



## EIGHTH ITEM ON THE AGENDA

**349th Report of the Committee  
on Freedom of Association***Contents*

	<i>Paragraphs</i>
Introduction .....	1–310
<i>Case No. 2513 (Argentina): Definitive report</i>	
Complaint against the Government of Argentina presented by the Confederation of Argentine Workers (CTA) and the Association of State Workers (ATE) .....	311–330
The Committee's conclusions .....	326–329
The Committee's recommendations .....	330
<i>Case No. 2535 (Argentina): Definitive report</i>	
Complaint against the Government of Argentina presented by the Union of Education Workers of Río Negro (UNTER) and the Confederation of Education Workers of Argentina (CTERA) .....	331–352
The Committee's conclusions .....	349–351
The Committee's recommendation .....	352
<i>Case No. 2549 (Argentina): Definitive report</i>	
Complaint against the Government of Argentina presented by the Association of State Workers (ATE) .....	353–369
The Committee's conclusions .....	366–368
The Committee's recommendation .....	369
<i>Case No. 2561 (Argentina): Report in which the Committee requests to be kept informed of developments</i>	
Complaint against the Government of Argentina presented by the Congress of Argentine Workers (CTA) and the International Trade Union Confederation (ITUC) .....	370–382
The Committee's conclusions .....	378–381
The Committee's recommendations .....	382

*Case No. 2562 (Argentina): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Argentina presented by the Confederation of Argentine Workers (CTA) and the Confederation of Education Workers of Argentina (CTERA) .....	383–407
The Committee’s conclusions .....	402–406
The Committee’s recommendations .....	407

*Case No. 2552 (Bahrain): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Bahrain presented by the General Federation of Bahrain Trade Unions (GFBTU) .....	408–424
The Committee’s conclusions .....	419–423
The Committee’s recommendations .....	424

*Case No. 2529 (Belgium): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Belgium presented by the Professional Association of Maritime Pilots (BvL) .....	425–498
The Committee’s conclusions .....	489–497
The Committee’s recommendations .....	498

*Case No. 2588 (Brazil): Interim report*

Complaint against the Government of Brazil presented by the National Confederation of Metalworkers (CNM) .....	499–513
The Committee’s conclusions .....	510–512
The Committee’s recommendation .....	513

*Case No. 2548 (Burundi): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Burundi presented by the Confederation of Trade Unions of Burundi (COSYBU) .....	514–545
The Committee’s conclusions .....	534–544
The Committee’s recommendations .....	545

*Case No. 2534 (Cape Verde): Definitive report*

Complaint against the Government of Cape Verde presented by the National Union of Workers of Cape Verde – Trade Union Confederation (UNTC–CS) and the International Trade Union Confederation .....	546–562
The Committee’s conclusions .....	555–561
The Committee’s recommendations .....	562

*Case No. 2555 (Chile): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Chile presented by the National Association of Regional Officials of the National Youth Service (SENAME-ANFUR) .....	563–583
The Committee’s conclusions .....	579–582
The Committee’s recommendation .....	583

*Case No. 2564 (Chile): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Chile presented by the Trade Union Confederation of West Santiago (CONFESIMA) and the Federation of Engineering Trade Unions (FESIN).....	584–613
The Committee’s conclusions .....	609–612
The Committee’s recommendations.....	613

*Case No. 2434 (Colombia): Interim report*

Complaint against the Government of Colombia presented by the World Confederation of Labour (WCL), the General Confederation of Labour (CGT), the National Association of Telephone and Communications Engineers (ATELCA), the National Union of Workers of Interconexión Eléctrica SA (SINTRAISA), the National Union of Workers of CHIVOR (SINTRACHIVOR) and the National Union of Workers of ISAGEN SA ESP (SINTRAISAGEN).....	614–671
The Committee’s conclusions .....	659–670
The Committee’s recommendations.....	671

*Case No. 2489 (Colombia): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Colombia presented by the Single Confederation of Workers of Colombia (CUT) .....	672–689
The Committee’s conclusions .....	681–688
The Committee’s recommendations.....	689

*Case No. 2493 (Colombia): Definitive report*

Complaint against the Government of Colombia presented by the National Trade Union of Workers in “La Previsora SA” (SINTRAPREVI) .....	690–702
The Committee’s conclusions .....	698–701
The Committee’s recommendation .....	702

*Case No. 2498 (Colombia): Interim report*

Complaint against the Government of Colombia presented by the National Union of Workers in Non-Governmental and Social Organizations (SINTRAONG’S), the Single Confederation of Workers of Colombia (CUT), the Confederation of Workers of Colombia (CTC), the General Confederation of Workers (CGT), the Union of Workers at Santo Tomás University (SINTRAUSTA), the Union of Employees in the University of Medellín and the International Trade Union Confederation (ITUC) .....	703–745
The Committee’s conclusions .....	732–744
The Committee’s recommendations.....	745

*Case No. 2556 (Colombia): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Colombia presented by the General Confederation of Labour (CGT) .....	746–755
The Committee’s conclusions .....	752–754
The Committee’s recommendation .....	755

*Case No. 2557 (El Salvador): Interim report*

Complaint against the Government of El Salvador presented by the Trade Union Confederation of El Salvador Workers (CSTS), the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA) and the Sweets and Pastries Industrial Trade Union (SIDPA) .....	756–781
The Committee’s conclusions .....	776–780
The Committee’s recommendations .....	781

*Case No. 2572 (El Salvador): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of El Salvador presented by the Workers’ Trade Union of the Social Fund for Housing (SITRAFOSVI) .....	782–793
The Committee’s conclusions .....	790–792
The Committee’s recommendations .....	793

*Case No. 2524 (United States): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) .....	794–858
The Committee’s conclusions .....	846–857
The Committee’s recommendations .....	858

*Case No. 2580 (Guatemala): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Guatemala presented by the Trade Union of Workers of Guatemala (UNSITRAGUA) .....	859–871
The Committee’s conclusions .....	867–870
The Committee’s recommendation .....	871

*Case No. 2585 (Indonesia): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Indonesia presented by the Federation of Construction, Informal and General Workers (FKUI) .....	872–899
The Committee’s conclusions .....	889–898
The Committee’s recommendations .....	899

*Case No. 2575 (Mauritius): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Mauritius presented by the General Workers' Federation (GWF).....	900–958
The Committee's conclusions.....	951–957
The Committee's recommendation.....	958

*Case No. 2536 (Mexico): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Mexico presented by the Puebla State Independent Union of Education Workers (SETEP).....	959–989
The Committee's conclusions.....	984–988
The Committee's recommendations.....	989

*Case No. 2541 (Mexico): Definitive report*

Complaint against the Government of Mexico presented by the General Federation of State and Municipal Workers (FGTEM).....	990–1006
The Committee's conclusions.....	1001–1005
The Committee's recommendation.....	1006

*Case No. 2577 (Mexico): Definitive report*

Complaint against the Government of Mexico presented by the Union of Workers of the National Autonomous University of Mexico, the National Union of Workers of the Secretariat of Agriculture, Livestock, Rural Development, Fisheries and Nutrition, the United Trade Union of Workers in the Nuclear Industry, the Independent Union of Workers of the Autonomous Metropolitan University and the National Union of Education Workers – section XI – (SNTE).....	1007–1061
The Committee's conclusions.....	1056–1060
The Committee's recommendation.....	1061

*Case No. 2591 (Myanmar): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Myanmar presented by the International Trade Union Confederation (ITUC).....	1062–1093
The Committee's conclusions.....	1076–1092
The Committee's recommendations.....	1093

*Case No. 2590 (Nicaragua): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Nicaragua presented by the Confederation of Labour Unification (CUS).....	1094–1110
The Committee's conclusions.....	1104–1109
The Committee's recommendations.....	1110

*Case No. 2545 (Norway): Definitive report*

Complaint against the Government of Norway presented by the Finance Sector Union of Norway (FSUN).....	1111–1156
The Committee’s conclusions .....	1144–1155
The Committee’s recommendation .....	1156

*Case No. 2532 (Peru): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Peru presented by the National Trade Union of Health Social Security Workers (SINACUT EsSalud).....	1157–1170
The Committee’s conclusions .....	1167–1169
The Committee’s recommendation .....	1170

*Case No. 2559 (Peru): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Peru presented by the Union of Agricultural Public Sector Workers (SUTSA) .....	1171–1180
The Committee’s conclusions .....	1177–1179
The Committee’s recommendation .....	1180

*Case No. 2546 (Philippines): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of the Philippines presented by the Public Services Labor Independent Confederation (PSLINK), supported by Public Services International (PSI) .....	1181–1221
The Committee’s conclusions .....	1212–1220
The Committee’s recommendations .....	1221

*Case No. 2486 (Romania): Report in which the Committee requests to be kept informed of developments*

Complaint against the Government of Romania presented by the National Trade Union Confederation MERIDIAN.....	1222–1245
The Committee’s conclusions .....	1236–1244
The Committee’s recommendations.....	1245

## Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 6, 7 and 14 March 2008, under the chairmanship of Professor Paul van der Heijden.
2. The members of American, Argentinean, Chilean, Guatemalan and Mexican nationality were not present during the examination of the cases relating to the United States (Case No. 2524), Argentina (Cases Nos 2513, 2535, 2549, 2561 and 2562), Chile (Cases Nos 2392, 2555 and 2564), Guatemala (Case No. 2580) and Mexico (Cases Nos 2536, 2541 and 2577), respectively.

