposing the system of unqualified preference, which is contrary to the principles of freedom of association.

The Committee noted the Government's statements relating to the approval by union members after 1977 of the union security clauses under the unqualified preference system, and also the information in the report submitted by the Government to the Committee of Experts in connection with the 1983 General Survey on Freedom of Association and Collective Bargaining to the effect that, up to the end of 1981, 195 ballots (of which 37 were postal ballots) had taken place involving 1,199 awards and some 400,000 workers (80 per cent of all union members), and that 84 per cent of those voting (approximately 33 per cent) had

favoured the unqualified preference. It observed that provision was made for voting to take place at intervals of not more than three years on the union security clauses which were the subject of the 1985 amending legislation.

With regard to the voting procedure, the Committee noted that there had been a diminution in voting opportunities through the removal of the provision regarding postal ballots. Although it noted the Government's statements in the 1983 report and its communication to the Committee on Freedom of Association concerning the preference of workers for meeting-type ballots, the Committee recalled and drew the Government's attention to its view that questions of this nature should only be the subject of Government intervention where this is aimed at ensuring respect for democratic rules within the trade union movement.

The Committee was of the view that a similar approach should be adopted in relation to the level at which decisions are to be made, but noted in this regard the view of the Government and the Federation of Labour that the choice of industry-wide ballots was consonant with the system of industrial relations in New Zealand. The Committee did not regard that choice as one which would impede the process whereby a decision on union membership clauses was reached. It also considered, on the basis of information available concerning eligibility to vote, exemption rules and electoral supervision machinery, that the other matters relating to the balloting procedure under the provisions in force did not involve questions relating to freedom of association of a kind which would require further examination.

In relation to the right of workers to join organizations of their choosing, the Committee noted that the right of registered unions to obtain the insertion of union security clauses in binding arbitration awards, which was the subject of the remarks of the Committee of Experts on the Application of Conventions and Recommendations cited by the complainant, no longer existed and had been replaced by the provisions of the 1985 Act concerning the determination of such matters by ballot. The Committee further noted the explanation provided by the Government and the opinion of the New Zealand Federation of Labour that the right to join a union was guaranteed by the legislation and that there was nothing to prevent workers from establishing unregistered

associations, even where a union membership clause had been accepted by the majority of workers.

The Committee gave careful consideration to the principle cited by the complainant, namely that “(...) when a worker can legally join another union, but is still obliged by law to join a particular union if he wishes to retain his employment, such a requirement would seem to be incompatible with his right to join an organization of his own choosing” and took the opportunity to draw attention once again to the importance that it attaches to this principle. In relation to the present case, the question which arose was whether the union membership preference clause, as operated in New Zealand, infringed this principle. The Committee did not consider it necessary to consider the situation (which existed up to 1984) where such clauses were inserted through binding arbitration awards, but the situation which operated under the 1985 Act. In this regard, it was of the view that the requirement that a worker join a particular union would, after the expiry of the initial period during which union security clauses had been compulsorily inserted, arose as the result of a decision taken by workers themselves in a ballot conducted under the terms of the legislation and not through any obligation imposed by the law itself. In other words, after the expiry of the 18-month interim period, the 1985 Act did no more than create the framework within which such decisions could be taken, that is by ballot. Both the facultative nature of this provision and the opportunity it created for the participation of workers in the decision led the Committee to the conclusion that the balloting system thus created by the Act for the period after the expiry of the interim period did not therefore conflict with the principles of freedom of association.⁵⁹

Case No 1385

The complaint was presented by the New Zealand Employers' Federation (NZEF) on 20 October 1986.

⁵⁹ See 244th Report, paras. 78-123.

The case referred to objections by the NZEF to the 1987 Labour Relations Act on the grounds that the granting of certain exclusive rights to unions by registration eliminated the workers' free choice of union and that the continuance of what amounted to compulsory union membership provisions also undermined the workers' freedom to choose an organization to represent them. The complainant also alleged that the excessively high minimum membership requirement (1,000 members) hindered the establishment of trade unions.

With regard to the minimum membership requirement, the Committee noted the Government's reasons for adopting such a provision and the fact that the 1,000 member requirement only applied to groups of workers seeking registration. In examining what appeared at first sight to be a very high minimum membership number requirement, the Committee bore in mind the underlying principle of the New Zealand industrial relations system that the registration of workers' organizations under the new Act was optional. Moreover, it noted that groups of workers which were not able, or did not wish, to comply with the Act's 1,000 member requirement could still be established.

In the Committee's opinion, the difficulty of gathering 1,000 members could be considerable in bargaining units covering a small number of workers. Such workers might therefore be deprived of the right to establish organizations capable of fully exercising their activities, contrary to the principles of freedom of association. Consequently, the Committee requested the Government to indicate whether the Governor-General had made use of the power afforded to him under section 6(2) of the Act to specify another number of minimum members for the registration of a union. The Government stated that the 1,000 minimum membership was an essential element in a policy to strengthen the union movement. The Committee regretted the Government's attitude on these issues. The Government subsequently stated that the 1987 Act, which contained the 1,000 member requirement for registration as a trade union, had been repealed. The Committee noted this information with satisfaction.

In relation to the alleged denial of workers' free choice of union, the Committee noted that certain important advantages were granted to unions which chose to register under the Labour Relations Act. In such situations, the position of the ILO supervisory bodies was not to criticize

systems under which the most representative union enjoys preferential or exclusive bargaining rights, on condition that decisions concerning representativity are based on precise, objective and pre-established criteria. More specifically, the Committee had indicated in the past that it is not necessarily incompatible with Convention No. 87 to accord negotiating privileges to the most representative unions if a number of safeguards are provided, including: a) certification is to be made by an independent body; b) the representative organizations are to be chosen by a majority vote of the employees in the units concerned; c) the right exists for an organization which fails to secure a sufficiently large number of votes to ask for a new ballot after a stipulated period; d) the right exists for an organization other than the certificated organization to demand a new ballot after a fixed period, often 12 months, has elapsed since the previous ballot.

The Committee considered that the registration system set up by the 1987 Labour Relations Act, which accorded exclusive negotiation rights to registered unions, would not be incompatible with the principles of freedom of association provided that the registration was based on objective and predetermined criteria.

The supervisory bodies also considered that the granting of exclusive rights to the most representative organization should not mean that the existence of other unions to which certain involved workers might wish to belong was prohibited. Minority organizations should be permitted to carry out their activities and at least to have the right to speak on behalf of their members and to represent them.

The Committee noted that an unregistered union was free to be established and cover all the workers who wished to be represented by it (it being understood that its collective agreements could not be registered) and could also negotiate on behalf of its members with any employer who recognized it. Moreover, an unregistered union, like registered ones, could call strikes, subject to certain reservations. The Committee noted with concern the complainant's opinion that the right to establish an alternative unregistered union was "at best theoretical".

The Committee requested the Government to supply information on developments in the number of unregistered unions and the type of

activities they carried out (in particular, the conclusion of collective agreements), but this information was not provided and the Committee considered that, in the case under review, the conditions attached to the grant of registration indirectly brought into question the right of workers to establish and join organizations of their own choosing, since they unduly influenced that choice.

With regard to the allegation that the provisions of the Act covering personal grievances were dependent on membership of a registered union, the Committee noted that, indeed in some cases, access to such procedures was linked to membership of a registered union (sections 209 (d) and 216(1)). It noted from a reading of the Act that direct access to the Labour Court was provided by section 218 when a worker considered that he had grounds for a personal grievance. This direct access was possible in four specified cases: when a worker was not a member of a registered union because he had been exempted from union membership under the exemption provisions of the Act; or when a worker not a member of a union had been subjected to duress by the employer in relation to union membership or non-membership; or when a worker not a member of a union had suffered discrimination because he was a member of a group which had previously requested registration; or when a worker belonging to a union was not satisfied with the treatment of his case. The Committee requested the Government to indicate whether section 218 allowed a non-exempted worker belonging to a non-registered union to have access to the Labour Court, for example in a case of unjustified dismissal and, if not, to specify the alternative remedies available to such a worker. The Government replied in this respect that this provision did not envisage the case of such workers.

With regard to the allegation that compulsory union membership denied the free choice by workers of an organization, the Committee observed that the pertinent section of the Labour Relations Act read as follows:

- a) while unions may provide for a wider membership, all persons working who fall within the coverage of a union membership rule have a right to join that union;

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- b) where an award or agreement contains a union membership clause, any adult worker covered by that award or agreement must become a member within 14 days of being requested to do so by the union;
 - c) the insertion of a union membership clause can be negotiated by the parties to an award or agreement but, if not settled by negotiation, the matter can be determined by a ballot of all workers bound by the award or agreement;
 - d) union membership ballots must be supervised by the Registrar of Unions;
 - e) exemption from union membership may be sought only on the grounds of conscience or other deeply held personal conviction.

The Committee noted that this provision basically maintained the system which previously existed in New Zealand under other legislation and about which the NZEF had complained in the past. As pointed out by the Government in the present case, the main provisions criticized by the Committee on Freedom of Association in that previous complaint had been removed from the Labour Relations Act of 1987. For example, the imposition of compulsory union membership clauses for an 18-month period and the “conveniently belong” criterion did not appear in the new Act. The Committee accordingly based its consideration of the legislation in force on the reasoning applied to the earlier complaint, in particular on the decision of the ILO’s supervisory bodies to leave it to “the practice and regulations of each State to decide whether it is appropriate to guarantee the right of workers not to join an occupational organization or (...) to authorize and, where necessary, regulate the use of union security clauses in practice”.

The Committee also recalled the distinction made between union security clauses allowed by law and those imposed by law, only the latter of which appear to result in a trade union monopoly system contrary to the principles of freedom of association. Given the freedom to ballot and negotiate union membership clauses under the terms of section 58, the Committee considered that it had not been presented with information requiring it to change its earlier decision concerning the union security

arrangements existing in New Zealand. It therefore considered that there was no violation of the principles of freedom of association in respect of this aspect of the legislation in force.⁶⁰

Panama

Case No. 1052

The complaint is contained in a communication of the National Council of Private Enterprise of the Republic of Panama (CONEP) of 22 June 1981.

The principal allegations were that sections 2 and 41 of Act No. 13, of 15 June 1981, instituted general wage increases and modified all the wages agreed upon in the collective agreements in force, thus infringing the freedom of association Conventions ratified by Panama.

The complainant added that the wage measures adopted neither encouraged nor promoted collective bargaining and that the increases imposed by the State reflected an attitude and intention on its part which were unacceptable to employers and employers' organizations which had concluded collective agreements, with the State thereby assuming the role of a dictator of voluntarily negotiated conditions of employment and establishing the basis so that in the future such conditions could be altered or modified to the detriment of employers or workers.

According to the complainant, the wage increases instituted by Act No. 13 altered the wage scales freely agreed on between the Panamanian Chamber of Construction and the Single National Trade Union of Construction Workers, as well as modifying all the clauses providing for wage increases in all the other collective agreements in force; all this contributed to the discouragement of the voluntary negotiation of collective agreements.

In general terms, the Committee emphasized the importance it attaches to the principle of the autonomy of the parties to the collective bargaining process, a principle generally recognized in the preparatory discussions that led to the adoption by the Conference in 1981 of the

⁶⁰ See 259th Report, paras. 517-552; 265th Report, paras. 260-282; 270th Report, para. 20; 275th Report, para. 15; and 284th Report, para. 14.

Collective Bargaining Convention (No. 154). It follows from this principle that the public authorities should not as a rule intervene to modify the contents of collective agreements freely concluded. Such intervention would be justified only for compelling reasons of social justice and the general interest.

In this connection the Committee noted that, after providing figures in support of its statements, the Government had pointed out that it had acted in the face of extraordinary circumstances to restore the purchasing power of workers, adding that the average wage of workers made it impossible for a great many of them to cover their basic family needs. The Committee also observed that the Government described the wage measures contained in Act No. 13 of 1981 as extraordinary measures and that it did not appear that the wage increases prescribed by the Act were disproportionate in relation to the rate of inflation. Finally, the Committee observed that before the adoption of Act No. 13 of 1981 consultations had been held with employers and workers, who had adopted divergent positions as to the amount of the wage increases to be granted.

Taking into account the exceptional circumstances of the case, as invoked by the Government, as well as the Government's statement that discussions had taken place prior to the adoption of Act No. 13 of 15 June 1981 with all parties concerned, the Committee could not find that the Act violated the principles of collective bargaining. The Committee did however consider in general that the harmonious development of industrial relations would be promoted if the public authorities, in addressing problems relating to the loss of the purchasing power of workers, were to adopt solutions which did not entail modifications of what had been agreed upon between workers' and employers' organizations without the consent of both parties.⁶¹

Case No. 1419

The complaint was presented by the International Organization of Employers (IOE) on 7 August 1987.

⁶¹ See 211th Report, paras. 142-158.

The complainant alleged that arrest warrants had been issued against seven employers' leaders (three of whom were said to have been arrested and two who were fugitives from justice) on charges of committing crimes of sedition and of attempting to overthrow the Government; the search of the premises of the Chamber of Commerce and the Panamanian Association of Managers of Enterprises and the confiscation of documents; the banning of certain newspapers, radio stations and television channels; and the encouragement or tolerance by the police of measures taken against certain employers' leaders and their enterprises during the months of June and July 1987.

The Committee noted that, according to the Government, the employers' organizations and the employers' leaders involved had had their rights curtailed within the framework of a criminal investigation because of their links with the National Civil Crusade and their presumed criminal activities within the movement, whose members included various occupational organizations. The Committee noted the Government's explanations concerning the nature and objectives of the National Civil Crusade, but observed that some of these objectives comprised aspects of interest to occupational organizations, such as the restoration of civil liberties and constitutional guarantees and the fight against the paralysis of the economy. However, there was nothing to indicate that the National Civil Crusade was protected by the guarantees afforded by the Conventions on freedom of association. It was nevertheless the responsibility of the Committee to determine the extent to which the measures taken by the authorities to punish the activities organized or carried out in support of the objectives of the National Civil Crusade had hampered the exercise of the rights of employers' organizations and their leaders.

The Committee emphasized that, although the Government had provided general information on the arrest warrants of the employers' leaders Messrs. Barria, Vallarino (both then in hiding), Brenes, Mallol and ZúZiga, it had not indicated the specific acts of which they are accused individually, nor had it provided information on the allegations relating to the arrest warrants of the employers' leaders César Tribaldos and Carlos González de la Lastra. The complainant subsequently indicated that Mr Aurelio Barria, who had been detained, had been released.

With regard to the allegation that the employers' leader Mr Brenes had been deported to Miami on 20 December 1988 on the grounds of having carried out subversive activities and that this had been presented by the authorities as a voluntary exile, the Committee noted the Government's statement that on 20 December 1988 Mr Brenes had been detained for a period of less than 12 hours for questioning and that there was serious evidence of his participation in activities against the internal security of the State. According to the Government, there were no criminal proceedings pending against Mr Brenes. As no charges had been brought against Mr Brenes, the Committee regretted that he had remained in detention for nearly 12 hours and emphasized that such measures could create a climate of intimidation and fear prejudicial to the normal activities of occupational organizations, as envisaged in Convention No. 87. Furthermore, the Committee noted that the Government had denied the allegation that, after his detention, the employer's leader Mr Brenes had been obliged by force to take a plane to Miami. Finally, the Committee regretted that the Government had not replied to the other pending allegations (arrest and fining of the journalist Alcides Rodríguez, and violence against the leaders of the Chamber of Commerce and their enterprises). The Committee consequently reiterated its previous conclusions and recommendations in this respect.

The Committee further noted that the Government had not made any specific observations on the comments of the complainant organization concerning the search of the premises of the two employers' organizations and the confiscation of documents. Indeed, according to the IOE, the report of the search carried out on the premises of the APEDE stated that nothing had been found, whereas the officials of the Public Prosecutor's Office who had supervised the search claimed that a large quantity of subversive material had been found. With regard to the search of the Chamber of Commerce, the IOE maintained that the police attempted, in vain, to introduce arms into the premises and that there was no report of the search.

The Committee invited the Government to provide further detailed information on the specific acts which had led to warrants being issued for the arrest of each of the seven employers' leaders, on the state of the proceedings and on the searches conducted and documents

confiscated on the premises of the APEDE and of the Chamber of Commerce (including the report of the search of the latter's premises), with specific reference to the points raised by the complainant organization. Furthermore, noting the social unrest (particularly within employers' organizations) which had led to the events of recent months, and aware that the points noted above still needed to be clarified, the Committee considered that social tension would be relieved if the employers' leaders under arrest, or for whom warrants had been issued, were released on bail and if those who had left the country were allowed to return. While noting the Government's explanations concerning the refusal to grant bail to those involved, the Committee requested it to examine the possibility of doing so.

With regard to the alleged arbitrary detention of the employer's leader Alberto Conte, the breaking into, searching and closure of his enterprise and the confiscation of his property, the Committee noted that, according to the Government, such actions were envisaged in the procedural law and that they had been carried out as part of a criminal investigation, initiated by the Public Prosecutor after it had been discovered that the offices of Mr. Conte's enterprise had been used as a centre for the preparation and publication of material calling for the disruption of public law and order with a view to undermining the security of the State's powers, punishable under section 301 of the Penal Code. The Committee noted that Mr. Conte had been released on bail on 23 December 1988 and that he had left the country on the same day; however, it noted that a new detention order had been issued against him later. The Committee requested the Government to send a copy of the publications found in Mr. Conte's enterprise and to inform it of the progress made in the proceedings against him.

Finally, the Committee requested the Government to send its observations on the allegations to which it had not replied concerning the prohibition of certain media and the vexatious and violent measures initiated and tolerated by the police against the leaders of the Chamber of Commerce and their enterprises during the months of June and July.

In a subsequent examination of the case, the Committee noted the installation of a new Government in Panama on 20 December 1989. The Committee noted with satisfaction that the new Government had taken a

series of measures which had put an end to the extremely serious violations of Conventions Nos. 87 and 98, namely: the occupation of the Chamber of Commerce and the Trade Union of Industrialists of Panama, the closure of important communications media used regularly by the organizations of employers, as well as the detention and proceedings against employers' leaders (who were therefore free and benefited fully from their civil rights).

Finally, the Committee noted that the Ministry of Trade and Industry had lifted the sanctions which the previous Government had imposed on certain enterprises for the suspension of their activities (El Trapiche, McDonald's, Kentucky S.A. and Dairy Queen) and that Decree No. 13 of 16 May 1989 (which allowed the Government to oblige certain "public utilities" to remain operational, without interruption, under penalty of sanctions), which had been used to violate the rights of employers' organizations, had been repealed. Finally, it observed that there were no criminal proceedings pending against the journalist Alcibíades Rodríguez, who was free to request the renewal of his announcer's licence.⁶²

Case No. 1475

The complaint was presented by the International Organization of Employers (IOE) in a communication dated 18 October 1988.

The IOE alleged that Decree No. 26 of 28 March 1988 respecting the right of association did not respect the obligations deriving from Panama's ratification of Convention No. 87.

The Committee noted the Government's statements that Decree No. 26 of 28 March 1988 applied to neither trade unions nor to associations of employers, which were governed by the Labour Code (which contained detailed provisions on the subject).

⁶² See 253rd Report, paras. 392-424; 256th Report, paras. 361-382; 262nd Report, paras. 245-267; 265th Report, paras. 443-456; 272nd Report, paras. 197-219; 281st Report, para. 17; and 284th Report, para. 15.

The Committee observed in this respect that the Committee of Experts on the Application of Conventions and Recommendations, when it examined Decree No. 26 at its session in March 1989, confirmed that its scope did not extend to trade unions or to employers' associations. The Committee on Freedom of Association concluded that, since Convention No. 87 applies solely to organizations of employers and of workers (and not to other associations or organizations), the case did not call for further examination.⁶³

Case No. 1931

The complaint was filed by the International Organization of Employers (IOE) and the National Council of Private Enterprise (CONEP) in a communication dated 12 June 1997.

The complainant organizations alleged that certain provisions of the Labour Code regulating collective disputes and strikes were in contradiction with Conventions Nos. 87 and 98. The Committee noted the observations of the Government, and in particular that the provisions to which the complainants were objecting were the result of consensus and tripartite negotiations in which representatives of the employers and workers had participated actively as the main parties.