\* \* \*

3. Currently, there are 143 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 33 cases on the merits, reaching definitive conclusions in 29 cases and interim conclusions in four cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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

4. The Committee considers it necessary to draw the special attention of the Governing Body to Cases Nos 2489 (Colombia) and 2591 (Myanmar) because of the extreme seriousness and urgency of the matters dealt with therein.

### **New cases**

5. The Committee adjourned until its next meeting the examination of the following cases: Nos 2612 (Colombia), 2613 (Nicaragua), 2614 (Argentina), 2615 (El Salvador), 2616 (Mauritius), 2617 (Colombia), 2618 (Rwanda), 2619 (Comoros), 2620 (Republic of Korea), 2622 (Cape Verde), 2623 (Argentina), 2624 (Peru), 2626 (Chile), 2627 (Peru), 2628 (Netherlands), 2629 (El Salvador), 2630 (El Salvador), 2631 (Uruguay) and 2632 (Romania) since it is awaiting information and observations from the governments concerned. All these cases relate to complaints submitted since the last meeting of the Committee.

### **Observations requested from governments**

6. The Committee is still awaiting observations or information from the governments concerned in the following cases: Nos 1787 (Colombia), 1865 (Republic of Korea), 2318 (Cambodia), 2361 (Guatemala), 2422 (Bolivarian Republic of Venezuela), 2450 (Djibouti), 2490 (Costa Rica), 2518 (Costa Rica), 2569 (Republic of Korea), 2581 (Chad), 2582 (Bolivia), 2593 (Argentina), 2598 (Togo), 2599 (Colombia), 2603 (Argentina), 2605 (Ukraine), 2606 (Argentina), 2607 (Democratic Republic of the Congo) and 2608 (United States).

## Observations requested from complainants

7. The Committee is still awaiting observations or information from the complainant in the following case: No. 2268 (Myanmar).

## Partial information received from governments

8. In Cases Nos 2177 (Japan), 2183 (Japan), 2203 (Guatemala), 2241 (Guatemala), 2265 (Switzerland), 2470 (Brazil), 2478 (Mexico), 2516 (Ethiopia), 2522 (Colombia), 2528 (Philippines), 2538 (Ecuador), 2550 (Guatemala), 2565 (Colombia), 2568 (Guatemala), 2571 (El Salvador), 2574 (Colombia), 2576 (Panama), 2587 (Peru), 2589 (Indonesia), 2596 (Peru), 2597 (Peru), 2609 (Guatemala) and 2611 (Romania), the governments have sent partial information on the allegations made. The Committee requests all these governments to send the remaining information without delay so that it can examine these cases in full knowledge of the facts.

## Observations received from governments

9. As regards Cases Nos 2254 (Bolivarian Republic of Venezuela), 2295 (Guatemala), 2317 (Republic of Moldova), 2323 (Islamic Republic of Iran), 2341 (Guatemala), 2355 (Colombia), 2356 (Colombia), 2362 (Colombia), 2392 (Chile), 2445 (Guatemala), 2462 (Chile), 2465 (Chile), 2476 (Cameroon), 2508 (Islamic Republic of Iran), 2533 (Peru), 2539 (Peru), 2540 (Guatemala), 2544 (Nicaragua), 2547 (United States), 2558 (Honduras), 2560 (Colombia), 2563 (Argentina), 2570 (Benin), 2573 (Colombia), 2578 (Argentina), 2579 (Bolivarian Republic of Venezuela), 2583 (Colombia), 2584 (Burundi), 2586 (Greece), 2592 (Tunisia), 2594 (Peru), 2595 (Colombia), 2600 (Colombia), 2601 (Nicaragua), 2602 (Republic of Korea), 2604 (Costa Rica), 2609 (Guatemala), 2621 (Lebanon) and 2625 (Ecuador), the Committee has received the governments' observations and intends to examine the substance of these cases at its next meeting.

## Urgent appeals

10. As regards Cases Nos 2384 (Colombia), 2543 (Estonia), 2553 (Peru), 2554 (Colombia), 2566 (Islamic Republic of Iran) and 2567 (Islamic Republic of Iran), the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

## Preliminary on-the-spot mission

### **Case No. 2544 (Nicaragua)**

11. Taking into account the seriousness of the allegations made in this case and on the basis of paragraph 67 of the procedure for the examination of complaints alleging violations of freedom of association, the Committee's Chairperson considered that it would be appropriate to carry out in this case a preliminary ILO direct contacts mission. This mission visited Nicaragua from 4 to 6 February 2008. The Committee intends to examine



this case at its next meeting of May 2008 when it will have the mission report at its disposal.

## Article 26 complaints

12. The Committee is awaiting the observations of the Government of Belarus in respect of its recommendations relating to the measures taken to implement the recommendations of the Commission of Inquiry.
13. As regards the article 26 complaint against the Government of the Bolivarian Republic of Venezuela, the Committee recalls its recommendation for a direct contacts mission to the country in order to obtain an objective assessment of the actual situation.

## Transmission of cases to the Committee of Experts

14. The Committee draws the legislative aspects of the following cases to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Cape Verde (Case No. 2534), Pakistan (Cases Nos 2229 and 2520), Poland (Cases Nos 2395 and 2474) and United Kingdom (Case No. 2473).

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

### Case No. 2373 (Argentina)

15. The Committee last examined this case at its March 2007 meeting and, on that occasion, emphasizing that a period of almost two years for the issuing of a decision on *amparo* proceedings (proceedings relating to the protection of constitutional rights) concerning issues relative to trade union rights was too long, had indicated that it expected the judicial authorities to issue a ruling in the near future with regard to the *amparo* proceedings initiated by the Association of State Workers (ATE) concerning contested ruling No. 2735/04, in which the Undersecretariat of Labour and Social Security of Mendoza Province had declared the industrial action (assembly at the workplace) carried out by the workers of Godoy Cruz municipality on 22 June 2004 to be illegal, and also with regard to the alleged sanction of issuing warnings to 45 workers who had participated in the industrial action of 22 June 2004, which had been declared illegal by the administrative authority of Mendoza Province [see 344th Report, paras 254–268].
16. In a communication dated 19 September 2007, the Government indicated that, on 26 September 2006, the First Labour Chamber of the first judicial district of Mendoza Province had rejected the application for *amparo* proceedings filed by the trade union in the case “Association of State Workers (ATE) versus the municipality of Godoy Cruz regarding *amparo*”. The Government also indicated that the trade union which had filed the application for *amparo* proceedings had appealed against this ruling, which had been referred to the Supreme Court of Justice of Mendoza.
17. *The Committee takes note of this information, expresses the hope that the Supreme Court of Justice of Mendoza will issue a ruling in the near future and requests the Government to keep it informed of the decision that is handed down in this regard.*

**Case No. 2371 (Bangladesh)**

18. The Committee last examined this case, which concerns a refusal to register the Immaculate (Pvt) Ltd Sramik Union and the dismissal of seven of its most active members, at its March 2007 meeting [see 344th Report, paras 31–34]. On that occasion, the Committee once again urged the Government to take steps immediately for the prompt registration of the Immaculate (Pvt) Ltd Sramik Union. Additionally, it once again requested the Government to convene an independent inquiry to thoroughly and promptly consider the allegation that seven members of the union were dismissed by the company upon learning that a union was being established, to ensure that appropriate measures are taken in response to any conclusions reached in relation to these allegations of anti-union discrimination, and to keep it informed of the progress made in this regard.
19. In a communication dated 5 July 2007, the Government indicates that the case filed by the complainant union regarding the refusal of registration was still pending before the Labour Court. The next date of hearing was fixed for that day (5 July), and as the matter was still pending, the Government cannot take any steps to register the union. The Government states that collective bargaining rights are ensured in the country, as the legislation is in conformity with ILO Conventions and collective bargaining agreements cover not only union members but all workers in the establishments concerned. It adds that the purpose of forming trade unions is frustrated when there are too many unions. A minimum requirement of 30 per cent of the total number of workers employed for unions to be registered is justified to minimize union rivalries, conflicts and clashes; this legal provision therefore need not be amended.
20. *The Committee deeply regrets that, once again, the Government has failed to give any follow-up action to its recommendations. As in its previous examination of this case, the Committee again notes that, although the facts of this case date back to 2003, the issue of the registration of the Immaculate (Pvt) Ltd Sramik Union is still pending before the court – a fact which unavoidably has an impact on the prospect of resolving this case. Recalling that justice delayed is justice denied, the Committee once again urges the Government to take steps immediately for the prompt registration of the Immaculate (Pvt) Ltd Sramik Union.*
21. *The Committee deeply regrets that the Government has provided no information concerning its recommendation to rapidly convene an independent inquiry into the serious allegations of anti-union discrimination in the present case. It once again requests the Government to convene an independent inquiry to thoroughly and promptly consider the allegation that seven members of the union were dismissed by the company upon learning that a union was being established. If it appears from the outcome of the independent inquiry that the dismissals occurred as a result of involvement by the workers concerned in the establishment of a union, the Committee once again requests that those workers will be reinstated in their jobs without loss of pay. If the independent inquiry finds that reinstatement is not possible, the Committee requests the Government to ensure that adequate compensation so as to constitute sufficiently dissuasive sanctions is paid to the workers, and requests to be kept informed of all developments in this regard.*

**Case No. 2382 (Cameroon)**

22. In its last examination of the case at its November 2006 session [see the 343rd Report, paras 28–32], the Committee had requested the Government to keep it informed of the result of the appeal lodged against the acquittal of Mr Joseph Ze, General Secretary of the Single National Union of Teachers and Professors in the Teachers' Training Faculty (SNUIPEN); of the possible appeal to a competent court requesting a ruling, based on the proven facts and the relevant provisions of the SNUIPEN by-laws, regarding the legality of

---

calling a second SNUIPEN congress and the alleged dismissal of Mr Ze; and of the conclusion of the inquiry conducted by the Secretary of State for Defence into the circumstances surrounding Mr Ze's detention on 16 April 2004.