The Committee noted that the legislative provisions referred to by the Government had been in force since 1971 and had not been amended by Act No. 44. The Committee recalled that its mandate “consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions”. The Committee also recalled that “Where national laws, including those interpreted by the high courts, violate the principles of freedom of association, the Committee has always considered it within its mandate to examine the laws, provide guidelines and offer the ILO’s technical assistance to bring the laws into compliance with the principles of freedom of association, as set out in the Constitution of the ILO and the applicable Conventions”. The Committee

⁶³ See 265th Report, paras. 54-61.

considered that these principles also applied to cases in which the legislation in question had been the subject of consultation or negotiations with the social partners before being adopted. For this reason, the Committee decided to examine point by point the legislative provisions to which the complainants objected. However, the Committee emphasized in general that the legislation under criticism was not sufficiently clear with regard to certain aspects and that it regulated industrial relations in too much detail and constituted a significant interference.

With regard to the immediate closing down of the enterprise, establishment, branch or works in the event of a strike being called, and guaranteed by the police authorities, the Committee noted that, in accordance with the legislation, in the event of a legal strike, when strikers constituted the majority of the workers in an enterprise, establishment, branch or works, the closure had to occur immediately and be guaranteed by the police. In this respect, the Committee noted the statements by the complainants that this legal regulation was detrimental to workers who were not on strike, prevented the carrying out of maintenance work on the equipment of the enterprise and, by paralysing all administrative and financial activity by employers, who were not able to enter their offices and installations, jeopardized the survival of enterprises. In previous cases concerning the exercise of the right to strike, the Committee had criticized “coercion of non-strikers in an attempt to interfere with their freedom to work” and had considered that the minimum services to be maintained in the event of a strike to guarantee the safety of persons and installations and the prevention of accidents (minimum safety service) were normal and acceptable restrictions.

In these circumstances, the Committee concluded that the closing down of the enterprise, establishment, branch or works in the event of a strike, as provided for in sections 493(1) and 497, was an infringement of the freedom of work of persons not participating in a strike and disregarded the basic needs of the enterprise (maintenance of equipment, prevention of accidents and the right of employers and managerial staff to enter the installations of the enterprise and to exercise their activities). In these circumstances, the Committee requested the Government to take measures without delay to repeal sections 493(1) and 497 of the Labour Code.

Payment of wages to strikers in certain cases

The Committee noted that the complainant organization opposed the provision of the Labour Code which required the employer to pay wages when the strike had the following objects: (1) to demand fulfilment of any collective agreement, direct settlement or arbitration award (section 510(1) of the Labour Code); (2) to obtain compliance with any statutory provision which had been infringed generally and repeatedly in the enterprise (section 510(1) of the Labour Code); (3) if the employer did not reply to the statement of claims or withdrew from the conciliation procedure (section 510(2) of the Labour Code); and (4) if the employer failed to comply with the obligation to close the enterprise in the event of a legal strike (section 511 of the Labour Code). The Committee also noted that, in relation to these matters, the complainant organizations pointed out that under the current regulations the labour administration authorities were not empowered to reject a flawed statement of claims which alleged imaginary or unfounded infringements of labour standards; the Committee accordingly understood that, according to the complainants, the conciliation procedure would be initiated and the strike could then be declared and the employer would have to pay the strike days in the circumstances referred to above.

Before examining the allegations relating to the payment of the wages of strikers by the employer, the Committee requested clarifications and information on the following points: (1) the manner in which sections 510 and 511 of the Labour Code were applied in practice; and (2) the existence of procedures and competent bodies in the event of violations of the legislation or of collective agreements, in the event of disputes over their interpretation or in the event that the employer failed to cooperate in the collective bargaining process. The Committee requested the Government to provide information in this regard.

Legal voids in relation to certain matters

The Committee noted that the complainant organizations emphasized the existence of legal voids in relation to certain matters concerning collective labour relations (determination of legal disputes which allowed the exercise of the right to strike, possibility for the employers to present a statement of claims and the possibility for employers to initiate a

conciliation procedure). In this respect, considering that a stable labour relations system should provide for the rights and obligations of both workers' organizations and employers and their organizations, the Committee requested the Government without delay and in consultation with the social partners to take measures with a view to regulating the above matters within the framework of the Labour Code.

Limitations on the number of advisers to the parties in the conciliation procedure

The Committee noted that section 427(3) of the Labour Code established the following:

“Section 427. The statement of claims shall be submitted in triplicate and shall contain the following information:

(...)

3. Name, identity card number and address of the delegates designated for the conciliation procedure who shall not be fewer than two in number and not more than five, accompanied, if they consider it appropriate, by a trade union adviser and a legal adviser; the delegates shall be accredited with sufficient powers to negotiate, bargain and conclude any agreement or enter into any arrangement or, as appropriate, conclude a collective agreement;

(...).”

The Committee noted that the complainant organizations had stated that the above provisions also applied by analogy to employers' delegates and advisers. In this respect, the Committee considered that excessively strict prescriptions on such matters as the composition of the representatives of the parties in the process of collective bargaining could limit its effectiveness and, in particular, believed that this was a matter which should be determined by the parties themselves. The Committee requested the Government without delay and in consultation with the social partners to take measures to amend section 427(3) of the Labour Code accordingly.

Submission of disputes to compulsory arbitration

The Committee observed that section 452 of the Labour Code established the following:

“Section 452. On conclusion of the conciliation procedure, the collective dispute shall be submitted in whole or in part for arbitration in any of the following cases:

1. if both parties agree to submit it to arbitration;
2. if the workers, before or during the strike, apply to the regional directorate of labour or the General Directorate of Labour for arbitration.

(...)”

The Committee noted that subsection 2 of section 452 unilaterally allowed workers to submit collective disputes to arbitration and that section 470 provided that “the arbitration award shall be a standard having the force of law between the parties”. In this respect, the Committee drew the Government’s attention to the fact that “Compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in a dispute, or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population.” As compulsory arbitration at the request of only one of the parties is a violation of the principles of freedom of association and collective bargaining, the Committee requested the Government without delay to take measures to amend subsection 2 of section 452 of the Labour Code. The Government subsequently informed the Committee that it had begun general consultations with the social partners, with a view to reconciling the different views and the Committee’s recommendations, and it indicated that the majority of workers’ organizations were not in agreement with the Committee’s recommendations. The Committee requested the Government to keep it informed of the outcome of these consultations. The Government subsequently indicated that it did not have the necessary

majority in Parliament to amend the Labour Code. The Government reaffirmed its intention to continue holding consultations to achieve consensus and amend the legislation. To this effect, it would request technical assistance from the San José Multidisciplinary Team. The Committee noted this information and hoped that such technical assistance would make it possible to achieve progress in the near future.⁶⁴

Paraguay

Case No. 1790

The complaint was presented by the International Organization of Employers (IOE) and the Federation of Production, Industry and Commerce of Paraguay (FEPRINCO) on 1 July 1994.

The complainants alleged that on 6 May 1994, in an arbitrary manner and on the instructions of the Bicameral Commission of the National Congress, the headquarters of FEPRINCO was occupied and audio tapes, records of meetings and diskettes belonging to the employers' organization seized. The irresponsible and prejudiced decision was based on an anonymous communication to Senator Fernando Pfanne, who had asked the President of the Bicameral Commission to have the premises searched immediately. The complainant organizations indicated that the search of the headquarters of the leading Paraguayan employers' organization constituted a violation of the civil liberties essential to the ordinary exercise of trade union rights and that it was detrimental to the climate necessary for tripartism to function in the country.

The Committee deeply regretted the fact that the Government had not sent the observations requested concerning the serious allegations made, despite the time that had elapsed since the lodging of the complaint and the fact that it had been asked to make its comments and observations on a number of occasions, including in an urgent appeal. In these circumstances, the Committee was bound to submit a report on the

⁶⁴ See 310th Report, paras. 474-507; 318th Report, paras. 353-371; 320th Report, para. 97; 321st Report, para. 54; and 323rd Report, paras. 69-71.

substance of the case without being able to take into account the information it was expecting to receive from the Government.

The Committee recalled that the International Labour Conference had declared in its resolution concerning trade union rights and their relation to civil liberties (1970) that the rights conferred upon workers' and employers' organizations must be based on respect for those civil liberties enunciated, in particular in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, and that the absence of these civil liberties removes all meaning from the concept of trade union rights. More specifically, the Committee pointed out to the Government that the right of the inviolability of the premises of workers' and employers' organizations, which is an essential element of the rights recognized under Convention No. 87, has as "an indispensable corollary (...) that the public authorities may not insist on entering premises without a judicial warrant authorizing them to do so". In this connection, the Committee condemned the search of the headquarters of FEPRINCO and the confiscation of documents and materials, both of which violated the fundamental rights of employers' organizations, and requested the Government to return immediately the documents and materials to FEPRINCO and to conduct an inquiry to clarify the circumstances surrounding these actions and, as appropriate, punish those responsible. The Committee requested the Government to keep it informed in this connection and also to ensure that in future there was full respect in the country of the right to the inviolability of the premises and property of employers' organizations.

In subsequent communications, the Government stated that the search of the FEPRINCO headquarters had been ordered by the courts on 6 May 1994 at the request of the President of the Bicameral Commission of the National Parliament, and that magnetic tapes, records of meetings and diskettes had been seized. FEPRINCO had made a number of judicial appeals against this action on the grounds that it was illegal, that there was no indication of the offences that were being investigated, that it was based on an anonymous denunciation, that the legal procedure had not been followed and that objects and property (not only documents) had been seized. The Court of Appeal (Second Criminal Chamber) revoked the search warrant on 22 November 1994. The

Committee noted this information and insisted that the documents and materials seized be returned to FEPRINCO.

Peru

Case No. 2375

The complaint was presented by the International Organization of Employers (IOE) on 30 July 2004.

The complainant alleged violations of the principles of freedom of association and collective bargaining covered by Convention No. 98. According to the complainant, the Government of Peru had issued legal provisions imposing upon the civil construction sector the requirement to bargain at the branch level, thereby impairing the fundamental right to determine freely and voluntarily the level of bargaining between employers and workers, in contradiction with the recommendations of the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations.

The complaint was presented by the International Organisation of Employers (IOE) the National Confederation of Private Employers' Institutions (CONFIEP) and the Peruvian Chamber of Construction (CAPECO)

The complainant organizations alleged that the construction sector was obliged by legislation to negotiate according to branch of activity, thereby preventing the parties from being able freely to determine the level of negotiation in violation of Convention No. 98

The Committee regretted that the Government has not sent its observations, The Committee recalls that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements

The Committee recalled that, with regard to the level of collective bargaining, the Collective Bargaining Recommendation, 1981 (No. 163),

provides, in Paragraph 4(1), that “measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels”. The Committee also recalled that, in previous occasions, it has considered that “according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98 the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority. The Committee has considered that the best procedure for safeguarding the independence of the parties involved in collective bargaining is to allow them to decide, by mutual agreement, the level at which bargaining should take place. Nevertheless, it appears that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the part concerned should be truly independent.

The Committee requested the Government to take the necessary steps to change article 45 of Decree-Act No. 22593 and article 46 of Act No. 27912 to bring them into conformity with the international labour standards and the principles indicated, so that the level of collective bargaining is determined freely by the parties concerned.

With regard to the issue of the level of collective bargaining when the parties are not in agreement, the Committee notes the arguments of the decision of the Constitutional Court of 26 March 2003, favouring in such cases collective bargaining at the level of the branch of activity in the construction sector. The Committee believes that, when there is no agreement between the parties as to the level of negotiation, rather than a general decision by the judicial authorities favouring negotiation at the level of the branch of activity, it would be more in keeping with the letter and the spirit of Convention No. 98 and Recommendation No. 163 to have a system established by common accord of the parties in which in each new collective bargaining they may assert their interests and points of view in a specific way. The Committee requests the Government to invite the most representative workers’ and employers’ organizations to

establish a mechanism to resolve conflicts relating to the level at which collective bargaining should take place.

Serbia and Montenegro

Case No. 2146

The complaint was presented by the Yugoslav Union of Employers (UPJ) on 5 July 2001.

The complaint principally concerned restrictions on the right of employers to establish and join the organization of their own choosing and to bargain collectively as a result of obligatory membership of the Chamber of Commerce and the requirement that the Chamber sign agreements negotiated by the complainant organization and its affiliates.

The Committee noted the Government's assertion that the Constitution of the Republic guaranteed the right of association to all and that section 6 of the Act on the Chamber of Commerce, referred to by the complainant, only covered participation in the conclusion and implementation of collective agreements, but did not imply any exclusive right of the Chamber to conclude collective agreements, nor did it exclude any other organizations from so doing. The Committee however noted that, while it was not clear from the legislation, the Government did admit that membership of the Chamber of Commerce was compulsory and then went on to state that participation in the collective bargaining process depended on the principle of representation.

The Committee emphasized that Article 2 of Convention No. 87 provides that employers shall have the right to establish and join the organization of their own choosing. The Committee therefore considered that compulsory contributions to Chambers of Commerce (which have the same prerogatives as employers' organizations under Article 10 of Convention No. 87) would be contrary to freedom of association standards and principles. It derives from this principle that, just as for trade unions, questions concerning the financing of employers' organizations, in relation to both their own budgets and those of federations and

confederations, should be governed by the by-laws of the organizations themselves. Considering that the powers and activities set forth in the Yugoslav Act on the Chamber of Commerce included those within the purview of employers' organizations within the meaning of Convention No. 87, the Committee requested the Government to take the necessary steps to repeal all the provisions of the Act which gave rise to compulsory membership or financing. The Committee requested the Government to keep it informed of the progress made in this regard.

With regard to the right to collective bargaining, the Committee recalled 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. While noting that the Act on the Chamber of Commerce did not appear in itself to provide a monopoly to the Chamber of Commerce to conclude collective agreements, the Committee took due note of the complainant's allegation that any collective agreement resulting from negotiations had to be signed by the Chamber of Commerce, particularly in the light of the Government's indication that collective bargaining had to be conducted on the basis of representativeness and in the light of the compulsory nature of membership of the Chamber of Commerce. The Committee considered that the principle of representation for collective bargaining purposes could not be applied in an equitable manner in respect of employers' associations if membership of the Chamber of Commerce was compulsory and the Chamber of Commerce was empowered to bargain collectively with trade unions.

The Committee considered that the employers concerned should be able to choose the organization which they wished to represent their interests in the collective bargaining process. Furthermore, the Committee considered that granting collective bargaining rights to the Chamber of Commerce, which was created by law and to which affiliation was compulsory, impaired the freedom of choice of employers of the organization which would represent their interests in collective bargaining. The Committee trusted that the Government would take the necessary measures to ensure that employers could freely choose the organization they wished to represent their interests in the collective bargaining process and that the results of any such negotiations were not subject to the

approval of the legislatively constituted Chamber of Commerce. The Committee noted the information provided by the Government in relation to the powers and activities of the Serbian Chamber of Commerce and, in particular, that the Labour Law excluded it as a compulsory participant in collective agreements and that it had not concluded any collective agreements since the adoption of the Labour Law.

The Committee noted that the Republic of Montenegro was currently amending its labour legislation, with the intention of ensuring that employers' associations were truly independent collective bargaining agents. The Committee welcomed this initiative and requested the Government to provide it with a copy of the relevant law once it had been drafted.⁶⁵

Spain

Case No. 900

The complaint was presented by the Spanish Confederation of Employers' Organizations on 11 July 1979; the General Union of Workers (UGT) had already presented a complaint on 14 February 1978 and the Unitary Trade Union on 30 April 1979.

The UGT's complaint alleged that in pursuance of the legislation promulgated during and immediately after the Civil War (1936-39), it had been declared illegal and its assets confiscated and handed over to the National Office of Trade Unions of the Spanish Falange of the Traditionalists and the National Syndicalist Action Groups.

⁶⁵ See 327th Report, paras. 884-898; 329th Report, paras. 152-155; 333rd Report, paras. 119-125; and 335th Report, paras. 168-172.

The Spanish Confederation of Employers' Organizations (CEOE) alleged on 11 July 1979 that, taking into account the decision of the Committee at one of its sessions to request the Government to consult the trade union confederations and as the Government had not at the time placed workers' and employers' organizations on an equal footing, it presented a complaint to the Committee claiming the return of the assets confiscated from employers' organizations in 1939 as well as the right to participate in the machinery established to decide on the disposal of the property accumulated by the trade union organization, a significant proportion of which had been contributed by the employers. The CEOE was of the opinion that failure to hand over these assets or to arrange for formal consultations on the procedure constituted an infringement of the lawful rights of employers, as represented by their organizations, as well as of the ILO Conventions on freedom of association.

The Committee indicated that, in cases which had come before it involving the liquidation of trade union funds and assets, it had been guided by the criterion that, when an organization is dissolved, its assets should be distributed among its former members or handed over to the organization that succeeds it. The Committee also pointed out that the latter expression should be taken to mean an organization or organizations pursuing the aims for which the dissolved unions were established and pursuing them in the same spirit.

The Committee expressed the hope that negotiations between the Government and the organization concerned would enable an arrangement to be promptly worked out which was acceptable to the parties concerned and consistent with the principles of freedom of association.

The Committee noted in this connection that the Government had made temporary arrangements for use to be made of some of the trade union organization's assets. It noted in particular with interest that in so doing the Government had been guided by the principle that assets should be used for the purposes for which they had been acquired and that, bearing this in mind, certain premises had been set aside for use by representative trade union organizations. The Committee also noted that the public authorities and the trade union Confederations had one year in which to work out a legal formula for the final assignment of the assets of which they were now able to make use, which did not preclude referring the matter to Parliament for final decision when the time came. The Committee encouraged arrangements to consult representative

organizations of employers and workers with a view to working out a final solution to the problems that existed. Finally, the Committee noted the Government's statement to the effect that part of the property at issue had provisionally been assigned to the labour authorities to be used for the benefit of all workers pending a final settlement as to the ownership and allocation of these assets. The Committee considered that the problem of the disposal of the assets confiscated from employers' organizations in 1939 and handed over to the trade union organization created in 1940 was a matter for negotiation between the Government and representatives of the employers' organizations so that an arrangement could be worked out promptly which was acceptable to the parties concerned.⁶⁶

Venezuela

Case No. 1612

The complaint was presented by the International Organization of Employers (IOE) and the Venezuelan Federation of Chambers and Associations of Commerce and Production (FEDECAMARAS) in a communication dated 5 July 1991.

The allegations referred principally to the incompatibility of certain sections of the Organic Labour Act, which entered into force in May 1991, with Conventions Nos. 87 and 98. The Committee regretted that the Government had not replied to all the allegations. Nevertheless, because of the time which had elapsed since the presentation of the representation, the Committee was bound to examine some of the allegations without having the corresponding observations at its disposal.

With regard to the allegation concerning the restriction of freedom of association by virtue of section 419, which provided that "ten or more employers engaged in the same industry or activity, or similar or related industries or activities, may establish an employers' association", the

⁶⁶ See 194th Report, paras. 238-262; and 202nd Report, paras. 337-354.

Government had not sent any observations. The Committee considered that a minimum number of ten was extremely high and violated the right of employers to establish organizations of their own choosing. In these circumstances, in order to bring the legislation into line with the principles of freedom of association, the minimum number required by law should be reduced, after consultation with the organizations concerned.

In relation to the allegation concerning the considerable increase in the minimum number of workers required to establish a trade union, the Committee noted the Government's statement that, regarding the establishment of trade unions in a given profession, occupation or type of employment, or by workers who work in enterprises within the same sector of industry or commerce, the minimum number of 40 workers required by section 418 of the Organic Labour Act was the same as the number in section 380 of the regulations of the former Labour Act. The Committee observed that this provision had not been criticized by the Committee of Experts on the Application of Conventions and Recommendations. Nevertheless, the Committee was of the view that it would be appropriate to consider with employers' and workers' organizations the possibility of reducing this number.

With regard to the required number of 20 workers to establish a works union (section 417), the Government pointed out that it had not changed the number set out in section 329 of the former regulations. The Committee emphasized that it had always maintained that: "The legal requirement that there be a minimum number of 20 members to form a union does not seem excessive and, therefore, does not in itself constitute an obstacle to the formation of a trade union". The Committee accordingly considered that this provision did not in itself violate the principle of freedom of association.