23. In a communication dated 24 October 2006, Mr Joseph Ze, in his capacity as General Secretary of SNUIPEN, complains of the difficulties that have surrounded the organization of the second SNUIPEN ordinary congress, which was due to take place on 28 and 29 September 2006, preceded by a training workshop. The complainant organization indicates that all the authorizations required for this event had been obtained (agreement for the use of the meeting room and certificate of announcement of a public meeting issued by the Deputy Prefect of Yaoundé V). According to SNUIPEN, however, the Prefect of Mfoundi verbally prohibited the holding of the congress. The complainant organization also alleges that congress participants were dispersed by the police acting under the direction of the Deputy Prefect when they attempted to gather in another district of the city. In the end the congress took place at the home of the General Secretary of SNUIPEN, despite action by the Deputy Prefect of Yaoundé IV and the gendarmes. SNUIPEN denounces this constant harassment and regrets that the disputes in which the police and armed forces intervene are never dealt with by the courts.
24. In a communication dated 2 April 2007, SNUIPEN provides additional information on certain points under examination. With regard to the legality of holding a second SNUIPEN congress and the alleged dismissal of Mr Ze, SNUIPEN states that this was a case of blatant interference by the public authorities in the management of the trade union, as those authorities accepted the credentials presented by dissident members who claim to have convened a congress on 4 August 2004 in Yaoundé. SNUIPEN notes that if the meeting in question took place, it was in contravention of those provisions of the union by-laws concerning convocation, established time limits, the capacity of participants and the issue of quorum. SNUIPEN adds that Mr Joseph Ze was never informed of the decisions adopted by the congress in August 2004, and his arrest and detention prevented him from bringing the matter before the competent judicial authorities with a view to contesting the legality of the congress in question. SNUIPEN alleges that the congress legitimately convened by Mr Ze on 28 and 29 September 2006 did take place, despite the actions of the public authorities, police and armed forces.
25. The complainant organization also denounces the bias of the authorities in inviting dissident members to represent SNUIPEN at meetings of the Ministry of Basic Education, despite the fact that no law or court decision authorizes them to do so. The complainant organization also indicates that the dissidents in question have every opportunity to seek recourse to the competent courts in order to contest the decisions that were taken against them and of which they were informed during the second SNUIPEN congress, but they prefer instead to take advantage of the authorities' bias and willingness to consent to their wishes.
26. SNUIPEN alleges that the attempt by the Ministry of Basic Education to transfer more than 2 million CFA francs to an account opened by dissident union members is proof of the biased attitude of the authorities. SNUIPEN has opposed this payment in the courts. A ruling on this question is awaited and may also, according to the complainant organization, help to clarify the question of the legality of the SNUIPEN congress on 4 August 2004.
27. As regards the allegations of harassment against Mr Ze, the complainant organization alleges that Mr Ze is being subjected to judicial harassment with a number of formal complaints that have been lodged against him by dissident union members acting in concert. The complainant organization adds that this harassment is also directed against Mr Ze's wife and daughters, who are regularly contacted by officials of the Ministry of Basic Education.

28. With regard to the inquiry conducted by the Secretary of State for Defence on the circumstances of Mr Ze's detention on 16 April 2004, the complainant organization recalls that Mr Ze was subjected to torture and extortion when in custody. SNUIPEN states that those responsible for this have been promoted despite their implication in this case. Furthermore, it is claimed that no instructions have been given to the police regarding the need to comply with the law when trade unionists are arrested and detained.
29. In a communication dated 22 August 2007, the Government responds to certain points raised by the complainant organization. It states, first, with regard to the holding of the second SNUIPEN congress on 28 and 29 September 2006, that the faction opposed to Mr Ze tried to call on the police to prevent the congress from taking place. It confirms that the congress took place at the home of the general secretary of SNUIPEN. In this regard, the Government, regretting the escalation in the dispute between the two SNUIPEN factions, states that it has adopted a neutral position. It expresses the hope that, in accordance with the suggestion made by the Committee on Freedom of Association, the two factions may seek recourse to the courts to resolve the question of the legality of the congress convened on 4 August 2004.
30. The Government confirms that Mr Ze was acquitted by the courts of the charge of embezzling public funds, a fact which should bolster the complainant organization's confidence in the justice system. The Government states that a court ruling to the effect that the congress of 4 August 2004 was not legal would result in an acknowledgement by the public authorities and the security forces that they had made a mistake.
31. Lastly, the Government states that the new Code of Criminal Procedure has changed the methods used by the administrative authorities and police.
32. *The Committee takes note of the information supplied by SNUIPEN and the Government's response. It notes that the facts alleged in the allegations made by SNUIPEN are of a serious nature, and requests that the Government take action as a matter of urgency to investigate these allegations and, if they turn out to be well founded, to take the necessary corrective measures.*
33. *As regards the organization of the second SNUIPEN congress on 28 and 29 September 2006, the Committee notes the information provided to the effect that all the necessary authorizations for the event had been obtained. It also notes that, according to information supplied by the complainant organization and by the Government, dissident members of the union had attempted to prevent the congress from taking place by asking the public authorities and security forces to intervene. The Committee is concerned by this intervention by the security forces to prevent a legitimate trade union meeting from taking place. It recalls and emphasizes the principle that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of the peace. [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth (revised) edition, para. 140].*
34. *As regards the allegations concerning the harassment of Mr Ze, the Committee notes with concern the allegation that his wife and daughter are regularly contacted by officials of the Ministry of Basic Education on matters relating to trade union activities. If proven true, such acts of intimidation, according to the Committee, constitute serious obstacles to the exercise of trade union rights and call for severe measures on the part of the authorities to punish those responsible.*

35. *As regards the inquiry which the Secretary of State for Defence should conduct into the circumstances of the detention in custody of Mr Ze on 16 April 2004, the Committee notes that no information has been provided on the inquiry's outcome. The Committee recalls that the inquiry is needed in the light of the serious allegations of torture and extortion of which Mr Ze is said to have been the victim when in custody. The Committee trusts that the Government will take the necessary measures to ensure that this inquiry is carried out without delay in order to determine the facts and ascertain responsibilities, punish those responsible, and prevent a recurrence of such acts. The Committee notes the information according to which the new Code of Criminal Procedure has changed the methods used by the administrative authorities and police. It hopes that the necessary instructions will be given to ensure that no trade unionist held in custody is subjected to abusive treatment, and that effective sanctions will be applied where such acts have been committed.*
36. *As regards the possible appeal before a competent court for a ruling on the legality of holding the second SNUIPEN congress on 4 August 2004, the Committee requests the complainant organization and the Government to keep it informed of any such appeal and any judgements handed down in this case.*

### **Case No. 2439 (Cameroon)**

37. In its previous examination of the case at its November 2006 session [see 343rd Report, paras 33–39], the Committee requested the Government to send as soon as possible: (a) the results of the inquiry into the allegations of interference by AES-SONEL; (b) information on the setting up of an investigating committee into the allegations of anti-union discrimination against the officials and members of the Confederation of Independent Trade Unions of Cameroon (CSIC) and of SNI-ENERGIE; (c) the court decisions concerning the participation of the CSIC in the electoral process and copies of the judgements in the Fouman and Ndzana Olongo cases, once they are available; (d) information on the collective agreement of the AES-SONEL company and any court decision issued in this regard.
38. In a communication dated 2 April 2007 signed by Mr Ndzana Olongo in his capacity as General Secretary, the CSIC denounced the Government's silence regarding the commitments which it made in its previous reply to the Committee on Freedom of Association concerning this case but on which it has failed to take action.
39. As regards the destabilization of the CSIC by the Government, the complainant organization alleges that the Minister for Labour and Social Security continues to deal with individuals who have no status, no mandate or who have been struck off the membership list of the confederation, authorizing them to act on behalf of the CSIC vis-à-vis the national authorities, particularly in meetings with the Government, in the presentation of greetings to the Presidency of the Republic and in the celebration of the national holiday, and holding meetings with them at the Ministry itself. The complainant organization says that this situation shows the Minister's disregard for the court decisions issued against the individuals in question (Ordinance No. 522 of 28 February 2002 of the Yaoundé Court of First Instance, Order No. 446/CIV/02-03 of 23 July 2003 of the Yaoundé Court of Appeal, Ordinance No. 236/D of 28 December 2005 of the Yaoundé Court of First Instance, copies of which are attached to the CSIC communication).
40. As regards the reinstatement of the trade unionists dismissed from AES-SONEL, particularly Mr Ndzana Olongo and Mr Fouman, the CSIC states that the proceedings are still under way in the courts. Moreover, the inquiries announced by the Government have not yet been conducted.

41. As regards the issue of the certificate of registration of the SNI-Energie trade union, the CSIC points out that the Government has been using the resignation of a group of members as a pretext for not issuing the certificate. The CSIC alleges once again that this split in SNI-ENERGIE has been instigated by the Government, which asked a small group to resign, create a new union in the same sector of activity and affiliate it to the Cameroon Workers' Trade Union Confederation (CSTC). The complainant organization denounces this government ploy as interference in the establishment and daily management of trade unions. The complainant observes that, according to the law, SNI-ENERGIE is deemed registered under section 11(b) of the Labour Code (Act No. 092/007 of 14 August 1992), which states that the registrar acknowledges receipt of the application and registers the trade union and its statutes within one month. After this deadline the registration is deemed to be effective. The CSIC deduces that SNI-ENERGIE is therefore deemed effective, recalling that more than one-and-a-half years elapsed before the Ministry of Labour and Social Security cited the resignation of a group of members as a pretext for not issuing the certificate for the union. The CSIC adds that, under the applicable legal provisions, only the registrar for the trade unions can decide whether or not to register a union. However, the registrar never indicated any opposition to the registration of SNI-ENERGIE. Consequently, the CSIC refers once again to the Government's obligation to issue the certificate of registration of SNI-ENERGIE.
42. In a brief communication dated 31 July 2007, the Government merely indicates that it suggested that the allegations of anti-union discrimination by the management of the AES-SONEL company should be examined by the representatives of the ILO Subregional Office in Yaoundé.
43. *The Committee notes the information supplied by the CSIC and by the Government. It notes that no information has been supplied by the Government concerning most of the points raised at its last examination of the case, especially the setting up of an investigating committee into the allegations of anti-union discrimination against the officials and members of the CSIC and SNI-ENERGIE. It requests the Government to take the necessary steps to set up the committee, as it has undertaken to do, and to forward the inquiry report as soon as possible.*
44. *As regards the issue of the certificate of registration to SNI-ENERGIE, the Committee notes that, under the applicable legal provisions, the registration of a trade union is deemed effective on expiry of the one-month deadline after the application for registration has been submitted. It notes the statement to the effect that there was no opposition to the registration from the registrar for the unions. In view of the information supplied, the Committee urges the Government to issue the certificate of registration to the SNI-ENERGIE trade union and to inform it as soon as possible of the measures taken in this regard.*
45. *Noting its intention to seek assistance from the ILO, the Committee requests the Government to keep it informed of the results of the inquiry which it undertook to set up into the allegations of interference by AES-SONEL and to send a copy of the court decisions issued with respect to the request for cancellation of the collective agreement, the appendix thereto and the memorandum of understanding between AES-SONEL and the FENSTEEEC trade union.*
46. *Finally, the Committee notes the indication that the proceedings concerning Mr Ndzana Olongo and Mr Fouman are still under way in the courts. The Committee trusts that final verdicts will be issued in the very near future on these cases and also on the issue of the participation of the CSIC in the electoral process, and requests the Government to forward the texts of the judgements as soon as possible.*

**Case No. 2448 (Colombia)**

47. The Committee last examined this case at its March 2007 meeting. On that occasion it made the following recommendations with regard to the outstanding issues [344th Report, paras 802–823]:
- (a) The Committee once again requests the Government to guarantee the right of the minor workers of COOTRAMENOR, who carry out tasks outside SUPERTIENDAS y Droguerías Olímpica SA, to freely exercise their trade union rights in order to defend their rights and interests, irrespective of whether they work directly with SUPERTIENDAS y Droguerías Olímpica SA or are self-employed workers or work for a cooperative, and to keep it informed in this respect.
  - (b) With regard to the refusal by the authorities to register as a member of the executive board Ms María Gilma Barahona Roa, elected by the National Assembly of the National Unitary Trade Union of Official Workers and Public Servants of the State (SINUTSERES) to the post of controller (*fiscal*), the Committee once again requests the Government to take the necessary measures to register Ms Barahona Roa as a member of the executive board of SINUTSERES. The Committee requests the Government to keep it informed in this respect.
  - (c) With regard to the non-respect by the Red Cross of the package of benefits agreed upon with SINTRACRUZROJA, the Committee requests the Government to keep it informed of the final outcome of the legal appeals that have been brought.
  - (d) With regard to the allegations concerning pressure exerted on members of the SINTRACRONAL organization to persuade them to give up the collective agreement and the delay by the Ministry of Labour in examining and taking measures in relation to the complaints brought by the trade union organization, the Committee requests the Government to do everything in its power to speed up the administrative investigation and requests the Government to keep it informed in this respect, as well as with regard to the final outcome of the legal action currently under way.
48. The General Confederation of Labour sent new allegations in a communication dated February 2007.
49. The Government sent its observations in communications dated 27 April and 4 July 2007.
50. With regard to section (a) of the recommendations, the Government notes that the State of Colombia guarantees the free exercise of trade union rights. However, in order to form a trade union, there are legal requirements that must be taken into account. One of the requirements is that persons classed as workers in terms of article 22 of the Substantive Labour Code, that is to say persons who are bound by a verbal or written employment contract, are permitted to organize themselves in trade unions. Other persons carrying out activities not under an employment contract can organize themselves into a different class of organization, as guaranteed by article 38 of the Political Constitution, as in this case where minor workers formed an associated labour cooperative. Therefore, it is an indispensable requirement, in order to form a trade union, to be an employee or worker, according to article 39 of the Political Constitution and articles 353 and 356 of the Substantive Labour Code. With regard to the members of the cooperatives, the Government has noted on previous occasions that these have a different legal status to salaried workers. The Constitutional Court, in ruling No. C-211 of 2000, found that there was not a subordinate relationship between the cooperatives and their members, because the member, as such, was not a salaried worker of the institution. As a result, cooperatives did not issue employment contracts, which were essential if there were to be a trade union, as explained above. *In that regard, referring to Article 2 of Convention No. 87 and recalling that the concept of worker means not only salaried worker, but also independent or autonomous worker, the Committee has considered that workers associated in cooperatives should have the right to establish and join organizations of their own*

choosing [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, paras 261 and 262]. The Committee once again requests the Government to take the necessary measures to guarantee the right to organize of the minor workers of COOTRAMENOR, who carry out tasks outside SUPERTIENDAS.

51. With regard to section (b) of the recommendations, the Government reiterates what it has said previously, that the resolution through which it denied the registration of Ms Maria Gilma Barahona Roa, still stands, that is to say that as the government channels have been exhausted, the trade union is entitled to go before the Administrative Disputes Court. Therefore, the Government is abiding by the decision handed down by that body, which is the body competent to review the legality of actions taken by the public administration. The National Unitary Trade Union of Official Workers and Public Servants of the State (SINUTSERES) sent another communication dated 27 September 2007 in which it indicated that Ms María Gilma Barahona Roa has still not been entered in the union register as a member of the executive board of the trade union. The Committee notes that the Government indicates that as the government channels have been exhausted, the trade union is entitled to go before the Administrative Disputes Court. *However, the Committee notes that this process could take too long, which might impede Ms Barahona Roa's work as a union official, particularly given the fact that Ms Barahona Roa has been elected to the post of Controller (fiscal) on the executive board of a national trade union, that is, to carry out work that goes beyond defending the interests of workers within the body that is in liquidation. Secondly, Ms Barahona Roa continues to have a fundamental role to play within the body that is in liquidation, even though legislation has established that no new collective agreements can be made. That role is primarily to defend the interests of the workers during that process of liquidation. Thirdly, and lastly, the Committee recalls that in accordance with Article 3 of Convention No. 87, workers should have the right to elect their representatives in full freedom. Therefore, the Committee once again requests the Government to take the necessary measures to register Ms Barahona Roa as a member of the executive board of SINUTSERES without delay.*
52. With regard to section (c) of the recommendations, relating to the non-respect by the Red Cross of the package of benefits agreed upon with SINTRACRUZROJA, the Government indicates that the Circuit-Clearing Tenth Labour Court, in a ruling on 31 January 2007, absolved the Cundinamarca and Bogotá section of the Colombian Red Cross, considering that it was not obliged to comply with the illegal benefits contained in the package of services and benefits, because article 4 of the decision of 15 July 2003 provides that: "the extralegal benefits contained in the package of services and benefits of June 1999 may be granted to the employees by the employer only if financial, economic and administrative circumstances so permit; the employer may at any time amend, modify, increase or cancel the said benefits, based on the institution's financial, economic or administrative prospects". The Cundinamarca and Bogotá section of the Colombian Red Cross successfully proved that the economic, financial and administrative situation was serious, which justified their not applying the benefits contained in the aforementioned package. *The Committee notes this information.*
53. With regard to section (d) of the recommendations, the Committee recalls that it had requested the Government to keep it informed of the final outcome of the administrative and legal action currently under way. The Committee notes that the Government reports that, a new collective agreement was signed in October 2006, with the participation of the General Secretary of the CGT, providing for salary adjustments. The Government adds that the Territorial Directorate of Cundinamarca, in resolution No. 002245 of 28 August 2006, decided not to sanction the National Society of the Colombian Red Cross, because it successfully proved that it had complied with its obligations under the collective agreement and the law. According to the Government, that investigation included the allegations relating to the staff renouncing the collective agreement in order to be hired.