With reference to the allegation concerning the impossibility for occupational organizations to determine freely their objectives (sections 408 and 409), the Committee noted that, even though subsection (l) of section 408 (workers' organizations) and subsection (j) of section 409 (employers' organizations) provided that organizations could determine their functions and aims in accordance with their statutes or the will of their members to further their aims, these two sections also imposed various objectives which had to be met compulsorily. The Committee

concluded that the mandatory list of functions and aims of associations was excessively extensive and detailed. It therefore requested the Government to take measures with a view to amending the legislation, in consultation with workers' and employers' organizations, so that it set out in general terms that the objectives of these organizations could be any which aimed at promoting and defending the interests of their members (in a manner similar to that of section 407 of the Act), leaving it to the organizations to define in their constitutions the specific objectives that they wished to pursue.

With regard to the allegation concerning the requirement for all occupational associations to be of a permanent nature (section 406), preventing employers and workers from establishing organizations on a temporary basis for specific purposes, the Committee pointed out that in general the permanent nature of workers' and employers' organizations was beneficial to the promotion and defence of the interests of their members. Nevertheless, the Committee understood that the creation of organizations for temporary purposes could be legitimate and useful in certain circumstances.

In relation to the allegation that sections 422 and 423 regulated in excessive detail the content of the constitutions of occupational associations and limited the right of employers and workers to formulate their programmes freely by imposing, in subsection (i) of section 423, a single democratic ideology and conferring, in subsection (p) of the same section, additional discretionary powers upon the competent authorities, the Committee observed, with regard to the allegation concerning the imposition of a single democratic ideology (section 423, subsection (i)), that the intent of the Act was to ensure the effective participation of members in the life of the association by requiring the election of their management committees in accordance with democratic principles. Moreover, with regard to the alleged discretionary power conferred upon the authorities by subsection (p) of the same section ("any other provision aimed at improving the organization's operation"), the Committee observed that this was an optional provision, which by nature did not limit the rights of associations, since it did not impose the "other provisions".

Concerning the allegation relating to the limitation of the rights of foreign workers, by preventing them from acting as representatives or serving on the management committees of their organizations unless they had been resident in the country for more than ten years (section 404), the Committee recalled that, after examining the content of the Organic Labour Act from the point of view of the application of Convention No. 87, the Committee of Experts on the Application of Conventions and Recommendations, at its 1991 session, had sent a direct request to the Government emphasizing that section 404 required an excessively long qualifying period for foreigners to hold office in occupational associations. The Committee on Freedom of Association was also of the view that a period of ten years' residence was excessive and requested the Government to remove this requirement, or at least to modify it as suggested by the Committee of Experts.

With regard to the allegation concerning the interference of the authorities in the administration of employers' and workers' organizations, as the Act specifically and exclusively limited the causes or reasons for which an organization could expel one of its members (section 448), the Committee considered that the four reasons envisaged by the Act for expelling members from an occupational organization or depriving them of their rights, listed hereunder, were not in themselves at variance with the principles of freedom of association: (a) embezzlement or misappropriation of the organization's funds; (b) refusal to comply with a decision taken by the assembly within the exercise of its legitimate powers, provided the interested party was aware of, or should have been aware of, the said decision; (c) disclosure of deliberations and decisions which the organization had designated confidential; and (d) immoral behaviour clearly contrary to collective interests. Nevertheless, the Committee shared the point of view of the complainant organizations that it would be more appropriate if these or other reasons were regulated by the organizations' constitutions and not by the Act.

With reference to the allegation concerning the mandatory registration of employers' and workers' organizations (section 420) and the requirement to obtain registration in order to have legal personality (section 429), thus limiting the right of association and hindering the establishment of organizations, the Committee observed that, according

to the Government, the requirement for occupational associations to register to obtain legal personality was a simple verification to ensure that the minimum requirements for their operation had been met, and that these requirements were set out in detail by the Act and not left to the discretion of the supervisory authority. The Committee observed that section 420 of the Organic Labour Act provide that occupational associations (of workers or employers) wishing to organize at the regional or national level had to register with the national labour inspectorate, that section 425 provided that the labour inspector shall receive the registration application from an occupational association and within 30 days shall order the registration, that section 426 provided that registration could be denied to an organization only in specific cases (if the organizations do not have as objectives the aims provided by law; if the organization has been established without the legal minimum number of members; if there are faults or omissions in the act of constitution, the internal rules and the list of founding members, or if any of these documents are lacking; finally if the association takes the name of an already existing organization), and that section 429 provided that the registration of an organization granted it legal personality.

On previous occasions, the Committee had noted that “if the conditions for the granting of registration are tantamount to obtaining previous authorization from the public authorities for the establishment or functioning of a trade union, this would undeniably constitute an infringement of the Convention. This, however, would not seem to be the case when the registration of trade unions consists solely of a formality where the conditions are not such as to impair the guarantees laid down by the Convention”. The sections of the Organic Labour Act would appear to limit the registration procedure to a simple verification that legal requirements have been fulfilled (with the exception of the provision mentioned in paragraph 15 of these conclusions, concerning the obligations and functions of occupational associations), and that these requirements merely consist of formalities which are not subject to the discretion of the authorities. The Committee nevertheless considered that the decisions of the labour inspector concerning registration should be subject to review before an independent judicial authority.

In relation to the allegation concerning government interference in the free negotiation of union security clauses (section 444) and the limitation of the rights of employers' and workers' organizations to negotiate the conditions of work they considered most appropriate to their respective interests, the Committee observed that section 444 provided that "the exercise of freedom of association shall not prevent the most representative trade union in an enterprise or occupation from requesting the employer or employers interested in collective negotiation to produce trade union forms for the recruitment of workers within the terms of the present Act". Similarly, the Committee observed that section 445 provided that "a collective agreement may contain clauses conferring upon the contracting trade union with the largest number of members the right to provide the employer with up to 75 per cent of the personnel he requires". With regard to section 445, as it provided that a specific type of clause could be negotiated within the framework of agreements, the Committee concluded that this provision did not violate the principles of freedom of association.

With regard to the allegation that under the terms of section 446 employers, without the prior authorization of workers, were obliged to withhold special trade union dues from workers' wages when they were not unionized so that they could benefit from a collective agreement, the Committee observed that section 446 of the Organic Labour Act established that:

"Employers shall deduct from the wages of trade union members the regular or special contributions fixed by the trade union in accordance with its statutes. Workers who benefit from a collective agreement concluded by the union, and who are not members of another union, shall have such special contributions deducted as a token of solidarity and in recognition of the benefits so obtained. The employer shall hand over the sums collected to the authorized representatives of the trade union as soon as they have been collected."

The Committee recalled that at its November 1992 session it had examined the question of trade union solidarity dues in Venezuela and considered that "problems related to union security clauses should be resolved at the national level, in conformity with national practice and the industrial relations system in each country", and that "both situations

where union security clauses are authorized and those where these are prohibited can be considered to be in conformity with ILO principles and standards on freedom of association”. Nevertheless, when legislation admits trade union security clauses such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements. In this regard, the Committee observed in the present case that the Act authorized the trade union to set unilaterally and to receive from non-members the amount of the special contribution set for members, as a token of solidarity and in recognition of the benefits obtained from the collective agreement. The Committee concluded that, to bring this into line with the principles of freedom of association, the Act should establish the possibility for both parties acting together, and not the trade union unilaterally, to agree in collective agreements to the possibility of collecting such dues from non-members for the benefits that they might enjoy. In these circumstances, the Committee invited the Government to take the necessary measures to amend the provisions of section 446 on trade union security clauses.

With reference to the allegation concerning the limitation of collective bargaining to unionized workers, the Committee noted that, as the complainant organizations had pointed out, section 507 of the Organic Labour Act did not refer to non-unionized workers, as it defined a collective labour agreement as “one concluded between one or more workers’ trade unions or federations or confederations, on the one hand, and one or more employers or employers’ associations, on the other, with a view to establishing the conditions under which work is to be performed and the rights and obligations accruing to each of the parties”. Since the Organic Labour Act did not provide for the possibility, in the absence of trade union organizations, for representatives of workers to negotiate with employers, and taking into consideration the concern expressed by the complainant organizations, the Committee requested the Government to examine with the social partners the possibility of amending section 507, taking into account the pertinent provisions of the Collective Agreements Recommendation, 1951 (No. 91): “For the purpose of this Recommendation, the term ‘collective agreements’ means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers

or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other."

The Committee recalled that the Recommendation emphasized the role of workers' organizations as one of the parties to collective bargaining. Direct negotiation between the enterprise and its employees, by-passing representative organizations where they existed, might in certain cases be detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted. The Committee recalled the importance of the independence of the parties to collective bargaining.

In relation to the allegation concerning the extension of collective agreements to workers not affiliated to the trade unions that had concluded them (section 398), by establishing machinery which could lead to trade union monopoly, with results which would appear to be contrary to the principles contained in Convention No. 87 and section 401 of the Organic Labour Act, the Committee emphasized that, when the extension of the agreement applies to non-member workers of enterprises covered by the collective agreement, this situation in principle does not contradict freedom of association principles, in so far as under the law, it is the most representative organization that negotiates on behalf of all workers, and the enterprises do not have a number of establishments (a situation examined below). Nevertheless, the Committee also emphasized that the wording of this section was too general and that it would be appropriate for the Act to clarify in what circumstances the extension might apply, and whether it might also apply in other cases. If this was indeed possible, then the legal guarantees provided for in the "standard-setting labour meeting" and mentioned two paragraphs below should be respected.

With regard to the allegations that the provisions of sections 530, 532, 533(e), 535, 538, 543 and 545 were at variance with the principles contained in Convention No. 98, the Committee pointed out that the Act dealt with a practice current in many countries, which admitted it on the condition that it be accompanied by certain guarantees. Under this

practice, a collective labour agreement with effect for an activity or occupation within a specific geographic area might be applied in other areas for the same activity or occupation. Generally, the extension could not take place from one activity or occupation to another, either within the same geographic area or outside it. Recourse to extension is used to avoid problems relating to economic competition (when in one area, for lack of a collective agreement, less favourable wages or working conditions keep labour costs down), to compensate for the workers' inability to negotiate collectively or organize trade unions. The intended aim is to make up for this shortcoming and reduce its possible effects within the country's economy. In the Committee's opinion, any extension should take place subject to tripartite analysis of the consequences it would bring in the sector to which it is applied. In these circumstances, observing that a representative of the Government and representatives of employers and workers participated in all standard-setting labour meetings (sections 528 and 542), thus providing the possibility for any of them to oppose extension of the agreement (section 534(2)), the Committee concluded that the provisions in the first section concerning the standard-setting labour meetings were not contrary to the principles of freedom of association. Nevertheless, the Committee considered that this section of the Act should specifically state that, before proceeding to any extension, the social partners should analyse the consequences that it would have on the sector to which it was to be applied.

In relation to the allegation that section 513 contained provisions which could undermine the right of workers to establish and join organizations of their own choosing, the Government had not sent any observations. The Committee noted that the text of the section established the following: "Where an enterprise has departments or branches in various jurisdictions, agreements between it and a trade union representing a majority of its employees shall apply to employees in such departments or branches." In the view of the Committee, it would be appropriate, in conformity with the principle of voluntary and free negotiation, for the Act to be amended so that it was left to the parties to decide on the matter.

With reference to the allegations concerning inequitable treatment favouring various economic chambers and bodies, as well as professional

colleges, to the detriment of employers' organizations, the Committee noted that section 405 of the Organic Labour Act provided that "chambers of commerce, industry, agriculture or any other field of production or service, together with their federations and confederations, provided that they possess legal personality, may perform the functions accorded by the present Act to employers' associations, subject to prior registration with the Ministry responsible. Similarly, legally established professional colleges and their federations and confederations shall enjoy equal rights to perform the functions of workers' trade unions in the representation of their members, subject to prior registration with the Ministry responsible."

In this respect, the Committee noted the IOE's statement that chambers of commerce, industry, agriculture and other legal entities of an associative type were not subject to the same requirements as employers' organizations in relation to their constitution and the carrying out of their activities, which discouraged the establishment of organizations of this type. Among other matters, the complainant indicated that, to the detriment of employers' organizations, associations of the type mentioned in section 405 enjoyed the following benefits: (1) they are not required to have the same minimum number of members in order to be established; (2) there are no legal restrictions on their functions and aims; (3) the procedure for their registration is simplified; (4) their registration may not be refused; (5) they do not need to notify the authorities of changes in their statutes or to provide information on their activities or their members; (6) the procedure for the election of their directors may be by acclamation, and periods of office may be longer; and (7) they have greater powers of decision as regards control of their finances and the use to which they may be put.

The Committee noted that chambers and other legal entities of an associative type could be established and perform the functions of employers' organizations, but that the establishment and operation of the latter was subject to requirements and limitations that appeared to exceed the legal requirements to which chambers and other legal entities of an associative type were subject. In the view of the Committee, this could influence the social partners when they decided on the form of association they wished to have (chamber or association, on the one

hand, or occupational organization, on the other). The Committee could not exclude the hypothesis that the legislator might have attempted to take account of a de facto situation existing in the country at the time when the provisions of section 405 were included in the Organic Labour Act; nevertheless, one of the social partners had manifested disagreement with the provision in question, since it would indirectly promote the establishment of chambers or associations and would make it difficult to establish employers' organizations. In these circumstances, the Committee considered that it would be appropriate for the Government, in consultation with the organizations concerned, to take the necessary steps to bring the requirements for the establishment and functioning of "employers' occupational associations" into line with those governing chambers and civil associations, so as to ensure that "employers' occupational associations" were not restricted by excessively detailed provisions which discouraged their establishment, contrary to Article 2 of Convention No. 87, which provides that employers, as well as workers, shall have the right to establish organizations of their own choosing without previous authorization.

With regard to section 473, to which the complainant organization objected, the Committee observed that, in submitting the representation, the IOE had alleged that the provisions of this Article limited the possibility that two or more trade unions could exist in a single enterprise and that, according to the complainant organization, this was contrary to the provisions of Convention No. 87. Subsequently, in submitting its additional information, the IOE added that the section concerned also violated the provisions of Convention No. 98, in particular relating to the voluntary nature of negotiation. The Committee also noted that the Government had not communicated its observations on these matters.

With reference to the first point, the Committee noted that the second paragraph of section 473 provided that a collective agreement could be negotiated only by a trade union representing an absolute majority of the workers in an enterprise. The Committee considered that this provision did not violate Convention No. 87, as it did not exclude the possibility of there being more than one trade union. The Committee nevertheless noted that the impugned provision also referred to the need for an absolute majority for bargaining purposes and, in this respect,

problems could arise in relation to the application of Article 4 of Convention No. 98 when no union in an enterprise or bargaining unit represented the absolute majority of workers, when it would be impossible for trade unions to negotiate a collective agreement, either jointly or separately. In these circumstances, since it did not promote collective bargaining within the meaning of Article 4 of Convention No. 98, the Committee requested the Government to take steps, in consultation with the organizations concerned, to amend the provision in question so as to ensure that when no trade union represented the absolute majority of the workers, the organizations could jointly negotiate a collective agreement applicable to the enterprise or the bargaining unit, or at least conclude a collective agreement on behalf of their members.

In relation to the second point raised by the IOE concerning the first paragraph of section 473, the Committee noted the complainant organization's statement that: (1) the provisions of this section allow a labour inspector discretionary powers to initiate a phase of negotiation between an employer and a trade union by the mere fact of taking cognizance of the existence of a collective dispute; (2) these powers allow inspectors to intervene even at stages when the planning of the conduct of the dispute is being organized; (3) the State reserves the right to intervene before either party is able to develop its programme of action; (4) labour inspectors are obliged to attempt to initiate a phase of bargaining regardless of whether the parties are interested in doing so; (5) these powers affect the impartiality of labour inspectors.

The Committee observed that the first paragraph of section 473 provided that, on taking cognizance of the existence of a dispute of a collective nature, or when the dispute arose, the labour inspector should attempt to initiate a phase of negotiation between the employer(s) and the trade union(s) concerned, and could take part in the discussions in person in an attempt to harmonize their interests and points of view. In this respect, the Committee recalled that the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), advocates that: "Voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers. (...) Provision should be made to enable the procedure to be set in motion, either on the initiative of any of

the parties to the dispute or ex officio by the voluntary conciliation authority.” The Committee concluded that the first paragraph of section 473 did not appear to exceed the admissible limits of intervention of the labour administration within the framework of voluntary conciliation according to this Recommendation. It was for the Committee of Experts to examine whether this provision exceeded the functions assigned to labour inspectors by the Labour Inspection Convention, 1947 (No. 81). Nevertheless, the Committee noted that the first paragraph of section 473 was drafted in such broad terms that an extensive interpretation could not be excluded and it could in practice be applied to situations in which conciliation was neither necessary, appropriate nor desirable. In these circumstances, the Committee requested the Government to ensure that the application of this section by the administrative authorities of the Ministry of Labour did not depart from the principles contained in Recommendation No. 92 and guaranteed the application of Article 4 of Convention No. 98, under which the public authorities have to encourage and promote the full development and utilization of machinery for voluntary collective bargaining, as well as to establish machinery for voluntary conciliation.

Finally, with regard to the recommendations made during the examination of this representation at its May 1993 session, the Committee noted the Government’s statement that it was beginning a process of discussion and revision of the general regulations of the Organic Labour Act and that it undertook to comply with the recommendations made by the Committee concerning these regulations. It also noted the decision of the Supreme Court, the highest judicial authority in Venezuela, to the effect that, in case of conflict, the Conventions ratified by Venezuela would prevail over the standards set out in the Organic Labour Act. The Committee also noted and welcomed the Government’s decision to initiate discussions with the social partners and to exercise its legislative initiative so that the regulations took into consideration the Committee’s recommendations concerning the amendment of the following legislative provisions: sections 419 and 418 concerning the requirement of a minimum number to establish workers’ and employers’ organizations; sections 408 and 409 on the aims of employers’ and workers’ organizations; section 448 on the causes or motives for expelling a member of an organization; section 446 on trade union security clauses; sections 398

and 513 on the extension of collective agreements to workers who are not members of the organization which concluded them and their extension to departments or branches in different jurisdictions; section 507 on the negotiation of collective contracts between non-unionized workers' representatives and employers; sections 530, 532, 533(e), 535, 538, 543 and 545 on the extension of collective agreements; and section 404 limiting the rights of foreign workers. The Committee trusted that the Government would include the provisions examined in its previous paragraphs relating to sections 405 and 473 of the Organic Labour Act among the legislative provisions that it proposed to examine with the social partners with a view to their amendment. Finally, the Committee insisted upon the necessity of amending the legislation in the sense indicated and that changes to regulations would be insufficient.⁶⁷

Case No. 2254

The complaint was presented by the International Organization of Employers (IOE) in communications dated 17 March 2003. At the time of the preparation of the present study, the Committee had made interim conclusions, which are reproduced below in extenso.

The allegations related to:

- *the marginalization and exclusion of employers' associations and of FEDECAMARAS from the decision-making process, thereby excluding them from social dialogue, tripartism and consultations in general (particularly in relation to the very important legislation that directly affects employers) and failing to comply with the recommendations of the Committee on Freedom of Association;*
- *action and interference by the Government to encourage the development of and promote a new employers' organization in the agricultural and livestock sector to the detriment of FEDENGA, the most representative organization in the sector;*
- *violations of human rights and rights fundamental for the exercise of the activities of employers' organizations as set out in Convention No. 87, and in particular acts of aggression and intimidation by the authorities and paramilitary groups and reprisals against FEDECAMARAS, its affiliated organizations and its officials for exercising their right to demonstrate in national civic work stoppages, namely:*

⁶⁷ See 290th Report, paras. 1-34; and 298th Report, paras. 1-24.

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- *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 Venezuelan employers and their officials by the authorities or people close to the Government (various cases are listed);*
 - *the operation of violent paramilitary groups with governmental support, with action against the facilities of an employers' organization and against demonstration activities by FEDECAMARAS;*
 - *the creation of an atmosphere hostile to employers in order to allow the authorities (and on occasion to encourage them in) the dispossession and occupation of ranches in full production, in violation of the Constitution and legislation and without complying with 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 upon unilaterally by the authorities, discriminating against companies belonging to FEDECAMARAS in administrative authorization for the purchase of foreign currency in retaliation for participation by this employers' confederation in national civic work stoppages.*

The Committee emphasized the severity of the allegations and deplored the fact that, even though the complaints had been submitted in March 2003, the Government's reply dated 9 March 2004 did not specifically reply to a considerable portion of the allegations.