*The Committee notes this information and requests the Government to keep it informed of the final outcome of the ongoing legal proceedings.*

54. In its communication of February 2007, the General Confederation of Labour alleges that the enterprise SUPERTIENDAS y Droguerías Olímpica SA intends to impose a plan of extra-legal benefits that, according to the complainant, is a hidden collective accord, while at the same time encouraging de-unionization, by issuing a communication for the employee to sign. The trade union mentions in its communication various pieces of evidence that it did not actually include, despite having been requested by the Office to do so. *Therefore, the Committee invites the complainant to send the aforementioned documentation so that the Government can send its observations on the matter.*

### **Case No. 2469 (Colombia)**

55. The Committee last examined this case at its May–June 2007 meeting [see 346th Report, paras 396–424]. On that occasion, the Committee made the following recommendations on the issues that remained pending:

- (a) With regard to the allegations presented by ASDESALUD relating to the refusal to grant the right to collective bargaining to public employees working at the Rafael Uribe and Uribe ESE and the failure to apply the collective agreement in force as a result of Decree No. 1750 of 2003, the Committee requests the Government:
  - (i) to take the necessary measures to ensure that, in consultation with the trade unions concerned, the legislation is amended in order to bring it into line with the Conventions ratified by Colombia, so that the public employees in question can enjoy the right to collective bargaining. The Committee requests the Government to keep it informed of any measure adopted on this matter and reminds the Government that it may avail itself of the technical assistance of the Office if it so wishes;
  - (ii) to take the necessary measures, recalling the importance of abiding by judicial decisions, to assure respect for acquired rights as established in the collective agreement in force at the ISS, and applied at the “Rafael Uribe and Uribe” State Social Company, for the period it is in force and in accordance with the Constitutional Court judgement.
- (b) With regard to the ASDESALUD allegations stating that the restrictions on granting trade union leave to 20 hours per month, contained in Circular No. 0005 of 2005, make it much more difficult to carry out its activities properly, given that it is an industrial trade union covering a wide area, the Committee asks the Government, in the light of Decree No. 2813, stipulating that trade union leave must be regulated while taking into account the needs of the trade union, to take the necessary measures to review Circular No. 0005 of 2005, after consultations with the trade union organizations concerned, in order to obtain a solution satisfactory to the parties.
- (c) With respect to the disciplinary proceedings against Ms María Nubia Henao Castrillón, Ms Luz Elena Tejada Holguín and Ms Olga Araque Jaramillo for using their trade union leave, the Committee requests the Government to ensure the disciplinary measures are withdrawn and that adequate compensation is paid to them for any damage caused. It also requests the Government to ensure that trade union officials working at the Rafael Uribe and Uribe ESE can use their trade union leave, with due regard for existing and future agreements.
- (d) With regard to the allegations presented by the CUT referring to the Government of Colombia’s failure to bargain collectively with the trade unions regarding the adoption of Act No. 909 of 23 September 2004 and its regulatory decrees on public employment and administrative posts, the Committee, observing that this is contrary to the commitments made by the Government when it ratified Conventions Nos 98, 151 and 154, refers to the principles set forth in subparagraph (a) of these recommendations. The

Committee requests the Government to fulfil its obligations under these Conventions and negotiate collectively with the trade unions concerned.

- (e) With regard to the allegations presented by the Union of Public Officials of the “Evaristo García” University Hospital ESE (SINSPUBLIC) stating that Act No. 909 of 23 September 2004 and its regulatory decrees violate the collective agreement signed in 2003 between the public authorities and the trade union, the Committee asks the Government to take the necessary measures to ensure that the collective agreement is duly applied and requests that the Government keep it informed on this matter.

56. In its communications of 27 June and 4 September 2007, the Government made the following statements.
57. With regard to recommendation (a), (i) concerning the need to amend the legislation in order to bring it into conformity with the Conventions ratified by Colombia, so that the public employees in question enjoy the right to collective bargaining, the Government states that currently there is no government project on this subject. It is hoped that progress can be made on this in cooperation with employers and workers. *The Committee once again reminds the Government that, under Conventions Nos 98, 151 and 154 ratified by Colombia, workers in the public sector and in the central public administration must have the right to collective bargaining and requests the Government to keep it informed on any measures adopted in this respect.*
58. As regards recommendation (a)(ii) concerning the application of the collective agreement in force at the time of the split-off of the Rafael Uribe and Uribe State Social Company (ESE) the Government states that, according to the information from the general representative of Rafael Uribe and Uribe, in liquidation, there was strict compliance with what was prescribed in the cited decisions, awarding to each official the economic benefits accruing from the collective agreement signed between the Social Security Institute (ISS) (at that time the employer of the officials affected by the split-off) and the SINTRASEGURIDAD SOCIAL trade union, in accordance with court judgements C-314 and C-349 of 2004 and the directives issued at the time by the Ministry of Social Security. The representative indicates that all the officials were awarded the financial difference between all payments made to them during their employment relationship with the recently created ESE and the benefits established by the collective agreement, signed on 31 October 2001 and due to remain in force until 31 October 2004. The ISS had made all due payments to the officials up to the time of the split-off (25 June 2003). The ESE therefore made up the difference from the date it was created (26 June 2003) until the date of expiry of the collective agreement (31 October 2004) in the form of a “single payment”. All due payments were made to all officials, a decision of recognition was issued (against which means of legal recourse were available) and payments were made as scheduled, so that at the time the dissolution of the institute was decreed and the liquidation process begun (14 February 2007), no remuneration was owed to any ESE official. *The Committee notes this information.*
59. As regards recommendation (b) concerning the granting of trade union leave and the restrictions thereon, the Government refers to the abovementioned representative’s statement that, with liquidation taking place, ESE Rafael Uribe and Uribe is granting trade union leave in accordance with the needs of the union. *The Committee notes this information.*
60. With regard to recommendation (c) concerning the disciplinary proceedings against Ms María Nubia Henao Castrillón, Ms Luz Elena Tejada Holguín and Ms Olga Araque Jaramillo, the Government states that, according to the information supplied by the coordinator of internal disciplinary controls at ESE Rafael Uribe and Uribe in liquidation, verdicts of not guilty were issued at first instance in all three cases, in view of the evidence in each case. *The Committee notes this information.*

- 61.** As regards recommendation (e) concerning the violation of the collective agreement signed in 2003 on the basis of Act No. 909 of 23 September 2004, the Government recapitulates the origins and background of the legislation and sets forth the parameters established for entry into the administrative service. The Government points out that, in line with the Constitutional Court rulings handed down to date, it was necessary to adopt a new law to meet the new challenges facing the State. For this reason it submitted to Congress the corresponding draft law, which became Act No. 909 of 2004, currently in force. The Government indicates that account was taken in the drafting of Act No. 909 of the proposals made by the trade unions of public employees and by the heads of the public institutions.
- 62.** The Government adds that section 27 of Act No. 909 states that the administrative service is a technical staff administration system whose purpose is to guarantee the efficiency of the public administration and offer stability and equality of opportunity regarding access to and advancement in the public service. In order to achieve this objective, entry to and tenure in administrative service posts shall be based exclusively on merit, by means of selection processes in which transparency and objectivity are guaranteed, without any form of discrimination. Entry to the public sector is therefore not possible without prior participation in the respective selection process or competition, initiated by the National Civil Service Commission in accordance with the administrative service regulations.
- 63.** The Government adds that sections 5 and 6 of Act No. 61 of 1987 and section 22 of Act No. 27 of 1992 made provision for the exceptional granting of tenure to employees at national and territorial levels, respectively, thereby allowing employees occupying posts on a provisional basis to become established officials in the public administration. By means of ruling No. C-030 of 30 January 1997, the Constitutional Court declared null and void the aforementioned legal provisions which laid down the possibility of exceptional entry in the service for persons who were employed there without tenure merely on the basis of meeting conditions of equivalence between studies and experience or the completion of courses. A consequence of this declaration was that the legal provisions governing exceptional tenure (automatic establishment) would also cease to be applicable in judicial terms.
- 64.** With regard to the above, the Constitutional Court declared:
- ... no regulation may exist within our legal order which permits automatic establishment in administrative service posts since this disregards the general provisions of article 125 of the Constitution and the principles of equality and efficiency which must govern the public administration.
- 65.** The Court adds:
- ... those persons who gained tenure in the administrative service under sections 5 and 6 of Act No. 61 of 1987 and section 22 of Act No. 27 of 1992 will maintain their situation, notwithstanding the declaration of nullity ...
- However, those officials who are still employed by the administration in an administrative post but are not established therein may not apply for tenure, since in order to do so they will be obliged to undergo the corresponding selection process adopted by each national or territorial institution in order to fill posts of this nature. Consequently, as from the notification of this decision, any application for tenure on the basis of the provisions declared null and void by the present ruling will be rejected ...
- 66.** The Government states that pursuant to the aforementioned ruling the National Civil Service Commission, by means of Circular No. 5000-29 dated 17 April 1997, issued the following pronouncement:

... The appointments of employees at the national and territorial levels occupying administrative service posts without tenure who did not submit an application for exceptional tenure before 15 February 1997 are of a temporary nature. Consequently, they may only become established in the administrative service in the usual way, namely by successfully completing a selection process and the relevant probationary period.

...

Those persons who can furnish proof of having submitted the corresponding application for tenure to any of the Civil Service Commissions or to the Ministry of Health – namely, employees of the health social security system – further to meeting the conditions for exceptional tenure have the right to remain in their posts until such time as the Civil Service Commissions take a definitive decision, pursuant to Decree No. 2611 of 1993 ...

67. The various judicial authorities (Constitutional Court, Council of State) have issued clear criteria with regard to the absolute unlawfulness of automatic or exceptional tenure in the administrative service, i.e. without the successful completion of the respective selection processes by employees. Hence, in Act No. 909 of 2004, although the legislature could not exclude from the competition those persons who were provisionally employed by the administration, it did not adopt any provisions making automatic entry to the service lawful, given that implementing regulations which had been declared null and void is illegal. The Government concludes that Act No. 909 is in conformity with constitutional requirements, which stipulate that entry to the public service must be on the basis of merit established through open public selection processes, in which equality of opportunity is guaranteed for candidates who meet the requirements of the posts.
68. In the particular case of the present allegations, the Government points out with regard to non-observance of section 24 (employment relationships) of the collective agreement signed with the University Hospital that Act No. 909 of 2004 is binding and therefore public servants are bound to comply with it on pain of disciplinary penalties.
69. The Government points out that the head of human resources of the Evaristo Garcia University Hospital said that, as regards the specific case of the Evaristo Garcia University Hospital, in some cases there might have been omissions on the part of previous administrations in processing various documents relating to exceptional tenure in the administrative service, but there was no actual proof. This means that, should a public servant of the hospital or trade union possess concrete evidence of the general claim made in the complaint under consideration, he would have to submit it and have recourse to legal remedies.
70. In its communication of 9 January 2008, the trade union claims that the Government has not taken account of the Committee's recommendations and that this implies that many of the current employees of Evaristo Garcia University Hospital ESE will be dismissed.
71. In this respect, the Committee observes that, in line with its previous examination of the case, section 24 of the collective agreement stated that, in conformity with the law, the Evaristo Garcia University Hospital will continue to maintain for an indefinite period the employment relationship of all public employees whose appointments and contracts were confirmed at the time of signature of the present collective agreement. *The Committee is of the opinion that, in the present case, since a collective agreement was signed, which regulates the issue of temporary workers, the situation is different from that of other public institutions where there was no collective agreement for settling such issues. The Committee recalls that agreements should be binding on the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 939]. The Committee therefore requests the Government to take the necessary measures to ensure that the collective agreement signed between the public administration and SINSPUBLIC is duly applied and that, during the period of validity of the 2003*

*collective agreement, stability is guaranteed for the workers who were employed on a temporary basis and fulfilled the conditions of section 24 of the collective agreement. The Committee requests the Government to keep it informed in this respect.*

### **Case No. 2481 (Colombia)**

72. The Committee last examined this case at its March 2007 meeting [see 344th Report of the Committee, paras 824–844]. On that occasion, the Committee made the following recommendations with regard to the outstanding issues:

- The Committee requests the Government, in conformity with Convention No. 98, to take measures to guarantee the right of ACOLFUTPRO to collective bargaining in its capacity as an occupational organization representing football players, either directly with football clubs or with the employers' organization that these clubs choose to represent them. The Committee requests the Government to keep it informed in this respect;
- The Committee requests the Government to undertake an investigation in order to ascertain the existence of pressure, threats of dismissal and other acts of discrimination directed at workers because of their decision to resort to strike action and, should such allegations be confirmed, to take measures to punish the persons responsible appropriately. The Committee requests the Government to keep it informed in this respect.

73. In its communication of 4 July 2007, the Government notes that the State of Colombia respects and recognizes the right of unionized and non-unionized workers to bargain collectively, in accordance with Convention No. 98. The Government, in accordance with domestic legislation and the international labour Conventions, has brought about an agreement and scheduled hearings in the present collective dispute. In the same way, the Office of the Vice-President of the Republic has held seven meetings in which ACOLFUTPRO, the Colombian Football Federation, DIMAYOR, COLFUTBOL, the representatives of both parties, the various sports clubs and the Vice-President participated.

74. During those meetings, the issue of the Player's Statute was raised, a recognition of the association by the sports clubs, the federation and the DIMAYOR, employment contracts, social security, right to work and the dispute resolution chamber. Presently, they are awaiting comments from the Colombian Football Federation before scheduling another meeting. The Government notes that the above demonstrates its willingness to resolve collective disputes involving workers' organizations, even when they are not on the Ministry of Social Protection's trade union register.

75. The Government adds that, in accordance with the report presented by the Inspection, Monitoring and Control Unit, 27 administrative labour investigations have been initiated into the various sports clubs and the DIMAYOR. A list of those investigations has been included.

76. In its communication of 16 November 2007, the Colombian Association of Professional Football Players (ACOLFUTPRO) noted with regard to the ongoing allegations that, on 22 May and 16 August 2007, the Ministry of Social Protection was asked to follow up the Committee's recommendations and to report back, which the Government responded to on 1 October 2007 making reference to the meetings held in the Office of the Vice-President of the Nation to deal with the issue of the Player's Statute. However, according to the complainant, the meetings held in the Office of the Vice-President were general in nature and did not deal with the resolution of the collective dispute ongoing since the list of demands was presented two years ago.

77. With regard to the 27 administrative labour investigations that have been started, the complainant indicates that none of them refer to the Committee's recommendation regarding the investigation to punish employers' representatives who are threatening players. The Committee notes that the complainant reports that the dispute has been presented to the Special Committee for the Handling of Conflicts referred to the ILO (CETCOIT) in order to resolve the current dispute between football workers and their employers. Within that framework, on 7 November 2007, a meeting was held between ACOLFUTPRO and the employers' representatives, during which the latter indicated that it was the Government's responsibility to take measures to guarantee the right to collective bargaining.
78. *In that regard, the Committee recalls that in its capacity as the organization representing the rights of workers, in this case football players, ACOLFUTPRO should be able to bargain collectively to defend their interests. Therefore, the Committee takes note of the numerous meetings on the matter that have taken place to date, in the Office of the Vice-President and in CETCOIT. The Committee notes that in spite of this, the representatives of the clubs, that is to say the DIMAYOR and COLFUTBOL, refuse to bargain collectively with ACOLFUTPRO. The Committee recalls that it is the responsibility of the Government to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 880]. The Committee also recalls that both employers and trade unions should bargain in good faith, making efforts to reach an agreement, and that the existence of satisfactory labour relations depends primarily on the reciprocal attitude of the parties and their mutual trust. In these conditions, the Committee once again requests the Government to take measures to guarantee the right of ACOLFUTPRO to collective bargaining, in its capacity as an occupational organization representing football players, either directly with football clubs or with the employers' organization that these clubs choose to represent them. The Committee requests the Government to keep it informed in this respect.*
79. *With regard to the allegations of pressure and threats of dismissal and other acts of discrimination directed at workers because of their decision to resort to strike action, the Committee notes that, on the one hand, the Government indicates that, in accordance with the report presented by the Inspection, Monitoring and Control Unit, 27 administrative labour investigations have been initiated into the various sports clubs and the DIMAYOR and a list of those investigations has been included, and, on the other hand, ACOLFUTPRO alleges that those investigations do not refer to the alleged events but rather to other matters. The Committee observes that, according to the list sent by the Government, the investigations carried out by the Inspection, Monitoring and Control Unit began, in the majority of cases, before the Committee's previous examination of the case and refer to different matters than those raised in the complaints. In these conditions, the Committee once again requests the Government to take the necessary measures to ensure that an investigation is carried out in order to ascertain the existence of pressure, threats of dismissal and other acts of discrimination directed at workers because of their decision to resort to strike action and, should such allegations be confirmed, to take measures to punish those responsible appropriately.*

### **Case No. 2483 (Dominican Republic)**

80. The Committee last examined this case at its March 2007 meeting [see the Committee's 344th Report, paras 897–913] and on that occasion made the following recommendations:

- (a) The Committee requests the Government to continue to promote the reinstatement of the union officials César Antonio Familia and Rabel Novas in their jobs with SEMMA. The Committee requests the Government to keep it informed of any measures adopted in this respect, and of the outcome of the appeal against the dismissals lodged with the Higher Administrative Court.
- (b) With regard to the allegations concerning interference by SEMMA in the activities of ASOEMEMMA and the non-remittance of the dues payable by the union members for March, April and May 2006, the Committee urges the Government, if the judicial authorities are not seized with these issues, to take measures without delay to undertake an inquiry into this matter and, if the allegations are corroborated, to ensure that steps are taken to put an immediate end to the acts of interference and to transfer to ASOEMEMMA all the union dues withheld during the period indicated in the allegations.

**81.** In communications dated 30 May, 15 June, 10 October and 3 November 2007, the Association of Teachers' Health Insurance Employees (ASOEMEMMA) reports that the Government has not taken steps to implement the Committee's recommendations. The association states that on 2 November 2007, it lodged an appeal with the Supreme Court against the substance of ruling No. 035-2007 given on 29 October 2007 by the Second Chamber of the Fiscal and Administrative Disputes Tribunal.

**82.** In communications dated 31 August and 28 October 2007, the Government states that the Ministry of Labour has taken steps to follow up the dispute. In an initial phase, this involved the participation of the National Department of Inspection which used all the means at its disposal to resolve the case; and subsequently the participation of the Minister of Labour through the intermediary of the Director-General for Labour. The Ministry of Labour, and in this case the Government of the Dominican Republic, cannot involve themselves in matters that are subject to litigation (section 426 of the Labour Code) or at least must refrain from expressing any opinion on cases that are the subject of litigation. The Government states that it is persisting in its efforts to find a consensual solution to the dispute that will comply with labour law, since in the Dominican Republic the principle of the separation of powers prevails. The Government adds that the General Labour Directorate received trade union representatives and communicated with representatives of the Ministry of Education in a concerted manner, and in a way that duly respected judicial procedure, in order to seek a settlement to the dispute, but must, in accordance with the law, await the Tribunal's decision. Lastly, the Government states that it regrets that this case has arisen and is closely monitoring the dispute.