The Committee observed 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 which only lasted a few days, as it was later cancelled by the President himself), the Government stated that: (1) the only reason for the complainants' accusations is to justify their positions, which have nothing to do with occupational or trade union situations, but on the contrary are strictly illegal, anti-democratic and discriminatory policies and FEDECAMARAS is an eminently political, subversive and anti-democratic institution; (2) FEDECAMARAS executives have engaged in subversive activities with the clear intention of destabilizing State institutions, imposing a dictatorship and taking power by force, which they achieved on 12 and 13 April 2002 with a coup d'état, the de facto

President then being Mr. Pedro Carmona, former President of FEDECAMARAS; (3) the work stoppage by FEDECAMARAS in April 2002 became a general strike on 11 April 2002, with all the sectors supporting the coup d'état being called upon to march, giving a certain mass character to the "protest" to justify the coup d'état that had been planned for months; (4) Carlos Fernández, the next President of FEDECAMARAS, endorsed the dictatorship on 12 April 2002 when he signed the "Act of Constitution of the Government of Democratic Transition and National Unity" on behalf of the employers; (5) FEDECAMARAS, the CTV and other sectors involved in the civic work stoppages between 2001 and 2003 made subversive calls in an attempt to achieve the overthrow of the President of the Republic and were resisted by the overwhelming majority of the people of Venezuela; these civic work stoppages occurred as a result of the far-reaching process of change in Venezuelan institutions and society vis-B-vis the previous implementation of neo-liberal measures, exclusive globalization, privatization and the deregulation of the rights of workers and the loss of control of the State economic apparatus by FEDECAMARAS; in effect, the case is about the loss of privileges by FEDECAMARAS and the fact that it is not above the Constitution.

a) *Conclusions on the allegations concerning the exclusion and marginalization of employers' associations and of FEDECAMARAS from social dialogue, particularly in relation to the development of laws that affect their interests and the establishment of economic policies*

The IOE and FEDECAMARAS pointed out that the Government has not convened the Tripartite Commission of Venezuela for years and indicated that, in violation of the legislation and the Constitution of the Republic, they had not been consulted in respect of the development of laws, legal texts or economic policies that directly affect their interests, specifically:

- the Labour Procedure Act;
- the award of a general increase in the minimum wage of 20 per cent by decree;

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- the ratification of the Indigenous and Tribal Peoples Convention, 1989 (No. 169);
 - the unilateral establishment of a new banking control scheme imposed by the authorities, and more generally the establishment of blatantly anti-employer economic policies and directives; and
 - the Enabling Act of 13 November 2002, which empowered the President of the Republic to issue 49 executive orders in areas affecting employers' interests.

With respect to the 49 executive orders issued by the President of the Republic under the Enabling Act of the National Assembly dated 14 November 2000, the Committee noted that, according to the Government: (1) the executive orders were the result of broad consultation with the citizens, a number of the country's social and cultural sectors and consultations with both peak and grassroots organizations, which were involved in drafting them; (2) from the outset, each of the employers' associations concerned affiliated to FEDECAMARAS and numerous actors in national life were consulted, including employers' and workers' organizations (trade unions and federations); (3) on 10 August 2001, the President of the Republic met the executive committee of FEDECAMARAS in plenary and "it was agreed to hold a working meeting between FEDECAMARAS and the Economic Office to deal with specific issues requiring action or consultations (...) with the participation of the President of the Republic"; (4) on 28 August 2001, the Vice-President of FEDECAMARAS and representatives of the Chamber of Construction and of CONINDUSTRIA met the Executive Office, headed by the Minister of Planning, and the special commission that drafted the Hydrocarbon Act, to provide their observations; in subsequent meetings, the other areas covered by the Enabling Act were discussed by economic sector; in September 2001, the President of FEDECAMARAS was invited to join the entourage of the President of the Republic on an official tour to encourage employers to engage in negotiations; (5) afterwards, when the officials of FEDECAMARAS realized that their unilateral plans were not being accepted meekly by the authorities and other sectors participating in the drafting of the executive orders, they began to distance themselves from opportunities for dialogue for selfish interests and voluntarily put an end to the dialogue of

their own accord; (6) in the face of this refusal, the Government maintained dialogue and negotiations with small and medium-sized enterprise sectors grouped together in FEDEINDUSTRIA, and concluded cooperation and financing agreements; (7) there was consensus on most executive orders, with some exceptions (it is not clear from the Government's reply whether, when consensus is mentioned, only FEDEINDUSTRIA is referred to, or also some of the associations affiliated to FEDECAMARAS; nevertheless, as the Government asks the question "Why have the various employer sectors associated to FEDECAMARAS withdrawn from dialogue to reach agreement on the adoption of the enabling legislation?" it would appear that the enterprise sectors associated with FEDECAMARAS were not included in the consensus referred to by the Government).

The Committee noted that, according to the Government, the 49 executive orders covered subjects of vital importance for the attainment of human rights and directly benefited the vast impoverished Venezuelan population which had been excluded for centuries from so-called representative democracy. The Government also indicated that some FEDECAMARAS officials had lodged annulment proceedings against the legislation approved and against regulations contained in various sections of the 49 executive orders, and had thus decided to suspend the validity of all of them.

The Committee noted the Government's observations in support of its view concerning the self-exclusion of FEDECAMARAS from dialogue, according to which: (1) following the attempts to paralyse the country on 10 December 2001, the National Assembly, in view of the controversy created essentially by the leadership of FEDECAMARAS, set up a special commission and invited the various sectors, and the employer sectors attended the meetings; and (2) during the civic work stoppage called by FEDECAMARAS on 11 December 2001, it refused to engage in dialogue with the Vice-President of the Republic on the grounds that it would only engage in dialogue with the President of the Republic. The Committee also noted the Government's allegation that FEDECAMARAS refused to be part of the Presidential Commission and of the national tables for dialogue (May 2002) set up by the authorities, under the pretext that the Venezuelan Workers' Confederation had

not joined them (according to the Government, the Confederation was not included because it lacks legitimate representatives). The Committee emphasized, however, that according to the Government these commissions included journalists, intellectuals, the Catholic Church, etc., and that the tables for dialogue did not appear to relate to bipartite or tripartite negotiations or consultations within the meaning of the ILO's instruments (in effect, the Government indicated that it is "management in the framework of the direct and leading participation of citizens, establishing compromises and the rendering of accounts by the Government, employers, workers and organizations of the social and joint economy"), nor did those conducted in the framework of the special commission of the "Legislative Assembly" referred to by the Government, nor the negotiations and consultations of the table for negotiations and agreements set up in November 2002 in which, according to the Government, FEDECAMARAS participated and in which the Government and the "opposition" reached a political agreement on 29 May 2002 to act always within the framework of the national Constitution (the Secretary-General of the Organization of American States was invited to participate in this process).

The Committee concluded that, in the process of preparing the 49 executive orders under the Enabling Act of 13 November 2000, a process which by law had to be completed within one year, consultations were conducted with FEDECAMARAS and its affiliated organizations in the first phase, and particularly in August 2001. The question of whether these consultations were genuine consultations to achieve consensus, as maintained by the Government, or minimum superficial consultations for appearance sake, as contended by the IOE and FEDECAMARAS (which pointed out, however, that the Government conducted detailed consultations with groups that were relatively unrepresentative of the population and that sympathized with the political regime), was something on which the Committee did not have sufficient elements to be able to reach a conclusion. In any case, the Committee observed that the Government's claim concerning the self-exclusion of FEDECAMARAS from dialogue in general, and in particular with respect to the 49 executive orders as from September 2001, did not seem to be backed up by conclusive evidence (for example, institutional statements by FEDECAMARAS, invitations from government authorities to

deal with labour, social or economic issues in bipartite or tripartite forums that had not been accepted). Returning to the 49 executive orders, apart from its surprise that it had been decided to regulate a number of vital and complex issues (hydrocarbons, economic and social development, agrarian reform, etc.) in the short period of one year through executive orders issued by the Executive Authorities, the Committee emphasized that, in its response, the Government had not specifically replied to the allegations concerning major shortcomings of legality and constitutionality with respect to those executive orders and the procedures followed for their adoption, defects which the complainant organizations had outlined in considerable detail and in a relatively convincing manner in their complaint and also in a long annex that is not included in this report.

With respect to the new system of exchange control, the Committee noted that the Government had based the system on the fact that the country was on the brink of collapse at the beginning of 2003, when there was a disproportionate flow of currency out of the country which would have prevented the Republic from being able to purchase food, medicines and other supplies abroad. The Committee noted the Government's indication that the new system of exchange control arose from an agreement signed between the Ministry of Finance and the Central Bank of Venezuela, and that the President of the Republic in the Council of Ministers had subsequently decreed, on 5 February 2003, the establishment of the Currency Administration Commission. The Committee observed, however, that although the Government cited a situation of economic emergency to justify the new system of exchange control, there was nothing in its reply to indicate that it had held consultations with FEDECAMARAS concerning the new system.

The Committee also emphasized the following points: (1) the Government's reply did not mention any bipartite or tripartite agreement or consultation, within the meaning of the ILO's instruments, with FEDECAMARAS as from September 2001 in matters (policies or legislation) of a labour or economic nature; (2) the Government did not deny that the National Tripartite Commission had not met for years, as stated in the allegations; and (3) the Government also did not deny the alleged lack of consultations with FEDECAMARAS in respect of the process of

drafting important legislation, such as the Labour Procedure Act, the general increase in the minimum wage of 20 per cent by decree or the process of the ratification of ILO Convention No. 169, the new banking control system or, more generally, the establishment of economic policies and directives.

In these conditions, the Committee concluded and deplored the fact that for years the Government had not convened the National Tripartite Commission and that, on an ongoing basis, it did not conduct bipartite or tripartite consultation with FEDECAMARAS within the meaning of the ILO's instruments on policies and legislation that fundamentally affected its interests in labour, social and economic matters, thereby violating the fundamental rights of the employers' confederation. The Committee drew the Government's attention to the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), which provides that consultations "should aim, in particular (...) at joint consideration (...) of matters of mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions", and includes among the matters for consultation "the preparation and implementation of laws and regulations affecting their interests". The Committee once again reminded the Government of the principle to which it had already drawn its attention in its 330th Report, Case No. 2067 (Venezuela), paragraph 175:

The most representative employers' and workers' organizations, and in particular confederations, should be consulted at length by the authorities, on matters of mutual interest, including everything relating to the preparation and application of legislation concerning matters relating to them and 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. In this respect, 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 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 meet the objectives pursued in any given situation.

The Committee emphasized that tripartite consultation should take place before the Government submitted a draft to the Legislative Assembly or established a labour, social or economic policy and that such consultation should form part of the elements required for the Government to take its decision, specifically because the most representative confederations of workers and employers represent them, that is they represent in this case thousands of employers and a very considerable proportion of the labour world. In more general terms, the Committee recalled that the 1944 Declaration of Philadelphia, which forms part of the ILO Constitution, reaffirms among the fundamental principles on which the ILO is based, that “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”.

For all the above reasons, the Committee urged the Government to stop marginalizing and excluding FEDECAMARAS from social dialogue and, in future, to apply fully the ILO Constitution and the principles of consultation and tripartism. The Committee also urged the Government without delay to convene periodically the Tripartite National Commission and to examine in this context, together with the social partners, all laws and orders adopted without tripartite consultation.

From a more global perspective, the Committee referred to the Government’s statement in which it indicated that it did not recognize the legitimacy of the executive committee of the Venezuelan Workers’ Confederation (CTV) (which the Committee had explicitly requested the Government to recognize - see 330th Report, Case No. 2067, paragraph 173) and to the general situation in the country, where an ever more apparent climate of political and social confrontation prevailed, which the Committee deeply regretted. The Committee considered that the failure to recognize the executive committee of the CTV and the marginalization and exclusion of FEDCAMARAS from social dialogue,

irrespective of the Government's reasons, was one of the essential factors of the social and political confrontation and, in the Committee's view, this situation needed to be resolved on an urgent basis. It was obvious that these organizations (which were the most representative confederations) did not share the Government's economic and social model, but excluding them from the social institutional system did not contribute to social peace, public tranquillity or social stability in general and, on the contrary, generated in practice ongoing conflicts and the mobilization of thousands of employers and hundreds of thousands of workers who could not make their voices heard through their chosen organizations. The Committee therefore considered that the Government should give a new orientation to labour relations and reconsider its attitude with respect to FEDECAMARAS and the CTV.

The Committee offered the Government ILO assistance to provide the State and society with its experience so that the authorities and social partners could 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, with all its consequences, of the most representative confederations and all organizations and significant trends in the labour world.

b) Conclusions on the allegations concerning actions and interference by the Government to promote and encourage a new employers' organization in the agriculture and livestock sector to the detriment of FEDENGA, the most representative organization in the sector

The complainant organizations alleged that the Government had promoted the development of the so-called National Confederation of Farmers and Stockbreeders of Venezuela (CONFAGAN) to the detriment of the National Federation of Stockbreeders (FEDENGA), the true representative organization in the sector, by carrying out activities in favour of CONFAGAN, with the Government thereby interfering in the internal affairs of employers' organizations. The complainant organizations indicated that FEDENGA had been excluded from the Agriculture

and Livestock Council due to its support for the popular protest by FEDECAMARAS against the Government. The Committee deplored the fact that the Government had not replied to these allegations (it only indicated that FEDENGA had threatened to paralyse the production of meat and milk in 2001 and to extend a work stoppage in the State of Zulia to other regions) and it consequently urged the Government to reinstate FEDENGA onto the Agriculture and Livestock Council and to stop favouring CONFAGAN to the detriment of FEDENGA.

c) Conclusions on the national civic work stoppage from December 2002 to January 2003 and the arrest with ill-treatment of Carlos Fernández on 19 February 2003 in reprisal for his actions as President of FEDECAMARAS and without the guarantees of due process

Concerning the ill-treatment suffered by Carlos Fernández, President of FEDECAMARAS, during his arrest, the Committee noted the Government's statements that his detention had been replaced by house arrest by the judicial authority when the lawyers of Carlos Fernández alleged blood pressure problems. The Committee noted the press articles to which the Government referred, according to which Carlos Fernández and his wife had stated that they had been well treated by the police who carried out the arrest, that he had not been physically ill-treated and that there had been no aggression against him. The Committee emphasized that press articles were of limited value as evidence and that the complainant organization had alleged that: (1) Carlos Fernández was assaulted by unidentified individuals on 19 February 2003; they were not wearing uniforms and did not appear to be officials or police and had arrived in vehicles without identification, without number plates and without a judicial warrant; (2) Carlos Fernández thought that it was a kidnapping and tried to defend himself; following a violent struggle in which Mr. Fernández was struck, causing superficial injuries and bruises to the chest area, he was immobilized and pushed into his car; (3) shots were fired and only afterwards did persons appear and identify themselves as police officers; (4) on 20 February 2003, he was shut in a cell measuring 2 metres by 2 metres, without ventilation, without light and with only a mat on the floor.

As the Government did not specifically reply to these points, the Committee requested it to carry out an investigation of this matter and to keep it informed.

With regard to the allegations relating to the violation of due process, the Committee noted that, according to the allegations: (1) Carlos Fernández was detained on 19 February 2003 without a judicial warrant being presented; (2) on 20 February 2003, he remained incommunicado and was not able to speak to his lawyers; (3) press articles attributed to the President of the Republic expressions from which it could be gathered that he was involved in this detention; (4) on 21 and 22 February, he made a statement to the judicial authority; (5) violent groups led by a government deputy tried to exert pressure on the judicial authority on 21 and 22 February by congregating and hindering access to the court and shouting insults; (6) on 23 February 2003 (it appeared from the allegations), the imprisonment was changed to house arrest by judicial decision, taking into account Carlos Fernández's state of health; (7) the judge who handed down the initial detention order was challenged by the defence and withdrew; (8) of the five charges initially made against Carlos Fernández, three were dropped (treason against the country, conspiracy (criminal association) and devastation (incitement to plunder the nation), leaving the charges of civil rebellion and instigation to commit offences.

The Committee referred to an appendix sent by the complainants (not contained in the allegations to avoid repetition) which is reproduced below and which describes a certain number of irregularities and violations of due process, to most of which the Government has not responded:

The process followed by the authorities of Venezuela in the detention of Carlos Fernández Pérez was evidence of the intention to leave him in a state of defencelessness before the charges made against him.

Carlos Fernández was summoned to the Office of the Attorney-General on 30 January of the current year to make a statement as a witness.

After having begun the corresponding statement, he was informed that his status had changed and he was sent a summons to make a further

statement on 4 February, together with his defence lawyers, but this time as defendant.

The day fixed for the statement, the defence lawyers he appointed asked to postpone the statement on the grounds that they had not had access to the file. On that occasion, the Sixth Prosecuting Attorney of the Office of the Attorney-General refused to show the file to the lawyers and the grounds were entirely irregular.

In view of the conduct of the Office of the Attorney-General, Carlos Fernández applied to the same judge who had witnessed the swearing in of his defence lawyers and exercised the right deriving from the right of defence that the statement the procurators were to have taken from him would not be given at the Office of the Attorney-General, but instead in the court of jurisdiction (section 125(6), organic Code of Criminal Procedure).

On 6 February, the Office of the Attorney-General gave access to the file. Irregularly, due to the conduct of the defence lawyers, the Sixth Prosecuting Attorney, Luisa Ortega, presented summons to Carlos Fernández for him to make his statement at the Office of the Attorney-General. The summons were incoherent, as one stated that he should appear on Monday 10 February and the other on Tuesday 11 February.

On Monday 10 February, Carlos Fernández went to the Office of the Attorney-General, accompanied by his defence lawyers, and stated that he would not be appearing because he had exercised the right that the prosecuting attorneys should take his statement before the court of jurisdiction.

On Wednesday 12 February, the first court of jurisdiction refused him the right to make a statement before the court. On Monday 17 February, the defence appealed and the decision remained pending as to whether he would be obliged to make his statement at the Office of the Attorney-General.

On the following day, 18 February, with the decision remaining pending concerning the obligation to make the statement at the Office of the Attorney-General, and without any decision having been made on

the appeal, the Office of the Attorney-General applied to a magistrate other than the one who had been involved previously for the detention of Carlos Fernández.

This application, without him being allowed to exercise his defence through a statement, had no meaning. It should only be applied in the case of persons who have refused to appear. This was not the case of Carlos Fernández who, in view of the proceedings initiated against him, was fully prepared to cooperate with the judicial authorities.

He appeared twice at the Office of the Attorney-General, on the first occasion when he made a statement as a witness, which was in breach of the law because on that occasion, in accordance with the provisions of the Organic Code of Criminal Procedure, the content of the investigation made him a defendant, thereby depriving him of the right of defence, as he had not been given access to the file and his lawyers were not allowed to be present. Despite this, Carlos Fernández attended the Office of the Attorney-General.

The second time he went to the Office of the Attorney-General was not to carry out an act of defiance, but to inform the acting prosecuting attorneys that he would not attend to make the statement because he was exercising the right to have his statement taken in court.

The reaction of Luisa Ortega, Sixth Prosecuting Attorney at the Office of the Attorney-General, to his exercise of this right and to a decision that was not final, was to treat him in the manner that people are treated who are reluctant to make statements and, without having heard him or allowed him to make a statement or defend himself, in taking action for his own benefit and seeking to invalidate the charges made against him, she sought his detention.

Carlos Fernández was not uncooperative or rebellious in relation to the Office of the Attorney-General. He demonstrated with his actions his readiness to comply with the criminal proceedings against him, thereby subjecting himself to persecution, without due process.

The Procurator's actions violated the following rights:

- Effective judicial protection: the first court of jurisdiction refused to recognize the right whereby the statement could be

taken by the Office of the Attorney-General in the presence of the judge so as to monitor the activities of the Office of the Attorney-General.