**83.** *The Committee takes note of this information. It requests the Government and the ASOEMEMMA to communicate the text of ruling No. 035-2007 of 29 October 2007 handed down by the Fiscal and Administrative Disputes Tribunal and to inform it of the outcome of the appeal lodged against that ruling. The Committee hopes that the court will hand down a ruling in the near future. Lastly, the Committee once again urges the Government to send it the information requested in its recommendation in paragraph 913(b) quoted above concerning allegations of interference by the SEMMA in the activities of the ASOEMEMMA and the withholding of union membership dues in March, April and May 2006. The new communication recently received from the Government will be examined at the Committee's next meeting.*

### **Case No. 2214 (El Salvador)**

**84.** At its March 2007 meeting, the Committee made the following recommendations [344th Report, paras 62 and 63]:

The Committee continues to await the ruling on the refusal by the ISSS to accept the coalition of the STISSS and SIMETRISSS trade unions with regard to reviewing the arbitration award, trusts that a ruling will be handed down in the near future and, bearing in mind that considerable time has elapsed since the proceedings were initiated, recalls that justice delayed is justice denied. The Committee also calls on the complainant organizations to provide the information requested by the Office of the Attorney-General of the Republic concerning the alleged eviction of the trade union from its premises.

85. In its communication of 11 June 2007, the Government states that it is awaiting the ruling by the Administrative Disputes Court on the question of the coalition of the STISSS and SIMETRISSS trade unions with regard to reviewing the arbitration award.
86. *The Committee takes note of this information, and reiterates its previous recommendations to the Government and the complainant organizations.*

### **Case No. 2299 (El Salvador)**

87. At its March 2007 meeting, the Committee made the following recommendations [see 344th Report, para. 66].

The Committee notes the Government's statement in its communication of 21 June 2006 that, until the Constitution of the Republic is amended, it will not be possible in the short term to grant legal personality to SITRASEPRIES. The Committee observes that, since this communication was sent, El Salvador has ratified Conventions Nos 87 and 98 (on 6 September 2006) and, recalling that Convention No. 87 applies to private security agents, the Committee urges the Government to take the measures necessary to grant legal personality to SITRASEPRIES. With regard to the alleged death threats against five officials of STITAS (which, according to the Government, is not an offence for which charges are automatically brought), the Committee notes the information provided by the Government and invites those concerned to lodge complaints with the Office of the Attorney-General of the Republic or the competent courts.

88. In its communication dated 11 June 2007, the Government states that El Salvador has ratified Conventions Nos 87 and 98, which have not entered into force; consequently, it will not be possible in the short term to grant SITRASEPRIES legal personality until an amendment is made to the Constitution of the Republic, which, in article 7, paragraph 3, expressly prohibits the existence of armed groups. Therefore, the administrative decision not to grant SITRASEPRIES legal personality continues to have a legal basis.
89. *With regard to the refusal to grant SITRASEPRIES legal personality, the Committee recalls once again that, in accordance with the principles of freedom of association, only the armed forces and the police can be excluded from the constitutional right to establish trade unions, and that all other workers, including private security agents, should freely be able to establish trade union organizations of their own choosing. In these circumstances, as it did at its March 2004 and June 2005 meetings, the Committee reminds the Government of its obligations resulting from the ratification of Conventions Nos 87 and 98 and urges it to take the necessary measures so that SITRASEPRIES is granted legal personality without delay.*
90. *With regard to the alleged death threats made against five STITAS officials, the Committee regrets that the complainants have not indicated if a complaint has been lodged with the relevant authorities.*



**Case No. 2368 (El Salvador)**

91. The Committee last examined this case at its meeting in March 2006 [see 340th Report, paras 782–791] and, on that occasion, made the following recommendations:

- (a) The Committee considers that, given the time that has elapsed since the alleged incidents (which according to the complainant union occurred in 2001 and 2002), the fact that some of the dismissed workers or persons claiming to have been threatened with dismissal have not asked the Ministry of Labour to take action, that some of the legal actions initiated by the complainant organization or its members have been unsuccessful for reasons of form (statute of limitations, inadequate identification of the defendants) or are pending, and in view of the concerns raised by the serious nature of the allegations during the period in question (including dismissals of union officials and members, threats of dismissal against workers who refuse to leave their union, promotion by the employer of a parallel union and violation of the collective agreement), the Committee requests the Government to undertake mediation measures between the complainant trade union, on the one hand, and the Río Lempa Hydroelectricity Board (CEL) and El Salvador Electricity Transmission Company, on the other, with a view to resolving the problems that remain pending in a manner satisfactory to both parties, in the light of the ILO's principles of freedom of association and collective bargaining.
- (b) The Committee requests the Government to keep it informed in this respect.
- (c) The Committee trusts that the Government will keep it informed of the ruling handed down concerning the dismissal of the trade union official Mr Roberto Efraín Acosta as soon as it is handed down.

92. In a communication of 11 June 2007, the Government reports that the labour relations between the Trade Union of Workers of the Hydroelectricity Board (STSEL) and the CEL are currently being conducted in a climate of stability, to the extent that the parties are now at the stage of directly negotiating the revision of the collective labour agreement between them. In addition, it is reported that the Constitutional Chamber of the Supreme Court of Justice definitively dismissed the case against the president of the CEL, as the trade union official Mr Roberto Efraín Acosta Cisneros, who was dismissed, was unable to prove that the then president of the CEL was directly responsible for that action.

93. *Given that the Government's reply does not refer specifically to the outcome of the proceedings relating to the dismissal of the trade union official Mr Roberto Efraín Acosta, the Committee requests the Government to keep it informed of the final outcome of those proceedings. Lastly, the Committee notes with interest the new climate of stability in the labour relations and in the process of reviewing the collective agreement between the STSEL and the CEL and hopes that this negotiation will make it possible to address the issues relating to the enjoyment of trade union rights.*

**Case No. 2396 (El Salvador)**

94. At its November 2007 meeting, the Committee made the following recommendation [see 343rd Report, para. 647]:

Deeply regretting the killing of the trade union leader José Gilberto Soto, the Committee emphasizes that it is essential to bring the guilty parties to justice and requests the Government, as a matter of urgency, to keep it informed of the criminal proceedings currently under way. It expects that the plaintiffs will be granted access to all the elements of the case file, that the investigation will be completed and the deficiencies reported by the ICFTU, if proven true, be rectified, without any attempts to obstruct the work of the Human Rights Ombudsman, and that the proceedings will be concluded in the near future.

95. In its communication of 31 August 2007, the Government indicates that it is sending the text of the judgement handed down by the Usulután Court against Herbert Joel Ramírez Gómez, convicting him of the acts against José Gilberto Soto with which he had been charged and which were deemed by the court to have constituted aggravated homicide, a crime punishable under sections 128 and 129(3) of the Penal Code. The Government indicates that, as the judgement indicates, the killing of José Gilberto Soto was unconnected with any trade union activity, that is, was not motivated by labour-related issues, and for that reason, respectfully requests the Committee to close this case, since the alleged facts do not constitute a violation of trade union rights.
96. *The Committee takes note of these statements but emphasizes that it has not received a copy of the court judgement, despite the fact that the Office requested it in September 2007. The Committee accordingly requests the Government to send a copy of the judgement in question.*

### **Case No. 2423 (El Salvador)**

97. The Committee last examined this case at its meeting in March 2007, when it made the following recommendations [see 344th Report, paras 914–939]:
- (a) The Committee regrets that the Ministry of Labour, when it examined the appeal lodged by the private security sector union SITRASSPES, did not resolve to grant it legal personality, despite the Committee's recommendation that it do so. The Committee considers that this situation is incompatible with the requirements of Convention No. 87, and specifically Article 2 of the Convention which provides for the right of workers without distinction to establish organizations of their own choosing. The Committee therefore once again urges the Government to grant the said trade union legal personality.
  - (b) The Committee draws attention to the very short time allowed by law for the parties concerned to produce the information requested by the Ministry of Labour in the appeals proceedings in respect of the granting of legal personality and regrets that the trade union SITRASAIMM was denied legal personality on such grounds. The Committee calls on the Government to take steps to review the legislation with respect to the time allowed and to reconsider SITRASAIMM's request to be registered as a trade union.
  - (c) The Committee urges the Government to grant the SITISPRI trade union legal personality and to keep it informed in this respect.
  - (d) The Committee requests the Government to pursue its efforts to have the 34 founders of the STIPES trade union and the founder of the SITRASSPES trade union, Juan Vidal Ponce, the official of the STEES trade union, Alberto Escobar Orellana, and seven union officials at the CMT, SA de CV, clothing company reinstated in their jobs, and to impose additional sufficiently dissuasive fines in accordance with national legislation if they are not reinstated, and also to ensure that the salaries and other labour benefits owed to them are paid.
  - (e) The Committee invites the complainant organizations to lodge a complaint with the Ministry of Labour concerning the dismissal of the founders of SITRASAIMM, Manuel de Jesús Ramírez and Israel Ernesto Avila, after they had submitted a request for the union to be granted legal personality, so that the Ministry of Labour can carry out an investigation into the matter.
  - (f) The Committee is obliged to note once again that the present case shows that the exercise of trade union rights – whether the right to establish trade union organizations or the right to adequate and effective protection against acts of anti-union discrimination – is guaranteed neither in the legislation, whose fines do not appear to have any dissuasive effect, nor in practice. The Committee reiterates its earlier recommendations and reminds the Government once again that it may avail itself of ILO technical cooperation in the context of the preparation of future trade union legislation. The Committee considers that, among other things, the new legislation should guarantee the

right to establish trade unions without restrictions, and that proceedings in the case of anti-union discrimination should be rapid and effective providing for sufficiently dissuasive sanctions. Moreover, the new legislation should avoid the Ministry of Labour informing the employer of the names of the founders of a trade union in order for the employer to indicate whether or not the founders are employees.