- His right to defence was violated as he was not informed of the charges against him prior to seeking his detention. The haste of the Prosecuting Attorney meant that she did not wait for the decision on the appeal lodged by Carlos Fernández.
- He was not allowed to exercise the means of defence established in section 131 of the Organic Code of Criminal Procedure, arising when he made the statement.
- In addition, before his detention, he was illegally prevented from filing proceedings to demonstrate the absence of any offence.
- The communication containing the application for detention submitted by the Prosecuting Attorney also violated his right to defence because the charges were not presented individually and, although he was accused of five offences, the evidence for each of them was not detailed, and the charges were presented as a whole, which meant that the defence had to guess the evidence that was supposed to support each of the five charges.
- The application was lodged with a court that was not competent to hear it as it was not the court which had carried out the preliminary hearing. It was a court other than the one in which the procedure had been initiated, for example the appointment of the defence lawyers. and which ruled on the application for his statement to be taken by the court and the inadmissibility of the preventive judicial detention (section 125(6) and (8) of the Organic Code of Criminal Procedure).
- Despite the fact that the court to which the application was made knew after the detention that it was not competent and that the jurisdictional court was, it did not refuse to hear the case and did not return the documents to the first jurisdictional court, which was why it was necessary to challenge it.
- Of the five charges, following the decision of the court to which the case was referred as a result of the challenge referred to above, two remained: rebellion and instigation to commit an offence. The conduct attributed to Carlos Fernández was not consistent with these offences. The principle of legality was

therefore violated, as established in Article 49(6) of the national Constitution. For example, for rebellion there has to be insurrection or an armed uprising, but the work stoppage called by FEDECAMARAS was peaceful, supported by civil society, unarmed and in the exercise of a democratic right.

- The court that handed down the final decision violated the principle relating to the general jurisdictional court before or at the time of the indictment, because the court competent to hear the case, as indicated above, which had held the preliminary hearing, was the court of jurisdiction.
- Despite there being a court that had held the preliminary hearing, the Office of the Attorney-General did not lodge its application for detention with that court, but went to another which knew nothing about any of the above rights. The representative of the Office of the Attorney-General made no mention of this aspect of the case, and it may therefore be stated that this information was concealed when the application was made for the detention of Carlos Fernández.
- Therefore, inter alia, the following rights were violated: the right to defence, the right to the general jurisdictional court, the obligation of the Office of the Attorney-General to be a party in good faith to the criminal proceedings (Article 49(1), (3), (4) and (6) of the Constitution of Venezuela).

The Committee noted the Government's statements that: (1) the arrest of Carlos Fernández took place based on a legally valid application and was carried out 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 against the country, at the request of the Office of the Attorney-General of the Republic in accordance with the Organic Code of Criminal Procedure, with these charges being brought on the basis of the accumulated evidence showing the harm done to the country by the sabotage of the oil industry during the public and notorious leadership by Carlos Fernández of the so-called "civic work stoppage", or lock-out, in December 2002 and January 2003; (3) the trial judge was No. 34 of the criminal jurisdiction of the Metropolitan Area of Caracas, who

was challenged by the defence lawyers of Carlos Fernández and replaced with trial judge No. 49; (4) this judge did not accept the charges of treason against the country, incitement to conspire (conspiracy) and devastation, but upheld the charges of civil rebellion and instigation to commit offences and ordered Carlos Fernández to be detained under house arrest while she continued the trial in view of his blood pressure problems; (5) on 30 January 2003, Mr. Fernández testified as a witness at the Office of the Attorney-General and was then summoned to make another statement as a defendant, a summons with which he did not comply; (6) on 18 February 2003, the representatives of the Attorney-General applied to the court of jurisdiction for preventive judicial custody, so that Mr. Fernández could be brought before the jurisdictional court and the judge rule as appropriate; (7) on 19 February 2003, judge No. 34 granted the application and issued a warrant for the arrest and detention of Mr. Fernández; (8) on 20 March 2003, the Court of Appeal decided to release Mr. Fernández, withdrawing the charges against him; Mr. Fernández immediately left the country; (9) on 20 March 2003, the Sixth Prosecuting Attorney of the Office of the Attorney-General lodged an appeal for protection of constitutional rights (amparo) with the Constitutional Chamber of the Supreme Court of Justice, which accepted the charges made by the Office of the Attorney-General of the Republic and once again ordered the house arrest of Carlos Fernández, an order that the Supreme Court of Justice upheld in a ruling read by the President of the Court on 2 August 2003; Mr. Fernández is therefore on the run.

The Committee noted that the Government had sent the decision of the Supreme Court of Justice (8/VIII/03) revoking the decision of the Court of Appeal on procedural grounds (the absence of the signature of one of the three magistrates (21/III/03) who, for health reasons, had been absent from the court for a few hours), but regretted that the Government had not referred the decision to the Court of Appeal that had ruled on the question of law. The Committee also noted that the Government's statements did not answer each of the violations of due process and irregularities of which, according to the annex provided by the complainant organization, Mr. Fernández had been a victim, and it considered that the complainant organization had provided sufficiently convincing evidence of a lack of impartiality in the case. Very specifically,

the Committee expressed surprise that a judge had been challenged, three of the charges had been dropped by another judge and the Appeals Court had ended up dropping all of them, even though the decision of this court had been referred to the Supreme Court of Justice, which revoked it for procedural reasons and once again decided, at the request of the Office of the Attorney-General (the same prosecuting attorney that had originally brought five charges against him) to order the arrest of Mr. Fernández.

With regard to the question of law, the Committee noted that the points of view of the complainant organizations and the Government differed, although they concurred that the arrest of Carlos Fernández, President of FEDECAMARAS, was related to the national civic work stoppage that took place between 2 December 2002 and the end of January 2003.

The Committee noted the complainant organizations' statements that the arrest of Mr. Fernández was in retaliation and discriminated against the exercise by FEDECAMARAS of its right to peaceful demonstration and its protest activities against the abuses of the Government and the economic and social crisis brought about by the Government's policies, the lack of dialogue with FEDECAMARAS and the violation of the rights of employers and workers, which had culminated in insecurity, violations of private property through invasions of agricultural land and property, encouraged by the Head of State, an increase in poverty and unemployment, public verbal attacks by the Head of State on employers and their leaders, etc.; in this context, a number of national civic work stoppages had been organized; the arrest of Carlos Fernández had occurred following the national work stoppage from 12 December 2002 to the end of January 2003; this stoppage was called by the Democratic Organizing Committee, which included FEDECAMARAS, the most representative trade union organizations, the main NGOs and political parties.

However, the Committee noted that the Government maintained that: (1) the objective of the "civic work stoppage" of FEDECAMARAS and the Democratic Organizing Committee (of which it was a member) related not to trade union purposes, but to strictly political, insurrectional, subversive and anti-democratic purposes; the objective of

the civic work stoppage which was begun in December 2002 was, on the contrary, to overthrow the President of the Republic; the objectives were announced in various ways: “for a recall referendum”, “for the fall of the President” or “for the President to initiate an election process”; (2) on the FEDECAMARAS website, it was stated that the civic work stoppage was “our greatest pressure to demand a democratic and electoral outcome to the crisis in the country” and the Democratic Organizing Committee urged the population to continue until the electoral goal was achieved (a recall referendum for the President of the Republic); (3) during the civic work stoppage, dissident soldiers in the Plaza Francia in Altamira were implicated in the murders of three young people and in terrorist acts at the Colombian Consulate and the Spanish Embassy and in other areas; (4) before the civic work stoppage, Carlos Fernández approached the soldiers taking part in the coup of April 2002 in order to “unify criteria” and shortly afterwards he allied himself with those rebel soldiers (who called for civil disobedience with insurrectional objectives) to sign a “democratic agreement” against the Government; the expression “indefinite national work stoppage” was already present in all statements; (5) Mr. Fernández gave public instructions to illegally and fraudulently collect signatures to call for a consultative referendum that they tried to convert into a recall referendum; he publicly encouraged economic sabotage, violence and social intolerance; he publicly called for employers to close their companies (including those producing food and medicine) that were paying wages to workers who did not complete their working hours; he subjected the population to violent closures of motorways and streets; he encouraged fascist sectors to undertake violent closures of businesses, supermarkets, etc., accompanied by municipal police belonging to the opposition during the work stoppage; as a result of the tirades of Mr. Fernández, there were attacks on workers and public transport vehicles, and in some cases people were seriously injured; (6) the right to education, freedom of movement and the health of individuals was violated; employers in rural areas tipped millions of litres of milk into the rivers and other waterways, forcing the population to face a lack of necessary foodstuffs; (7) the right to information, freedom of expression, television and mass media were subject to abuse (and the main protagonists were Mr. Ortega and Mr. Fernández) with subliminal advertising techniques and war propaganda, lies, manipulation and

disinformation, incitement to constrain freedom of movement; officials and their families were threatened physically and verbally; the installations of the Oil Company of Venezuela were cut off and sabotaged using terrorist activity causing damage to equipment and the finances of the country (more than 10,000 million dollars) as this company provides 83 per cent of the GDP of the Republic; more than 500,000 jobs were lost and unemployment increased five percentage points (from 15.7 to 20.7 per cent); the oil industry suffered sabotage to refineries and oil wells and other installations that led to the spillage of crude oil; boats were stopped or sunk; access valves and keys to computer centres in the oil industry were sabotaged; (8) the provision of energy sources to the aluminium and iron industries in Guyana was sabotaged; (9) there was harassment of foreign embassies; campaigns were initiated to encourage the non-payment of taxes and social security contributions; (10) a restricted work timetable was implemented in financial organizations; a publicity and propaganda campaign against the celebration of Christmas, etc., was carried out.

The Committee indicated its awareness that the civic national work stoppages were huge and complex public demonstrations in which not only members of employers' and workers' organizations participated, but also members of sympathetic political parties and NGOs, and in which the right to demonstrate was combined with employers' lock-outs and probably indefinite general strikes, which lasted, in the case of the national civic work stoppage, for two months from December 2002 to January 2003.

The Committee noted that the Government had basically described the illegality and illegitimacy of these civic work stoppages from an exclusively political or insurrectional point of view (the aim to overthrow the President of the Republic) and had maintained the legality and the legitimacy of the arrest of Carlos Ortega. In order to address these matters, the Committee highlighted a series of issues.

The first issue was that the Constitution of the Republic very generously provided for the right to public assembly without previous authorization (Article 53) and the right to strike in the public and the private sectors (Article 97) and other human rights, including provisions on the recall of all mandates and magistracies through the calling of a referendum (Article 72). Article 350 also provided that "the people of

Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, shall disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights” (in this respect, a report of the Secretary-General of the OAS attached by the Government indicates that this provision must not be interpreted as a general right to rebellion). Because it is a recent Constitution, these rights have not been developed in legislation and this (for example, in cases of conflicts of constitutional rights, or of the minimum services to be maintained during strikes) leads to confusion and, although it does not justify them, it may explain some of the abuses and excesses referred to by the Government, which the Committee deeply regretted. The second issue was whether the national civic work stoppage was exclusively political and insurrectional, as indicated by the Government (in which case, the Committee would not have competence in this issue). In this respect, the Committee emphasized that the national civic work stoppage did not give rise to a coup d’état and that, while the Government had provided information showing that the main objective was to depose the President of the Republic or achieve a recall referendum, the above constitutional provisions do not appear to allow for illegality or illegitimacy or the classification of an act as being of an insurrectional nature to be attributed to this objective (or claim) on the hypothesis that it was the only one (moreover, the Government has annexed a political agreement with the support of the OAS following the national civic work stoppage that the Government signed with the Democratic Organizing Committee, which organized the work stoppage, in which the parties issued a statement against violence and for peace and democracy and proposed specifically to contribute to resolving the crisis in the country through the electoral process and refer to the concept of recall referenda (Article 72 of the Constitution) if they are formally requested by a minimum number of voters). The Committee emphasized, however, that the allegations in the present complaint show that FEDECAMARAS and the employers considered that the national civic work stoppage was directly linked to the social and political acts of the Government and their consequences and the exclusion of FEDECAMARAS from social dialogue by the Government; moreover, the Government itself recognized in its reply that it did not accept the legitimacy of the executive committee of the Confederation of

Venezuelan Workers (CTV), which also took part in the national civic work stoppage and which is the most representative workers' confederation (the chronology of the statements during the national civic work stoppage, which the Government attached, includes, in the Committee's opinion, statements of intent by Mr. Fernández showing that the national civic work stoppage was an act of protest by FEDECAMARAS for employer reasons and in which he referred to "mistaken economic policies, devaluation, controlled exchange rates (...) the objective of the Government is to destroy private enterprise" ... "we do not agree that they should continue to close enterprises (...), 40,000 million dollars" are missing "through government mismanagement (...)"). Consequently, the Committee could not share the point of view of the Government that this national civic work stoppage had nothing to do with issues relevant to employers' organizations. Moreover, the Committee recalled the principle that "in a situation in which workers' organizations [and employers' organizations] consider that they do not enjoy the freedoms essential for the performance of their functions, they should be entitled to demand the recognition of these freedoms and such claims should be considered to form part of legitimate trade union activities" [see Digest of decisions and principles of the Freedom of Association Committee, 4th edition, 1996, para. 28].

The third issue related to the arrest of Carlos Fernández, President of FEDECAMARAS, which the complainant organizations described as discrimination and the fact that it occurred as a result of his activities as an employers' official. The Committee noted that participation in the civic work stoppage was out of the ordinary (according to statements by the current President of FEDECAMARAS, which appear in one of the Government's annexes, for some days participation rose to one and a half million people) and noted the Government's statements that sabotage and violent acts occurred, with damage to physical integrity, as well as numerous violations of human rights and enormous economic and job losses. The Committee profoundly regretted this and hoped that those responsible for the crimes would be punished. The Committee noted that the Government ascribed to the President of the CTV and the President of FEDECAMARAS incitement to a large part of the crimes and offences mentioned, but did not prove or highlight the specific causal link between the various statements ("tirades" according to the

Government) and possible acts of the President of FEDECAMARAS and such offences, such that it appeared to credit him rather with non-individualized or causal generic global incitement; moreover, in the chronology of statements during the civic work stoppage sent by the Government as an attachment there was no statement by Carlos Fernández containing calls for violence or the commission of crimes. The Committee recalled that “there should be no confusion between trade unions’ [or employers’ organizations] performance of their specific functions, i.e. the defence and promotion of the occupational interests of workers [or employers], and the possible pursuit by certain of their members of other activities that are unconnected with trade union functions [or those of employers’ organizations]. The penal responsibility which such persons may incur as a result of such acts should in no way lead to measures being taken to deprive the unions themselves or their leaders of their means of action” [see Digest, op. cit., para. 456]. Moreover, the Committee noted that the Government’s reply seemed to show that, of the organizations involved in the national civic work stoppage and which made up the Democratic Organizing Committee (FEDECAMARAS, CTV, NGOs, important political parties, etc.), arrest warrants were issued only for the President of FEDECAMARAS and the President of CTV.

Taking all these facts and the specific constitutional context of Venezuela into account, the Committee considered that the arrest of Carlos Fernández, as well as being discriminatory, was intended to neutralize or act as retaliation against this employers’ official for his activities in defence of employers’ interests, and it therefore urged the Government to take all possible steps to annul immediately the judicial proceedings against Carlos Fernández and to ensure that he could return to Venezuela without delay and without risk of reprisal. The Committee requested the Government to keep it informed in this respect. The Committee deeply deplored the arrest of this employers’ official and emphasized 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 it requested the Government to respect this principle.

d) Conclusions on the allegations relating to discrimination in the application of a new system of exchange control

With regard to the allegations relating to the application of a new system of exchange control in 2001 (suspension of the free purchase and sale of currencies) unilaterally established by the authorities, discriminating against companies belonging to FEDECAMARAS in administrative authorizations for the purchase of foreign exchange currencies (in retaliation for its participation in the national civic work stoppages), the Committee noted that the Government replied by asking how, following the civic work stoppage (from December 2002 to January 2003), in the last three quarters of 2003, over 700,000 jobs that had been lost after the economic sabotage of the national economy could have been recuperated if foreign currency had been refused to companies. The Committee however pointed out that the allegations were based on quoted statements by the Minister of Production and Trade and the President of the Republic. The Committee had examined elsewhere the justification provided by the Government for this system.

In view of the alleged discrimination and serious difficulties expressed by the complainant organizations because of the negative impact on many industries of this system, which had been unilaterally established by the authorities, the Committee requested the Government to examine with FEDECAMARAS without delay the possibility of modifying the current system and to guarantee in the meantime, in the event of complaints, that it was applied without discrimination of any sort through impartial bodies. The Committee requested the Government to keep it informed in this respect.

e) *Conclusions on the allegations relating to physical, economic and moral harassment (including threats and attacks against the Venezuelan employer sector and its officials by the authorities or people close to the Government); the operations of violent paramilitary groups with governmental support against the facilities of an employers' organization and against the protest actions of FEDECAMARAS; the dispossessions and occupation of ranches in full production which had been allowed and at times encouraged by the authorities in violation of the Constitution, without following legal procedures; and the policy of harassment of the private communication sector*

The Committee regretted that the Government had not replied specifically to these allegations. In these circumstances, the Committee urged the Government to take the necessary measures, without delay:

- to ensure that the authorities did not try to intimidate, pressurize or threaten employers and their organizations for their activities with regard to legitimate demands, in particular in the communications and agro-industrial sectors;
- 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;
- to carry out an investigation without delay into the allegations relating to 180 cases (up to April 2003) that had not been resolved by the authorities of the illegal invasion of lands in the states of Anzoátegui, Apure, Barinas, Bolívar, Carabobo, Cojidas, Falcón, Guárico, Lora, Mérida, Miranda, Monagas, Portuguesa, Sucre, Taclira, Trujillo, Yanacuy and Zulia, and requested that, in the case of expropriations, it fully respect the legislation laid down and the relevant procedures;
- to carry out urgently an independent investigation (by persons 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 to ensure that there were no clashes or confrontations between these groups and protesters in demonstrations, and to keep it informed in this respect.

In general terms, the Committee expressed its serious concern at these allegations and the poor situation in relation to the rights of employers' organizations, their representatives and members. The Committee drew 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" [see Digest, op. cit., para. 47]. The Committee also emphasized that freedom of association could 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, were fully respected and guaranteed. The Committee urged the Government to guarantee these principles fully in the future.⁶⁸

⁶⁸ See 334th Report, paras. 879-1089.

REPRESENTATIONS MADE UNDER ARTICLE 24 OF THE ILO CONSTITUTION

Guatemala

In a communication dated 26 May 2003, the organizations indicated below made the following representation.

The undersigned Worker and Employer representatives, with delegates accredited to the Tripartite Commission on International Labour Issues, a body established in Guatemala to give effect to ILO Convention No. 144, based on article 24 of the Constitution of the International Labour Organization, and representing the following workers' bodies: the Trade Union and Popular Action Unit (UASP), the General Union of Workers of Guatemala (UGT) (composed of the CGTG, CUSG, CTC, FESTRAS, FESEBS) and the employers' association known as the Coordinating Committee of Agricultural, Industrial and Financial Associations (CACIF), hereby make a representation and/or complaint against the Government of the Republic of Guatemala as a basis for the corresponding action and for its referral to the Governing Body of the Organization. The representation is based on the following facts:

1. Guatemala ratified the Tripartite Consultation (International Labour Standards), Convention, 1976 (No. 144), on 13 June 1989. With a view to giving effect to the Convention, by means of a Government resolution, the Tripartite Commission on International Labour Issues was created and has been meeting periodically since that date. The Commission has addressed issues of interest to workers and employers, and has also made recommendations concerning the adoption of labour legislation which have on occasion been accepted by the Congress of the Republic.
2. With much concern, we have seen how the current authorities, which came to power in January 2000, have undermined the above dialogue forum by refusing to address issues in the Commission which should legally have been submitted to it. In our view, it is a matter of particular concern that the Ministry of Labour refused to submit to the Tripartite Commission the draft text of the Code of

Labour Procedure, the preliminary draft of which was prepared in 2000. Through these actions, the Ministry, in addition to failing to give effect to its undertakings in relation to the Organization, has caused irreparable harm to the strengthening of the Tripartite Commission.

3. Regrettably, the Ministry has persisted in the above conduct; indeed, in the most recent discussions of the draft texts to amend the Labour Code, which were supposed to have been examined by the Tripartite Commission on International Labour Issues, the Government, in the first place, failed to submit several of the reforms for consultation and, on the other, failed to comply with the compromise reached in the meeting of the Tripartite Commission on 24 April 2003 concerning the discussion in the session of 8 May of draft reforms relating to sexual harassment, child labour, homeworkers and universal benefits, which were submitted to the Legislative Assembly before the date indicated, thereby eliminating the possibility of discussing the matter and reaching consensus on it.
4. In brief, the above organizations wish to bring to the knowledge of the ILO the repeated violation of Convention No. 144 by the Government of the Republic, with a view to ensuring that the necessary efforts are made to remedy the situation so as to consolidate the procedure of tripartite social dialogue to discuss matters which affect us.

No decision was taken by the Officers of the Governing Body concerning the receivability of this representation. On the one hand, most of the issues raised had been examined by the Committee of Experts or the Committee on Freedom of Association. On the other, questions were raised in relation to one of the three complainant organizations regarding its status as an occupational organization; this organization had a short time previously presented another representation alleging the failure of the Government to comply with Convention No. 144 and the report of the ad hoc Committee had been adopted by the Governing Body in

March 2004; in its report, the latter Committee had entrusted the Committee of Experts with the follow-up of its recommendations.

Employers' organizations have presented various representations under article 24 of the Constitution, but as they related to matters concerning the freedom of association of employers and their organizations, they were referred to the Committee on Freedom of Association.

COMPLAINTS MADE UNDER ARTICLE 26 OF THE ILO CONSTITUTION

Nicaragua

The complaint was lodged on 17 June 1987 at the 73rd Session of the International Labour Conference by Henri Georget, Employers' delegate, Niger; Johan von Holten, Employers' delegate, Sweden; Hiroshi Tsujino, Employers' delegate, Japan; Javier Ferrer Dufoll, Employers' delegate, Spain; Arthur Joao Donato, Employers' delegate, Brazil; Raoul Inocentes, Employers' delegate, Philippines; Wolf Dieter Lindner, Employers' delegate, Federal Republic of Germany; Tom D. Owuor, Employers' delegate, Kenya; and Ray Brillinger, Employers' delegate, Canada, by a letter dated 17 June 1987, alleging the infringement of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

The complainants' principal allegations were as follows:

- I. In respect of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

Since 1981 at least 21 complaints have been lodged with the ILO by workers' and employers' organizations in respect of violations by the Government of Nicaragua of its obligations under Convention No. 87. These violations consisted of murder, physical aggression, torture, arbitrary arrests, breaking into homes, sacking

of offices, confiscation of property, travel restrictions, violation of freedom of expression and many other matters, including non-recognition of independent organizations of workers until complaints were made to the ILO. Any organization of employers or workers that does not submit to the authority of the Sandinist National Liberation Front (FSLN) was subjected to repression by the Government, either through its officials or through organized mobs.

Nicaragua had been virtually under a state of emergency for several years and the state of emergency was constantly extended. The state of emergency was being used by the Government to suppress all rights and freedoms essential to the effective observance of Convention No. 87.

Furthermore, a new Constitution was proclaimed in 1987 which implicitly denied to employers the right to associate which they had had previously, while according that right to many other categories of persons. This was in clear violation of Article 2 and paragraph 2 of Article 8 of Convention No. 87.

II. In respect of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Decree No. 530, adopted by the Government on 24 September 1980, had since that date subjected collective agreements to the approval of the Ministry of Labour for reasons of economic policy, and this effectively rendered meaningless the freedom to bargain collectively. Despite the fact that competent bodies of the ILO had repeated that this was in violation of Convention No. 98, the Government had done nothing to correct the situation. Wages in particular could not be the subject of collective bargaining, as they were determined by the National Labour and Wages Organization.

III. In respect of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

The most representative organization of employers in Nicaragua was, according to the complaint, the Higher Council of Private Enterprise (COSEP), which was covered by Article 1 of the

Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). However, the Government had failed to consult COSEP on the procedures to ensure effective consultations envisaged in Article 2 of the instrument. The Government, contrary to what it stated in its reports on the application of the Convention, also failed to consult COSEP on the matters covered by Article 5 of the Convention. The Government had respected none of its obligations under the Convention as far as consultations with COSEP were concerned.

The complainants further referred to a series of violations of freedom of association and civil liberties as a result of various measures which continued to occur even after the complaint was presented in June 1987, such as: the detention and conviction of the director of an economic research institute linked to COSEP; the confiscation in June 1989 of the property of three directors of a coffee producers' association affiliated to COSEP for having refused to participate in a government agrarian policy; failure to consult COSEP on the amendment of the Labour Code; and failure to set up a tripartite consultation commission promised by the Government. According to the complainants, the situation in law and in practice had, for the most part, not improved, and had deteriorated in certain respects.

In a communication dated 30 March 1990, the International Organization of Employers (IOE) stated that it supported the communication submitted by the complainants on the same date.

The following conclusions of the Commission of Inquiry should be noted:

The Commission of Inquiry indicated that intervention of the authorities may take the form of legal texts or acts affecting certain civil liberties, the absence of which "removes all meaning from the concept of trade union rights", as stated in the Resolution concerning trade union rights and their relation to civil liberties adopted by the International Labour Conference in 1970. This resolution, which is constantly invoked by the ILO supervisory bodies in dealing with this kind of problem, recognizes that the rights conferred on workers' and employers' organizations are based on respect of the civil liberties enumerated in

particular in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ratified by Nicaragua). According to the resolution, the following are essential for the exercise of trade union rights: (a) the right to freedom and security of person and freedom from arbitrary arrest and detention; (b) freedom of opinion and expression, and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of frontiers; (c) freedom of assembly; (d) the right to a fair trial by an independent and impartial tribunal; (e) the right to protection of the property of trade union organizations.

With account being taken of these various factors, as well as the special and revealing circumstances surrounding some of the expropriations which affected the officials mentioned, the Commission of Inquiry considered that the decisions taken were influenced to a greater or less extent, depending on the case, by the fact that the persons concerned were employers' leaders who were strongly opposed to the Government, who adopted critical attitudes to the Government or who collaborated closely with the respective organizations. This did not mean that there was not a framework of objective reasoning, sanctioned by the Act, to justify officially the expropriations. But even in these cases, the element of discrimination based on such circumstances appeared to have been decisive. To this extent, the Government's action was contrary to the provisions of Article 3 of Convention No. 87.

Both in the complaint made under article 26 of the Constitution and in the pending observations of the Committee of Experts, reference was made to Decree No. 530 of 1980 as an infringement of Article 4 of Convention No. 98. This Decree amended section 22 of the Labour Code and introduced a requirement that collective agreements must be approved by the Ministry of Labour.

The Commission of Inquiry considered that, according to the principles of freely concluded contracts which inspire Article 4 of Convention No. 98, and which imply the autonomy of the parties and respect of what is agreed, collective agreements must be applied without modifications unless these are decided upon by the parties themselves or unless such agreements or certain clauses thereof are suspended or cancelled on justifiable grounds by the authorities. With regard to a

possible suspension or cancellation of the agreements or specific clauses thereof, the Commission was also of the opinion that such a measure would be appropriate only in exceptional circumstances, in accordance with the principles set forth by the ILO supervisory bodies, and in cases of manifest illegality. In all events, respect should be given to the possibility of appealing to the courts.

The Commission observed that Convention No. 144 requires that countries which have ratified it undertake to establish procedures which ensure effective consultations with respect to ILO standards and that representatives of the representative workers' and employers' organizations should participate in such procedures. The Convention and its accompanying Recommendation are flexible with regard to methods of application, and consultations can be carried out through various bodies or even by means of written communications. But the representative organizations must be consulted on the nature and form of the procedures. Consultations on standards must be held at appropriate intervals fixed by common agreement and at least once a year. The obligatory subjects for consultation are: the items included on the agenda of the Conference; the submission of Conventions and Recommendations adopted by the Conference to the competent authorities; the re-examination of unratified Conventions and of Recommendations; questions arising out of reports on ratified Conventions; and proposals for the denunciation of ratified Conventions.

In the light of these various provisions and the information available, it appeared that most of the Convention had not been observed. The Convention had been ratified by Nicaragua in 1981 and, except for certain sporadic meetings in recent years which examined some subjects related to ILO standards (with the difficulties mentioned regarding COSEP) and the presumed dispatch of questionnaires on Conventions and Recommendations in the course of preparation to employers' and workers' central organizations (and which was denied by COSEP), did not seem to have been applied in any other way. The Committee therefore had to conclude that neither law nor practice conformed to the provisions of Convention No. 144.

The Commission of Inquiry made the following recommendations:

Civil rights: It is extremely important for the Government and the National Assembly to continue in their efforts to reform the legislation with a view to increasing the security of persons and strengthening respect for judicial safeguards, in particular by the amendment and updating of the Act respecting the functions of the police, the Police Code and the Code of Criminal Procedure. In turn, any possible legislation on social communications should guarantee freedom of opinion and expression, and in particular, freedom to hold opinions without interference, to seek, receive and impart information and ideas through any media and regardless of frontiers, in accordance with the terms of the ILO resolution respecting trade union rights and their relation to civil liberties.

Expropriations: The Commission of Inquiry recommended that any appeal which may have been made by COSEP officials to the National Review Committee in accordance with Legislative Decree No. 11-90 respecting the review of confiscations should be resolved as soon as possible, with account being taken of the above conclusions.

The revision of the legislation and its application both in the private and public sectors should include the following measures concerning the problems raised in this case:

1. Recognition of the right of association of employers, workers, state servants (including public officials), self-employed workers and persons employed in family workshops. This recognition should also be included at an early date in the Constitution for employers, in line with other categories of workers.
2. Recognition of the right of employers and workers to establish organizations of their own choosing, without previous authorization. This provision established by Convention No. 87 implies that trade union plurality should always be a possibility in legislation and practice, with employers and workers being left to make their own decisions in this respect. It also implies the right to secure the registration of an organization without the formalities imposed by legislation or by the authorities amounting to a requirement of

prior authorization. The authorities should refrain from any acts of coercion or favouritism concerning the establishment of organizations, and avoid any discrimination based on political or ideological grounds.

3. Recognition of the right of employers' and workers' organizations to organize their internal activities and programmes, the authorities should refrain from any discrimination and intervention which may limit this right or impede the legal exercise thereof. In this connection, the Commission referred more specifically to the political activities of organizations and strikes.
 - a) Legislation should not contain a general prohibition of the political activities of organizations. Such organizations should have the power to express freely their opinions on the economic and social policy of the Government as regards the interests of the sectors which they represent. It is the responsibility of the judicial authorities to examine and decide on any instances of abuse which may be committed in this respect. The limits have been fixed for trade unions by the 1952 resolution concerning the independence of the trade union movement, which establishes that relations with political parties or political action should not be of such a nature as to compromise the continuance of the trade union movement or its social and economic functions, whatever political changes may occur in a country. The Commission believes that these principles could also be used as a basis for relations and political action by employers' organizations.
4. Promotion of collective bargaining, with the authorities refraining from any intervention or removing any obstacle which could restrict the free conclusion of collective agreements, including at different levels, in accordance with the provisions of Convention No. 98 and with account being taken of the Collective Bargaining Convention, 1981 (No. 154), as well as the conclusions made by the Commission of Inquiry in the corresponding chapter.

Consultation in respect of international labour standards: The Commission considered that the Government should establish and apply

as soon as possible procedures ensuring effective consultation in this domain, in accordance with the provisions of Convention No. 144. Before establishing such procedures, the Government should consult the representative workers' and employers' organizations, as required by the Convention itself. In the same way, the Commission recommends to the Government that account be taken for this purpose of the information and comments contained in the 1982 General Survey of the Committee of Experts on the Application of Conventions and Recommendations on Tripartite Consultation (International Labour Standards), with regard to the various forms used and their possible adaptation to national circumstances.

Finally, article 28 of the Constitution of the ILO provides that the Commission of Inquiry should indicate the time within which its recommended measures should be adopted. The Commission considered that it would be extremely difficult for it to establish a precise period in this respect, since the recommendations concerned different measures, and at all events most aspects would require intensive legislative work. In any case, the Commission considered that the Government should indicate, from 1991, in its reports made under article 22 of the Constitution on the application of Conventions Nos. 87, 98 and 144, the measures which had been taken, both in law and practice, to give effect to its recommendations. In this way, the Committee of Experts on the Application of Conventions and Recommendations would be able at its meeting in March 1992 to review the progress achieved and subsequently decide, on this basis, the periodicity with which the Government should continue including information in its reports on the application of these recommendations.

Venezuela

A complaint was made by the following Employer delegates to the 92nd Session of the International Labour Conference on 17 June 2004: Mr. Daniel Funes de Rioja, Substitute Delegate, Argentina; Mr. Bryan Noakes, Delegate, Australia; Mr. Peter Tomek, Delegate, Austria; Mr. Dagoberto Lima-Godoy, Substitute Delegate, Brazil; Mr. Andrew Finlay, Delegate, Canada; Mr. Costas Kapartis, Substitute Delegate, Cyprus;

Mr. Bernard Boisson, Delegate, France; Ms. Antje Gerstein, Delegate, Germany; Mr. I. P. Anand, Substitute Delegate, India; Ms. Lucia Sasso-Mazzufferi, Delegate, Italy; Mr. Herbert Lewis, Delegate, Jamaica; Mr. Toshio Suzuki, Substitute Delegate, Japan; Mr. Jorge de Regil, Delegate, Mexico; Mr. Vidar Lindefjeld, Delegate, Norway; Mr. Abdullah Dahlan, Delegate, Saudi Arabia; Mr. Bokkie Botha, Delegate, South Africa; Mr. Javier Ferrer Dufol, Delegate, Spain; Ms. Göran Trogen, Substitute Delegate, Sweden; Mr. Michel Barde, Delegate, Switzerland; Mr. Ali M'Kaissi, Substitute Delegate, Tunisia; Mr. Mel Lambert, Delegate, United Kingdom; Mr. Edward Potter, Delegate, United States; and Mr. Bingen de Arbeloa, Delegate, Venezuela.

The complaint alleges the violation by Venezuela of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

According to the complainants, Venezuela has violated Conventions Nos. 87 and 98 on several occasions since 1999, as noted by the ILO supervisory bodies. During that period, the Employer and Worker Groups have complained to the Committee on Freedom of Association of the Governing Body and to the Committee on the Application of Standards and the Credentials Committee of the International Labour Conference about the harassment of which they are the victims. The policies of the Government of Venezuela have resulted in the closure of over 100,000 enterprises and the loss of jobs for some hundreds of thousands of workers, which has led to the greatest social and economic crisis experienced by Venezuela.

According to the complainant organization, in recent years the Credentials Committee of the International Labour Conference has regularly examined complaints concerning the composition of Venezuelan delegations attending the Conference.

Despite the recommendations made by the ILO supervisory bodies (Conference Committee on the Application of Standards, Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association), the Government of

Venezuelan continues to take action against the social partners. In the case of employers, these acts consist of:

- physical, economic and moral attacks by the Government against independent employers in Venezuela, their organizations and their representatives;
- the marginalization of the majority of employers' organizations and their exclusion from the processes of social dialogue and tripartite consultation;
- acts of interference by the Government to promote the development of a parallel employers' organization with a view to circumventing and weakening the most representative organizations, including the Venezuelan Federation of Chambers and Associations of Commerce and Production (FEDECAMARAS);
- the promotion of a hostile environment for independent employers, including the seizure of lands and the promotion of the illegal occupation of productive ranches; and
- the application of a discriminatory system of currency controls in relation to the enterprises affiliated to the most representative employers' organization, FEDECAMARAS, in reprisal for their membership.

The Government of Venezuela replied that it rejected all the allegations made by the complainants and called for the complaint to be declared irreceivable and shelved on the basis that its contentions were unfounded, and that it would be unnecessary and inappropriate to set up a Commission of Inquiry in view of the new situation in Venezuela following the Presidential Referendum of August 2004, that the overlapping of procedures which have still not been completed on the same issue or situation would be inappropriate and that it would be a misuse of the ILO's objectives to use the complaint procedure for the purposes of publicity and political ends. The Government added that the complainants had not specified the actual standards which had allegedly been violated. The country was not experiencing an extreme situation which justified or necessitated the establishment of a Commission of Inquiry and it provided data on positive economic indicators. It also emphasized that the complainants were referring to situations relating to a case presented by workers' organizations and that it was unlawful to

take over as their own cases presented by workers. The Government further indicated the reasons why in practice it rejected the various allegations and added that a Direct Contacts Mission had been undertaken in 2004 and that the Mission's report had not been submitted to the Committee of Experts and the Committee on the Application of Standards, for which reason the procedure should be suspended, particularly since the Committee on Freedom of Association had submitted interim reports which were not final in relation to which the Government would provide further information. Moreover, the Government noted that the situation had changed since the complaint was made and that there was now a good climate in political and social relations.

At its Session in November 2004, the Governing Body of the ILO examined the document prepared by its Officers concerning the complaint made under article 26 of the Constitution of the ILO by various delegates to the 92nd Session (2004) of the International Labour Conference and, after examining its receivability, requested the Director-General to ask the Government of Venezuela, as the Government against which the complaint had been presented, to provide its observations on the complaint, which should reach the Director-General by 10 January 2005 at the latest. It decided to examine at its 292nd Session (March 2005) whether the complaint should be referred to a Commission of Inquiry in the light of: (i) the information provided by the Government of Venezuela on the complaint; and (ii) the recommendations made by the Committee on Freedom of Association.

At its session in March 2005, the Committee on Freedom of Association could not examine or make recommendations to the Governing Body on the complaint made under article 26 of the Constitution of the ILO as all the Employer members of the Committee present at its session had signed the complaint. In these conditions, it considered that it was for the Governing Body, on the basis of the information at its disposal, to decide on the effect to be given to the complaint made under article 26 of the Constitution of the ILO.

In view of the situation, the Governing Body postponed its decision on whether or not to set up a Commission of Inquiry until its Session in November 2005 (in June 2005, elections were held to the

Governing Body, which would give rise to the designation of new members of the Committee on Freedom of Association).

The complete reports of the Committee on Freedom of Association and of the ad hoc committees set up under article 24 of the Constitution on complaints or representations made by employers' organizations are appended to this report, as is the report of the Commission of Inquiry set up to examine the complaint made by delegates to the Conference under article 26 of the Constitution and the text of another complaint lodged recently, which was declared receivable but on which there has not yet been a decision on the establishment of a Commission of Inquiry. A number of examples of observations made by the Committee of Experts on the application of ratified Conventions in relation to matters raised by employers' organizations are also appended, as well as the full text of the discussions in the Committee on the Application of Standards on these observations and the reports of Direct Contacts Missions relating to these cases and cases submitted to the Committee on Freedom of Association.

8. PRINCIPLES DEVELOPED BY
THE SUPERVISORY BODIES ON
THE BASIS OF COMPLAINTS
MADE BY EMPLOYERS'
ORGANIZATIONS RELATING TO
VIOLATIONS OF CONVENTIONS
Nos. 87, 98 AND 144

Summary of Conventions Nos. 87, 98 and 144

***Freedom of Association and Protection of the Right to
Organise Convention, 1948 (No. 87)***

Workers and employers, without distinction whatsoever, have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing to further and defend their interests without previous authorization.

However, the extent to which the guarantees provided for in the Convention apply to the armed forces and the police will be determined by national laws or regulations.

Workers' and employers' organizations have the right to establish and join federations and confederations. They also have the right, in the same way as federations and confederations, to affiliate with international organizations of workers and employers.

Furthermore, these organizations, federations and confederations have the right to:

- draw up their constitutions and rules;
- elect their representatives in full freedom;
- organize their administration and activities; and
- formulate their programmes.

The public authorities have to refrain from any interference which would restrict this right or impede the lawful exercise thereof.

The acquisition of legal personality by workers' and employers' organizations, federations and confederations may not be made subject to conditions of such a character as to restrict the rights enumerated above. Furthermore, they may not be dissolved or suspended by administrative authority.

In exercising the rights provided for in the Convention, workers and employers and their respective organizations have to respect the law of the land. However, the law of the land must not be such, nor may it be so applied as to impair the guarantees provided for in the Convention.

In general, any State which ratifies the Convention undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.

***Right to Organise and Collective Bargaining Convention, 1949
(No. 98)***

Workers must be protected against acts of anti-union discrimination, and particularly acts calculated to:

- make their employment subject to the condition that they shall not join a union or shall relinquish membership thereof;
- cause the dismissal or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Workers' and employers' organizations must enjoy adequate protection against any acts of interference by each other, and particularly acts which are designed to promote the domination, financing or control of workers' organizations by employers or employers' organizations.

Measures appropriate to national conditions have to be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between, on the one hand, employers and, on the other, employers' and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.

The Convention leaves it to national laws or regulations to determine the extent to which it applies to the armed forces and the police. Furthermore, it does not deal with the position of public servants engaged in the administration of the State, nor may it be construed as prejudicing their rights or status in any way.

***Tripartite Consultation (International Labour Standards)
Convention, 1976 (No. 144)***

States which ratify Convention No. 144 undertake to operate procedures which ensure effective consultations between representatives of the government, of employers and of workers on the following matters:

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- government replies to questionnaires concerning items on the agenda of the Conference and their comments on proposed texts to be discussed by the Conference;
 - the submission of instruments to the competent authorities in accordance with article 19 of the Constitution of the ILO;
 - the re-examination of unratified Conventions and of Recommendations;
 - reports on the application of ratified Conventions; and
 - proposals for the denunciation of Conventions.

The consultations must be undertaken at appropriate intervals fixed by common agreement, but at least once a year.

The representatives of employers and workers must be chosen freely by their representative organizations.

The competent authority has to:

- assume responsibility for the administrative support of the consultation procedures envisaged in the Convention;
- make appropriate arrangements with the representative organizations for the financing of any necessary training of participants in these procedures; and
- after consultation with the representative organizations, may decide to issue an annual report on the working of the procedures.

Even though Convention No. 144 covers consultations in relation to international labour standards, this does not in any way prevent member States from establishing means of application of the Convention through tripartite commissions, nor does it prevent these tripartite commissions from having a broader mandate that covers other matters of mutual interest, such as the examination of draft legislation, the determination of social and economic policy and the resolution of industrial disputes. There are examples of countries in which the functions of tripartite commissions have been extended in this way.

Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976 (No. 152)

Employers and workers should be represented on an equal footing in any bodies through which consultations are undertaken.

The Recommendation enumerates various procedures through which tripartite consultation could be carried out:

- a committee specifically constituted for questions concerning the ILO;
- a body with general competence in the economic, social or labour field;
- a number of bodies with specific responsibilities; or
- written communications, where those involved in the consultation procedures are agreed that such communications are appropriate and sufficient.

Each State should operate procedures which ensure effective consultations between the representatives of the government, of employers and of workers on the preparation and implementation of measures to give effect to ILO Conventions and Recommendations, in particular to ratified Conventions.

The competent authority, after consultation with the representative organizations of employers and workers, should determine the extent to which the consultation procedures should be used for matters of mutual concern, such as:

- the preparation, implementation and evaluation of ILO technical cooperation activities;
- the action to be taken in respect of resolutions and other conclusions adopted by the Conference, regional conferences and other meetings convened by the ILO; and
- the promotion of better knowledge of ILO activities.

Content of the principles of the supervisory bodies

This section contains principles that are fairly general in scope that have been developed on the basis of the complaints presented to the Committee on Freedom of Association by employers' organizations. These principles, which are used as a basis for its reasoning, enable the Committee to maintain unity in the criteria applied in its conclusions and, where appropriate, in considering whether or not the allegations made are well-founded. The main principles and decisions of the Committee when examining the complaints made by employers' organizations are set out below, as well as a number of principles established by a Commission of Inquiry set up to examine a complaint by various Employer delegates to the International Labour Conference.

Principles relating to the fundamental rights of employers and procedural guarantees

Right to organize and civil liberties

- The absence of civil liberties removes all meaning from the concept of trade union rights; the rights conferred on workers' and employers' organizations must be based on respect for those civil liberties, such as security of the person and freedom from arbitrary arrest and detention [see 279th Report, Case No. 1556, paragraph 58].
- In a situation in which workers' organizations [and employers' organizations] consider that they do not enjoy the freedoms essential for the performance of their functions, they should be entitled to demand the recognition of these freedoms and such claims should be considered to form part of legitimate trade union activities [see 334th Report, Case No. 2254, paragraph 1082].
- Workers' and employers' organizations can only develop in a system which respects and guarantees basic human rights [see 251st Report, Case No. 1361, paragraph 106].

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- The resolution concerning trade union rights and their relation to civil liberties, adopted by the International Labour Conference in 1970, recognizes that the rights conferred on workers' and employers' organizations are based on respect for the civil liberties enumerated in particular in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. According to the resolution, the following are essential for the exercise of trade union rights: (a) the right to freedom and security of the person and freedom from arbitrary arrest and detention; (b) freedom of opinion and expression and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of frontiers; (c) freedom of assembly; (d) the right to a fair trial by an independent and impartial tribunal; (e) the right to protection of the property of trade union organizations [Report of the Commission of Inquiry of 1991, paragraph 436].

Right to life and security

- 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 323rd Report, Case No. 2021, paragraph 324; 291st Report, Case No. 1700, paragraph 310; and 334th Report, Case No. 2254, paragraph 1088].
- In cases relating to the death or murder of employers' leaders, an independent judicial inquiry must be carried out with a view to elucidating the facts in full, determining responsibilities and punishing the guilty parties [see 208th Report, Case No. 1007, paragraph 387].
- With regard to the death threats made against the President of an employers' confederation, the Committee observed that the Government had taken the necessary measures to protect this employers' leader and his residence. The Committee requested the Government to continue providing such protection for as long as his life was in danger [see 291st Report, Case No. 1700, paragraph 308].

Guarantees of due process

- Respect for due process of law should not preclude the possibility of a fair and rapid trial and, on the contrary, an excessive delay may intimidate the employers' leaders concerned, thus having repercussions on the exercise of their activities [see 262nd Report, Case No. 1419, paragraph 263].
- There should be no confusion between the performance by trade unions or employers' organizations of their specific functions, that is the defence and promotion of the occupational interests of workers or employers, and the possible pursuit by certain of their members of other activities that are unconnected with these functions. The penal responsibility which such persons may incur as a result of such acts should in no way lead to measures being taken to deprive the unions themselves or employers' organizations or their leaders of their means of action [see 334th Report, Case No. 2254, paragraph 1083].

Detention of employers' leaders

- 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 the Committee requests the Government to respect this principle [see 334th Report, Case No. 2254, paragraph 1084].
- The preventive detention of leaders of workers' and employers' organizations for activities connected with the exercise of their rights is contrary to the principles of freedom of association [see 233rd Report, Case No. 1007, paragraph 233].
- Preventive detention should be accompanied by a set of safeguards and limitations to ensure that it cannot be used for purposes other than that for which it is intended and, in particular, to provide protection against situations where the detention is unsatisfactory from the point of view of sanitation, unnecessary hardship or the right to defence [see 216th Report, Case No. 1084, paragraph 38; 222nd Report, Case No. 1114, paragraph 71; and 255th Report, Cases Nos. 1351 and 1372, paragraph 56].

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- The arrest, even if only briefly, of leaders of workers' and employers' organizations for activities in connection with the exercise of their right to organize is contrary to the principles of freedom of association. Such arrest may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities; all the more so when it occurs in an arbitrary manner, outside any regular legal procedure. The Government should take steps to ensure that the authorities which proceeded to arbitrary arrest have appropriate instructions to eliminate the danger which arrest for trade union activities implies [see 331st Report, Case No. 2220, paragraph 575].
 - The arrest of leaders may create an atmosphere of intimidation and fear prejudicial to the normal development of the activities of organizations [see 331st Report, Case No. 2220, paragraph 575].

Forced exile of leaders

- The expulsion of leaders of employers' or workers' organizations from their country for having been involved in activities related to their position is not only contrary to human rights, but also interferes in the activities of the organizations to which they belong [see 255th Report, Case No. 1344, paragraph No. 56].

Freedom of assembly and expression

- 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 [see 246th Report, Case No. 1351, paragraph 260].
- The right of an employers' or workers' organization to express its opinions uncensored through the independent press should in no way differ from the right to express opinions in exclusively

occupational or trade union journals [see 255th Report, Case No. 1344, paragraph No. 58].

- The right of employers' and workers' organizations to publish and distribute their information must be guaranteed [see 251st Report, Case No. 1361, paragraph 106].
- The publication and distribution of news and information of interest to trade unions or employers' organizations constitutes a legitimate activity and the application of measures for their control may involve serious interference by the administrative authorities [see 218th Report, Case No. 1007, paragraph 462].

Right to leave the country

- The leaders of workers' and employers' organizations should enjoy appropriate facilities for carrying out their functions, including the right to leave the country when their activities on behalf of the persons they represent so require, and the free movement of these representatives should be guaranteed by the authorities [see 241st Report, Case No. 1317, paragraph 309].

Inviolability of the premises of employers' organizations

- The right to the inviolability of the premises of workers' and employers' organizations, which is an essential element of the rights recognized under Convention No. 87, has as an indispensable corollary that the public authorities may not insist on entering premises without a judicial warrant authorizing them to do so [see 300th Report, Case No. 1790, paragraph 296].

Property of employers' organizations

- A climate of violence, such as one in which the premises and property of workers' and employers' organizations are attacked, is a serious obstacle to the exercise of their rights, and such acts require severe measures to be taken by the authorities [see 291st Report, Case No. 1700, paragraph 309].
- The right to adequate protection of trade union property is one of those civil liberties which are essential for the normal exercise of the rights of organizations [see 279th Report, Case No. 1556, paragraph 62].

Principles relating to the freedom of association of employers and the rights of employers' organizations and their leaders

Establishment of organizations

- A minimum number of ten employers engaged in the same industry or activity, or similar or related industries or activities, is extremely high and violates the right of employers to establish organizations of their own choosing [see 290th Report, Case No. 1612, paragraph 15].
- The 10,000 member threshold for the federal registration of employers' and workers' associations could influence unduly the free choice of persons as to the organization to which they wish to belong [see 284th Report, Case No. 1559, paragraph 260].
- Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. This implies for the organizations themselves the right to establish and join federations and confederations of their own choosing. The requirements for the establishment of organizations must not be such as to be equivalent in practice to previous authorization, nor to constitute such an obstacle to the establishment of an organization that they amount in practice to outright prohibition [see 329th Report, Case No. 2140, paragraph 295].
- The principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization and such requirements must not be such as to be equivalent in practice to previous authorization, nor to constitute such an obstacle to the establishment of an organization that they amount in practice to outright prohibition [see 329th Report, Case No. 2133, paragraph 545].
- If the conditions for the granting of registration are tantamount to obtaining prior authorization from the public authorities for the establishment or functioning of an employers' or workers' organization, this would undeniably constitute an infringement of the Convention. This, however, would not seem to be the case when registration consists solely of a formality and where

the conditions are not such as to impair the guarantees laid down by the Convention [see 290th Report, Case No. 1612, paragraph 24].

- With regard to the denial of the right to register an employers' organization through a lack of provisions in the law, the Committee indicated that "employers' occupational associations" should not be restricted by excessively detailed provisions which discourage their establishment, contrary to Article 2 of Convention No. 87, which provides that employers, as well as workers, shall have the right to establish organizations of their own choosing without previous authorization [see 333rd Report, Case No. 2133, paragraph 59].
- The resolution concerning trade union rights and their relation to civil liberties adopted by the International Labour Conference provides that the rights conferred on workers' and employers' organizations are based on respect for the civil liberties enumerated in particular in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ratified by Nicaragua). According to the resolution, the following are essential for the exercise of trade union rights: (a) the right to freedom and security of the person and freedom from arbitrary arrest and detention; (b) freedom of opinion and expression and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of frontiers; (c) freedom of assembly; (d) the right to a fair trial by an independent and impartial tribunal; (e) the right to protection of property [Report of the Commission of Inquiry, 1991, paragraph 436].
- The right to secure the registration of a workers' or employers' organization should not be subject to formalities imposed by legislation or by the authorities which amount to a requirement for prior authorization. The authorities should abstain from any acts of coercion or favouritism concerning the establishment of organizations and avoid any discrimination based on political or ideological grounds [Report of the Commission of Inquiry, 1991, paragraph 544(2)].

Dissolution of organizations

- Measures of suspension or dissolution of employers' or workers' organizations by the administrative authority constitute serious infringements of the principles of freedom of association [see 279th Report, Case No. 1556, paragraph 59].
- When a workers' or employers' organization is dissolved, its assets should be distributed among its former members or handed over to the organization that succeeds it. This latter expression should be taken to mean an organization or organizations pursuing the aims for which the dissolved organizations were established, and pursuing them in the same spirit [see 194th Report, Case No. 900, paragraph 258].

Organization of activities

- Employers' and workers' organizations must be allowed to conduct their activities in the defence of their interests in a climate that is free from pressure, intimidation, harassment, threats or actions to discredit them or their leaders, including the adulteration of documents [see 328th Report, Case No. 2167, paragraph 302].
- Governments have to respect the freedom of the employers to establish organizations of their own choosing and the right of the latter to organize their administration and activities and to formulate their programmes without interference from the public authorities which would restrict this right [see 208th Report, Case No. 1007, paragraph 386].
- Freedom of association and the right to organize imply not only the right of workers and employers to establish freely organizations of their own choosing, but also the right for the organizations themselves to pursue lawful activities for the defence of their occupational interests [see 329th Report, Case No. 2140, paragraph 295].
- The question of the fixing of "Private Enterprise Day" by a central employers' organization is a matter which should be decided freely by the occupational organization concerned and there should be no need for an administrative authorization for

this kind of commemoration or the fixing of its date [see 246th Report, Case No. 1351, paragraph 261].

Political activities of employers' organizations

- A broadly based prohibition of political activities by employers' and workers' organizations would be contrary to Article 3 of the Convention since it would impair the right of such organizations to organize their activities and develop their programmes of action. But at the same time such organizations should maintain their independence in relation to political parties and in the development of their political activities [Report of the Commission of Inquiry, 1991, paragraph 502].
- Legislation should not contain a general prohibition of the political activities of organizations. Such organizations should have the power to express freely their opinions on the economic and social policy of the Government with regard to the interests of the sectors that they represent [Report of the Commission of Inquiry, 1991, paragraph 544(3)(a)].

Financial administration of employers' organizations

- Questions relating to the financing of employers' organizations with regard both to their own budgets and those of federations and confederations should be governed by the by-laws of the organizations themselves [see 327th Report, Case No. 2146, paragraph 895].

Conciliation

- Voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers. Provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority [see 298th Report, Case No. 1612, paragraph 22].
- Legislation which lays down mandatory conciliation and prevents the employer from withdrawing, irrespective of circumstances, at the risk of being penalized by payment of wages in respect of strike days, is disproportionate and this runs

counter to the principle of voluntary negotiation enshrined in Convention No. 98 [see 318th Report, Case No. 1931, paragraph 369].

Collective bargaining

- Measures appropriate to national conditions have to be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation [see 329th Report, Case No. 2140, paragraph 296].
- The importance should be emphasized of the right of representative organizations to negotiate, whether these organizations are registered or not. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes. Employers' and workers' organizations should be able to engage in free and voluntary negotiations regardless of the registration of such organizations, and the authorities should refrain from any interference which would have the effect of preventing employers' organizations from engaging in negotiations with a view to the regulation of terms and conditions of employment by means of collective agreements [see 333rd Report, Case No. 2133, paragraph 60].
- 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. The principle of representation for collective bargaining purposes cannot be applied in an equitable fashion in respect of employers' associations if membership of the Chamber of Commerce is compulsory and the Chamber of Commerce is empowered to bargain collectively with trade unions [see 327th Report, Case No. 2146, paragraph 896].
- The requirement of approval or acknowledgement by a government authority to make an agreement valid is not in full conformity with the principle of voluntary collective bargaining

established by Convention No. 98 [see 208th Report, Case No. 1007, paragraph 389].

- Failure to reply to a statement of claims may be deemed an unfair practice contrary to the principle of good faith in collective bargaining which may entail certain penalties as foreseen by law, without resulting in a legal obligation upon the employer to pay strike days, which is a matter to be left to the parties concerned [see 318th Report, Case No. 1931, paragraph 369].
- With regard to the amendment by law of the contents of a collective agreement, the Committee has pointed out that this measure is not consonant with Convention No. 98 and that the intervention of the public authorities in order to modify the contents of collective agreements would be justified only for compelling reasons of social justice and in the general interest [Report of the Commission of Inquiry, 1991, paragraph 521].
- The authorities should refrain from any intervention or remove any obstacle which could restrict the free conclusion of collective agreements, including at different levels, in accordance with the provisions of Convention No. 98 [Report of the Commission of Inquiry, 1991, paragraph 544(4)].
- The granting of collective bargaining rights to a Chamber of Commerce which is created by law and to which affiliation is compulsory impairs the freedom of choice of employers in respect of the organization to represent their interests in collective bargaining [see 327th Report, Case No. 2146, paragraph 897].
- Procedures can be established, such as the creation of consultative bodies designed to ensure that the parties to collective bargaining have regard voluntarily in their negotiations to considerations relating to the economic or social policies of the Government, and the safeguarding of national interests, which in any case should utilize persuasion and not entail recourse to measures of compulsion, while conserving the freedom of both parties with regard to the final decision [see 208th Report, Case No. 1007, paragraph 389].

Representatives of the parties in collective bargaining

- With regard to excessive legal restrictions on the number of delegates and advisers of the parties in collective bargaining, excessively strict requirements on the composition of the representatives of the parties in the process of collective bargaining may limit its effectiveness and in practice this is a matter which should be determined by the parties themselves [see 310th Report, Case No. 1931, paragraph 504].

Extension of collective agreements

- Any extension of collective agreements should take place subject to analysis by the social partners of the consequences that it would have on the sector to which it is to be applied [see 290th Report, Case No. 1612, paragraph 31].

Compulsory arbitration

- Compulsory arbitration to end a collective labour dispute at the request of only one of the parties is a violation of the principles of freedom of association and collective bargaining [see 310th Report, Case No. 1931, paragraph 506].

Closure of enterprises in the event of a strike

- The closing down of the enterprise, establishment or works in the event of a strike is an infringement of the freedom of work of persons not participating in a strike and disregards the basic needs of the enterprise (maintenance of equipment, prevention of accidents and the right of employers and managerial staff to enter the installations of the enterprise and to exercise their activities) [see 310th Report, Case No. 1931, paragraph 497].
- In a case in which, in the event of a strike, the closure of establishments was required to occur immediately and be guaranteed by the police, the Committee recalled that it had criticized “coercion of non-strikers in an attempt to interfere with their freedom to work” and considered that the minimum services to be maintained in the event of a strike to guarantee the safety of persons and installations and the prevention of accidents (minimum safety service) are normal and acceptable restrictions [see 310th Report, Case No. 1931, paragraph 496].

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- The Committee has considered legitimate a legal provision that prohibits pickets from disturbing public order and threatening workers who continued to work [see Digest of 1985, paragraph 434].

Discrimination against employers' organizations

- Discrimination against a representative organization of employers in relation to its participation in the preparation of the Code and in tripartite consultations on economic and social matters would be tantamount to an act of favouritism or coercion which would not only influence negatively the right of the employers or workers concerned (or their organizations) to establish organizations of their own choosing (Article 2 of Convention No. 87), but would also imply interference restricting the right of this organization to exercise its activities, contrary to Article 3 of the Convention. It should be recalled that, under Article 6 of the Convention, the provisions of the above two Articles also apply to federations and confederations [Report of the Commission of Inquiry, 1991, paragraph 524].

Principles relating to other matters

Respect for the law

- In exercising the rights provided for in Convention No. 87, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land [see 323rd Report, Case No. 2021, paragraph 324].

Occupation of property and places of work

- With regard to the occupation of plantations or places of work, evacuation orders pronounced by the judicial authorities have to be enforced whenever criminal acts are committed on plantations or at places of work in connection with industrial disputes [see 323rd Report, Case No. 2021, paragraph 325].
- The occupation of plantations by workers and by other persons, particularly when acts of violence are involved, is contrary to

Article 8 of Convention No. 87 [see 323rd Report, Case No. 2021, paragraph 324].

Expropriation of employers' lands

- In a case concerning the expropriation of the land and assets of the leaders of an employers' confederation, the Committee pointed out with concern that these measures have allegedly affected a large number of leaders of the employers' organization in a discriminatory manner and it expressed the hope that the persons in question would be fairly compensated [see 255th Report, Case No. 1344, paragraph 55].
- In relation to the confiscation of the land of employers' leaders, the Committee, in the light of the information gathered during a Direct Contacts Mission, was convinced that the actual possibilities for the persons concerned of appealing against these measures to the courts were relatively limited and that there was either no compensation for these confiscations (in the case of land that was unused, unprofitable or abandoned) or inadequate compensation (the issue of agrarian reform "bonds"). The Committee considered that all the provisions concerning compensation for expropriated land should be reviewed to make sure that there is real and fair compensation for the losses thus sustained by the owners, and that the Government should reopen the compensation files if so requested by persons who consider they have been despoiled in the agrarian reform process [see 261st Report, Case No. 1454, paragraph 29].

Payment of compulsory contributions

- Compulsory contributions to Chambers of Commerce are contrary to the principles of freedom of association [see 327th Report, Case No. 2146, paragraph 895].

Payment of wages for strike days

- Obliging the employer to pay wages in respect of strike days, in addition to potentially disrupting the balance in industrial relations and proving costly for the employer, raises problems of conformity with the principles of freedom of association, to

the extent that such payment should be neither required nor prohibited, and should consequently be a matter to be resolved between the parties [see 318th Report, Case No. 1931, paragraph 366].

- Salary reductions for strike days give rise to no objections from the point of view of the principles of freedom of association [see 230th Report, Case No. 1171, paragraph 170; and 297th Report, Case No. 1770, paragraph 73].

Union security clauses

- Problems related to union security clauses should be resolved at the national level, in conformity with national practice and the industrial relations system in each country, and both situations where union security clauses are authorized and those where these are prohibited can be considered to be in conformity with ILO principles and standards on freedom of association. Nonetheless, when legislation admits trade union security clauses, such as the withholding of trade union dues from the wages of non-members benefiting from the conclusion of a collective agreement, those clauses should only take effect through collective agreements [see 290th Report, Case No. 1612, paragraph 27].
- A distinction has to be made between union security clauses allowed by law and those imposed by law, only the latter of which appear to result in a system of trade union monopoly contrary to the principles of freedom of association [see 259th Report, Case No. 1385, paragraph 551].
- In a case in which an Act authorized the trade union to set unilaterally and to receive from non-members the amount of the special contribution set for members, as a token of solidarity and in recognition of the benefits obtained from the collective agreement, the Committee concluded that to bring this into line with the principles of freedom of association, the Act should establish the possibility for both parties acting together - and not the trade union unilaterally - to agree in collective agreements to the possibility of collecting such a contribution from non-members for the benefits that they may enjoy [see 290th Report, Case No. 1612, paragraph 27].

Tripartism

- As envisaged in the Declaration of Philadelphia, 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 [see 334th Report, Case No. 2254, paragraph 1066].

General wage increases

- In relation to a case in which an Act provided for general wage increases and modified all the wages agreed upon in existing collective agreements, the Committee emphasized the importance that it attaches to the principle of the autonomy of the parties to the collective bargaining process. It follows from this principle that the public authorities should not as a rule intervene in order to modify the contents of collective agreements freely concluded. Such intervention would be justified only for compelling reasons of social justice and the general interest. Taking into account the exceptional circumstances of the present case invoked by the Government as well as the Government's statement that discussions had taken place with workers and employers, the Committee considered that the harmonious development of industrial relations would be promoted if the public authorities, in tackling problems relating to the loss of the purchasing power of workers, were to adopt solutions which did not entail modifications of what had been agreed upon between workers' and employers' organizations without the consent of both parties [see 211th Report, Case No. 1052, paragraphs 152-157].

Consultations

- Tripartite consultation should aim, in particular, at the joint consideration of matters of mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions, including in relation to the preparation and implementation of

laws and regulations affecting the interests of workers' and employers' organizations [see 334th Report, Case No. 2254, paragraph 1065].

- Employers' and workers' organizations should be consulted fully by the authorities on matters of mutual interest, including the preparation and application of legislation which affects their interest and the determination of minimum wages. This helps to give the laws, programmes and measures adopted or applied by public authorities a firmer justification and helps to ensure that they are well respected and successfully applied. The Government should seek general consensus as much as possible, given that employers' and workers' organizations should be able to share in the responsibility of securing the well-being and prosperity of the community as a whole. This is particularly important given the growing complexity of the problems faced by societies. No public authority can claim to have all the answers, nor assume that its proposals will naturally achieve all of their objectives [see 328th Report, Case No. 2167, paragraph 295].
- Tripartite consultation should take place before the Government submits a draft to the Legislative Assembly or establishes a labour, social or economic policy, and such consultation should form part of the elements required for the Government to take its decision, specifically because the confederations principally representative of workers and employers represent them, that is to say, they represent employers and a very considerable proportion of the labour world [see 334th Report, Case No. 2254, paragraph 1066].
- It is important for consultations to take place in good faith, confidence and mutual respect, and for the parties to have sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise. Governments should take these principles into account in social and economic matters, particularly with regard to setting minimum wages, drafting the code of labour procedure and developing tax laws, and should ensure that they attach the necessary importance to agreements reached between workers and employers [see 328th Report, Case No. 2167, paragraph 296].

9. CONCLUSIONS

The underlying purpose of all of the ILO's supervisory machinery is to obtain an objective, independent and impartial view in cases in which governments or other public authorities have failed to comply with commitments deriving from membership of the ILO or the ratification of Conventions, to the prejudice of the rights of workers or employers and their respective organizations. The examination of the complaints or representations made by organizations, the replies from governments and the respective evidence by the technical or technical-tripartite supervisory bodies, which provide added value to the knowledge of the situation from their specific viewpoint, makes it possible to determine the extent to which ILO standards are given effect in law and practice.

Compliance with these standards, and particularly with ratified Conventions, is an objective which is of concern not only to national employers' and workers' organizations, but also to all the member States of the ILO and, in the final analysis, to the international community, not only for reasons of social justice and stability, but also on grounds related to the basic rules of the game for international competition, without overlooking the fact that many ILO standards refer to fundamental human rights or are directly related to the essential requirements of the rule of law.

An examination of the allegations made by employers' organizations under the various procedures and the conclusions of the ILO's

supervisory bodies gives rise to four preliminary observations. The first is that many of the complaints made by employers' organizations are of extraordinary gravity. The second is that, in the immense majority of the cases presented, the conclusions of the supervisory bodies have confirmed the existence of the facts and problems alleged by employers' organizations, and in general have in many cases facilitated the resolution of the problems raised after governments have been urged to take the necessary measures to remedy specific practices or laws. The third is that the complaints and representations made by employers' organizations relate exclusively to violations of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); these complaints concern a number of countries in Europe, Africa and the Americas, as well as Australia and New Zealand. The fourth is that the employers' organization that is most present in the supervisory procedures as a complainant is the International Organization of Employers (IOE).

Moreover, there is a constantly increasing number of national employers' organizations from every continent making observations or comments to the Committee of Experts on these and other Conventions, which may then lead to the discussion of the problems raised by the Conference Committee on the Application of Standards.

Nevertheless, it is worth noting that, despite the fact that many ILO Conventions accord rights to employers and their organizations, and that nearly all of them provide for tripartite consultation on a broad range of matters,⁶⁹ recourse to the supervisory machinery by these organizations, and particularly to the Committee of Experts, has not intensified with regard to all the ILO's Conventions, since the participation of these organizations makes it possible for the regular supervisory bodies (the Committee of Experts and the Committee on the

⁶⁹ See, for example, in relation to occupational safety and health, the article by R. Hernández Pulido, K-M Felderhoff, I. Kröner-Moosmann and T. Samuel, "Occupational safety and health", in *International labour standards: A global view*, ILO, Geneva, 2002, pp. ..., which contains a long list of subjects covered by tripartite consultation involving employers and their organizations.

Application of Standards) to have fuller information at their disposal and therefore to be able assess in greater depth the situation with regard to the application of Conventions in national law, practice and laws that are being formulated.

Up to now, employers' organizations have made 31 complaints to the Committee on Freedom of Association, two complaints under article 26 of the ILO Constitution leading to the establishment of one Commission of Inquiry, and various representations under article 24 of the ILO Constitution. As noted above, employers' organizations, particularly at the national level, frequently make comments or observations to the Committee of Experts on the application of a very diverse range of ratified Conventions, and the representatives of these organizations have succeeded in having cases which are of concern to them discussed by the Conference Committee on the Application of Standards.

The number of complaints and representations made by employers' organizations could appear to be low at first sight when compared with those made by trade union organizations. In this respect, it is interesting to note that: before the 1980s, employers' organizations had not made use of these procedures; many of the ILO's Conventions refer mainly to the rights of workers; and, for various reasons, before initiating a procedure in the ILO, employers' organizations generally prefer to exhaust the channels of direct dialogue, negotiation with governments, and even national administrative or judicial procedures. It should also be emphasized that no complaint has yet been submitted by employers' organizations to the Fact-Finding and Conciliation Commission on Freedom of Association.

A reading of the extensive documentation examined in this publication shows that the problems referred to the supervisory bodies by employers' organizations may be summarized as follows:

1. violations of fundamental human rights relating to the exercise of the rights of employers' organizations, their leaders and members: the murder of two employers' leaders; death threats against employers' leaders or employers, and threats against their organizations in relation to protest activities; the prosecution of employers' leaders with a view to their intimidation; a high number of cases of the

detention of employers' leaders, including their physical ill-treatment, for reasons related to their functions; the lack of guarantees of due process; aggression against employers and physical or moral harassment; violent acts by paramilitary groups against the property of employers' organizations or in the event of protest activities; attacks against the premises of employers' organizations; the occupation of the premises of employers' organizations; searches of the premises of employers' organizations; obstacles to the rights of expression, assembly and demonstration; thefts from the premises of employers' organizations and the confiscation of property; the plundering, invasion and occupation of ranches with the encouragement of the authorities; the expropriation of the lands and property of employers' leaders; inspections of enterprises by labour inspectors with a view to intimidation in the context of protests against government policy; campaigns to vilify employers' leaders; the exile of employers' leaders to avoid unjustified reprisals by the authorities;

2. restrictions relating to the establishment and operation of employers' organizations and the rights of their leaders: excessive requirements for the establishment of employers' organizations; denial of the registration of such organizations; excessive regulation of the objectives of employers' organizations and the content of their constitutions; the imposition of compulsory arbitration in the context of collective bargaining; acts of discrimination against employers and their organizations in relation to their claims; the promotion or favouring of employers' organizations close to a government to the prejudice of truly representative organizations; denial of the right of collective bargaining to representative employers' organizations; the dissolution of employers' organizations by administrative authority; failure to return the property of employers' organizations which have been dissolved; prohibition of the right of employers' leaders to leave the country to attend meetings with other employers' organizations; legislation restricting the rights of employers' organizations; the imposition by law of union security clauses in enterprises and compulsory membership practices for workers and employers; general increases in wages imposed by decree, modifying all the wages agreed upon in collective

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- agreements; the need for collective agreements to be approved by the Ministry of Labour taking into account criteria relating to economic policy; the imposition by law of collective bargaining at the branch level; the immediate compulsory closure of enterprises imposed by law in the event of strikes; the legal obligation for employers to pay wages in the event of strikes; limitations on the number of advisers to the parties in conciliation procedures; legal voids (or confuse rules) respecting certain aspects of industrial relations; compulsory membership of a chamber of commerce and the requirement that the chamber sign agreements negotiated by any employers' organization in the sector; prohibition of the holding in a country of "Private Enterprise Day", which included a meeting of 2000 employers; the obligation imposed by decree for public utility enterprises to provide services to the public without interruption under penalty of sanctions;
3. marginalization or exclusion of the most representative employers' organizations from social dialogue and favouritism towards employers' organizations that are unrepresentative or close to governments in the processes of negotiation or consultations on matters directly affecting employers and their organizations.

A significant number of the issues raised by employers' organizations relate to problems in various countries linked to the transition from planned socialist economies to the market economy.

The documentation analysed in this publication shows that the reports of the supervisory bodies have given rise, sometimes after needing to show perseverance, to many cases of progress based on the procedures initiated by employers' organizations. These have ranged from the release of detained employers' leaders to the registration of employers' organizations, the ending of the compulsory affiliation of employers to an employers' organization, the amendment of restrictive legislation and many other matters. In a certain number of cases, the presentation of complaints has also led to the cessation or considerable attenuation of general attitudes by the authorities that were hostile, marginalizing or discriminatory, thereby promoting a new orientation in social dialogue and industrial relations in accordance with ILO standards and principles. In other cases, complaints have achieved their objective

when the authorities have ended up interpreting legislation in a manner which is not in violation of the rights of employers' organizations, as set out in ILO Conventions. A complaint can sometimes be more effective when direct contacts are made by a representative of the ILO Director-General who visits a country to find solutions to the problems raised with governments and employers' and workers' organizations. On a number of occasions, this type of mission or the mere filing of a complaint have also led to the parties involved seeking negotiated solutions directly, with the employers' organizations concerned withdrawing the complaint.

The ILO's supervisory procedures, including the interventions of the Director-General, have a considerable impact on public opinion and a preventive effect in relation to future measures which might restrict the rights of employers and their organizations. As observed with great pertinence by Nicolas Valticos, one of the characteristics of the supervisory system consists of publicity measures which allow public opinion to have an influence at the national and international levels. Admittedly, the deliberations of the independent supervisory bodies and conciliation procedures are confidential. However, certain points are first the subject of direct interventions with governments to attempt to achieve results. Moreover, the reports and conclusions of the supervisory bodies are published, as are the debates of the Conference, which are also public. The element of "shaming into action" can also be relevant since, in the final analysis, States are often sensitive to such publicity.⁷⁰

However, governments do not always give effect to all the recommendations of a supervisory body. In the most serious cases, the complainant organizations have then opted to combine various procedures with a view to achieving the maximum level of pressure and thereby persuading governments to bring an end to the violations of their rights.

In this respect, a complaint to the Committee on Freedom of Association, or a representation under article 24 of the Constitution of

⁷⁰ Nicolas Valticos, *Droit international du travail*, op. cit., p. 535.

the ILO, in addition to giving rise to the corresponding report, is also examined and may be discussed by the Governing Body. Employers' organizations directly, or the Committee on Freedom of Association, can increase the pressure by referring unresolved problems to the Committee of Experts, which can take up a position on the matter in its annual report and even draw the attention of the Conference Committee on the Application of Standards to a specific situation. In the Conference Committee, tripartite discussion of an individual case, which takes the form of a public debate that is not without passion and vigour, constitutes an additional encouragement for the Government to rectify specific laws, measures or practices and to make firm commitments in this respect (the preparation of draft legislation, the release of employers' leaders or trade union leaders, the submission of problems to social dialogue, acceptance of technical assistance missions, etc.). The Conference Committee, which reaches conclusions on each of the individual cases that it examines, draws the attention of the International Labour Conference in its report to the cases to which it devotes a special paragraph or to cases of continued failure of implementation with a view to the elimination of serious shortcomings in the application of Conventions. In this way, the legitimate claims of employers can be raised at the global level in the Committee on the Application of Standards, thereby increasing the possibilities of resolving the problems raised. Over and above these procedures, there is always the option of inviting a government to accept a Direct Contacts Mission in the context of complaints, representations, the comments of the Committee of Experts or the conclusions of the Conference Committee on the Application of Standards, or even of referring cases to Commissions of Inquiry, which have the effect of suspending other supervisory procedures during the course of their work and which is the supervisory body with the greatest impact.

The effectiveness of the supervisory machinery, as pointed out by Nicolas Valticos, does not solely depend on the adoption of specific techniques. What in the end plays a conclusive role is the spirit in which these procedures are pursued and the women and men who are responsible for their operation. This spirit can be defined by scientific rigour in the examination of issues, intellectual honesty in their assessment (which presupposes independence of spirit, and not merely of status, complete objectivity in dealing with States and the parties, as well as courage), the

purpose of the measure adopted, the objective sought by the supervision (which is not only intended to identify divergences, but also to promote the implementation of standards in a constructive spirit), and finally perseverance.⁷¹ In practice, certain problems are resolved fairly rapidly, while others require more time: but the supervisory bodies never abandon serious problems.

Another important point is that, with all the various complaints and representations that have been made, a corpus of principles has been developed, as described earlier in this publication, relating to the rights of employers' organizations and their leaders, which apply and develop the ILO's general principles in relation to fundamental rights.

A further aspect which should be emphasized is the new procedure of the Committee on Freedom of Association, which urges the government against which a complaint is presented to convey the views of the enterprises involved in the complaint, particularly through the respective employers' organization. This new rule guarantees their right of defence and the Committee on Freedom of Association is increasingly taking into account the viewpoint of the enterprise concerned and the respective employers' organization in its examination of complaints.

The procedure of the Credentials Committee of the International Labour Conference has been included in this publication. Behind the objections raised to the credentials provided by a government for Employer or Worker delegates, what is generally at issue is the representativeness of the organization to which they belong. Over and above the effects that this procedure may have in relation to the International Labour Conference (it may result in the revocation of credentials through a vote in Plenary), the reports of the Credentials Committee indirectly often have important consequences at the national level, for example in cases where the Committee notes that one national organization is clearly more representative than the others.

Although the action taken by employers' organizations has led to various Direct Contacts Missions, in contrast with workers'

⁷¹ Ibid., p. 535.

organizations, it has not given rise to other procedures in support of the supervisory machinery, such as missions led by the Chairperson of the Committee on Freedom of Association, tripartite missions composed of members of the ILO Governing Body or special technical assistance programmes which at the same time endeavour to find solutions to the problems raised through other means. Furthermore, as already noted, no complaint by employers' organizations has been referred to the Fact-Finding and Conciliation Commission on Freedom of Association.

The International Organization of Employers (IOE) and a fair number of its affiliated national organizations have an in-depth knowledge of the ILO's supervisory machinery and of its Conventions and Recommendations. Nevertheless, it would be desirable for this knowledge to be extended to all national employers' organizations, with particular reference to the countries of Asia and Africa, which are less present in the supervisory machinery. In this connection, it would be useful to prepare an exhaustive and systematic publication on the rights of employers and their organizations as set out in Conventions and Recommendations and other ILO instruments (the present publication is confined to the rights of employers' organizations in relation to the ILO's supervisory system).

The supervisory procedures of the ILO which, almost without exception, have traditionally operated on the basis of consensus, have been developed and improved over the years and their vitality, dynamism and relevance are illustrated by the increasing use made of them in general. For example, although the number of representations made under article 24 of the Constitution is fairly low, each year the number of complaints examined by the Committee on Freedom of Association is around 100 and the number of comments published by the Committee of Experts in its report reached 774 in 2004 (in addition to 1419 direct requests). The relevance of the supervisory procedures for employers has various reasons: institutional shortcomings (excessive delays in national procedures, the lack of independence of national judicial procedures), the existence of legislation that is incompatible with ILO standards, generalized situations of legal insecurity, the incapacity of national bodies and mechanisms to establish the facts in cases of serious violations of fundamental rights as a basis for identifying responsibilities or cases in

which there are abuses of the law in practice for reasons of a purely ideological or political nature.

It is possible that recourse to the supervisory machinery will intensify still further as a result of the changes brought about by globalization. Although it is difficult to predict how they will develop, the Governing Body and the ILO's supervisory bodies are engaged in a process of reflection with a view to revitalizing and strengthening these mechanisms, and certain bodies have already introduced innovations.

The supervisory machinery is based on dialogue with the governments concerned and on persuasion; it does not give rise to sanctions. The ILO does not have at its disposal machinery for enforcement and the reports of its supervisory bodies only constitute moral sanctions. The only precedent which comes close to a sanction has been the suspension of ILO technical assistance to a country or the recommendation of the Governing Body in the context of the follow-up to a Commission of Inquiry that the ILO's constituents (governments, employers and workers) should examine in the light of such recommendations the relations that they can maintain with the member State concerned.

Finally, for reasons which vary as the years go by, the International Community has an interest in an objective assessment of the extent to which labour rights are given effect in the various countries. For example, the European Union and certain governments and authorities in developed countries take into account the reports of the ILO's supervisory bodies and the situation of the labour legislation or fundamental labour rights in certain countries with a view to deciding whether or not to grant them trade privileges or advantages. The ILO has nothing at all to do with these processes, although the phenomenon has to be acknowledged, as does the fact that, in relation to this issue, the viewpoint of specialized NGOs which prepare reports on compliance with fundamental rights may also be taken into account by certain governments or international organizations. The specificity of the ILO is that the representatives of employers' organizations, by participating in the ILO's tripartite supervisory bodies, take part as members of such bodies in decision-making processes, which are therefore based on values, views and interests which are often very diverse. This confers upon the decisions adopted a very high level of legitimacy and balance, while at the

same time offering the component of civil society most closely concerned the principal participatory role incumbent upon it. This specific role of employers' organizations, which is also shared by workers' organizations, and which no other NGO can fulfil in the world of work or in the ILO's supervisory system with the same legitimacy and capacity for achieving results of broad general acceptance, is one of the landmarks in the history of contemporary international law and is of enormous significance and value in a globalized society.