- (g) Finally, the Committee requests the Government to keep it informed of the decisions handed down by the courts with respect to the trade unionists who were dismissed by Hermosa Manufacturing, SA de CV.

**98.** In a communication dated 11 June 2007, the Government sent the following information.

**Refusal by the Ministry of Labour to grant legal personality to the trade unions SITRASAIMM, SITRASSPES and SITISPRI (recommendations (a), (b) and (c))**

*SITRASAIMM:* The Government states that account should be taken of the fact that the only documents to be submitted by SITRASAIMM were copies of 17 individual work contracts, which were presumably readily available, and therefore the short deadline is reasonable. With respect to reviewing the legislation concerning the time allowed, it should be recalled that this legislation differs from labour legislation in that the residual law to process SITRASAIMM's application for reconsideration was the Civil Proceedings Act, and for this reason the Government will not commit itself to promoting legal reforms in this area of civil law, as it would be entering into an area outside the scope of labour issues and amending civil procedures pertaining to applications for reconsideration. Notwithstanding the above, it is important to mention that within the framework of the report entitled "The labour dimension in Central America and the Dominican Republic, building on progress: strengthening compliance and developing capacity", known as the White Paper, the Ministry of Labour adopted a series of measures to facilitate the granting of legal personality to trade unions and to make legal deadlines more efficient, handing down rulings in less time than established in the Labour Code. An instrument has also been drawn up that contains all the information concerning the functions performed by the Department of Social Organizations of the Ministry of Labour, particularly those relating to the granting of legal personality to trade unions. In addition, the Government has committed itself to reviewing articles 211 and 248 of the Labour Code relating to the reduction in the number of members required to constitute a trade union and the reduction of the waiting period so that a trade union that has been refused legal personality does not have to wait six months before trying to form another trade union. It has also expressly committed itself to conducting national consultations with ILO technical assistance in order to evaluate fully the administrative procedures for the registering of trade unions, and the recommendations resulting from that process will be promptly implemented by the Ministry of Labour and Social Welfare. *The Committee notes this information and asks the Government to inform it about the current status of the process for the registration of the SITRASAIMM.*

*SITRASSPES and SITISPRI:* With respect to the refusals to grant legal personality to these private security trade unions, in its communication of December 2007, the SITRASSPES indicates that in September 2007 it submitted a new request for legal personality, which was once again refused by the authorities. The Government states that while it is true that Conventions Nos 87 and 98 have been ratified (they have not yet entered into force), the situation will not change as article 7(3) of the Constitution of the Republic, which expressly prohibits the existence of armed groups, has not been amended, and therefore the refusal of the administrative authorities will continue to have a legal basis. *The Committee notes this information. It recalls that only members of the police and the armed forces can be excluded from the sphere of application of Convention No. 87 and requests the Government to take the necessary measures – including the amendment of the*

*Constitution of the Republic if necessary – to grant legal personality to the trade union organizations SITRASSPES and SITISPRI.*

Dismissals and transfers of the founders of the trade union organizations STIPES and SITRASSPES, and dismissals of other trade unionists

*STIPES:* With regard to the Trade Union of Port Workers of El Salvador (STIPES), the procedures to fine the enterprises where the dismissed founders of STIPES worked have been applied, resulting in a fine of US\$3,429.92 being imposed on the enterprise Operadores Portuarios Salvadoreños, SA de CV. The other enterprises involved are also in the process of being fined, and the ILO will be informed once the respective fines have been imposed. To date, a review of the files does not reveal any request for conciliatory action having been registered by the founders of the trade union.

*SITRASSPES:* With respect to the reinstatement of the worker Juan Vidal Ponce Peña, founder of the Private Security Workers' Union of El Salvador (SITRASSPES), on 7 September 2005, on the request of Mr Ponce Peña, the Minister of Labour, through the General Directorate of the Labour Inspectorate, carried out a special inspection at the enterprise Sociedad de Servicios Administrativos de Seguridad de Empresas, SA de CV. It concluded that the enterprise in question had infringed article 248 of the Labour Code by dismissing Mr Ponce Peña and recommended that he be reinstated immediately in his usual position. It had also infringed article 29, obligation 2, of the same legal text, owing the worker outstanding pay for reasons attributable to the employer. On 26 September 2005, a further inspection was carried out to check whether the infringements specified during the special inspection had been rectified: the infringement relative to reinstatement had not been rectified; the infringement relating to the pay due to Mr Ponce had been rectified, with the enterprise depositing the pay in question into escrow accounts with the Ministry, which were subsequently withdrawn by the worker in question. Despite the above, and making use of the various legal mechanisms available to apply for legal protection, Mr Ponce requested the Directorate General of Labour to convene the Sociedad de Servicios Administrativos de Seguridad de Empresas, SA de CV to discuss his reinstatement during a conciliatory hearing. Following up on the request, the Directorate convened the legal representative of the enterprise on 3 February 2006; the employer's attorney appeared as the employer representative and stated that his principal had not dismissed Mr Ponce and that furthermore both parties had reached an extra ministerial agreement. This statement was endorsed by Mr Ponce Peña, who was present at the conciliation hearing.

*STEES:* With respect to the reinstatement of the worker Alberto Escobar Orellana, Second Disputes Secretary of the Education Workers' Union of El Salvador (STEES), who worked at the José Simeón Cañas Central American University (UCA), despite ongoing efforts by the labour inspectorate to make the University rectify the infringement committed, that is to say reinstate Mr Escobar Orellana in his position of work, such reinstatement did not occur, and as a result the corresponding fine was imposed. In spite of the efforts of the Ministry of Labour to ensure compliance with labour legislation through administrative channels (i.e. the labour inspectorate), the worker has been informed of his right to go through judicial channels and to use the available legal machinery; he has also been informed that he can apply for legal protection. The Government will go on assisting the worker if he so requests.

*CMT SA de CV:* There has been no change in the actions taken by the Ministry of Labour since the Committee was last informed.

*Hermosa Manufacturing, SA de CV*: A letter was sent to the Attorney-General of the Republic through the Directorate General of Labour requesting information about the cases brought before the courts concerning the complaints made by workers dismissed from the enterprise.

99. *The Committee notes this information. The Committee urges the Government to take the necessary measures for the reinstatement of the 34 founders of the STIPES trade union, of Mr Alberto Escobar Orellana at the José Simeón Cañas Central American University, and of the seven trade union leaders at the clothing company CMT SA de CV. The Committee also asks the Government to inform it of the result of the legal proceedings relating to the dismissals of trade unionists at the enterprise Hermosa Manufacturing, SA de CV. The Committee once again reminds the Government that ILO technical assistance is at its disposal so as to ensure adequate protection against acts of anti-union discrimination.*
100. *Lastly, the Committee invites the complainant organizations to lodge a complaint with the Ministry of Labour concerning the dismissal of the founders of SITRASAIMM, Manuel de Jesús Ramirez and Israel Ernesto Avila, after they had submitted a request for the union to be granted legal personality, so that the Ministry of Labour can carry out an investigation into the matter.*

### **Case No. 2487 (El Salvador)**

101. The Committee last examined this case at its June 2007 meeting, when it made the following conclusions and recommendations concerning alleged anti-union acts carried out by the company Servicios San José SA de CV against officials and members of the union (SETRASSAJO) [see 346th Report, paras 927 to 929]:
- The Committee further notes the Government’s statement that the SETRASSAJO did not report the alleged persecution to the labour inspectorate and that the administrative authority’s actions were therefore restricted to conciliation with respect to the dismissal of the trade union officials and the 11 members, namely, endeavouring to get them reinstated. The Committee also notes that the Government adds that the SETRASSAJO finally reported the events to the special unit on gender and the prevention of discrimination in respect of employment and that, as the company is refusing to reinstate the dismissed officials and members, the sanctioning process has begun to impose a fine on the company.
  - The Committee observes that these are serious allegations of anti-union acts committed against a trade union executive committee and 11 of its members for legitimately exercising their trade union activities; the acts include dismissals, threats, pressure and the alleged continual changing of the company’s name to prevent the formation of trade unions. The Committee recalls, first, that, under Article 2 of Convention No. 87, recently ratified by El Salvador, workers, without distinction, shall have the right to establish or join trade union organizations of their own choosing, and that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, para. 771]. Taking into account the Government’s statement that it has started the sanctioning process against the company, with the intention of imposing a fine on it because of its refusal to reinstate the dismissed workers, the Committee requests the Government to take the necessary measures so that the sanctions imposed in this process are sufficiently dissuasive to ensure that the company allows its workers to freely exercise their trade union rights by putting an end immediately to all anti-union acts against the officials and members of the SETRASSAJO and by reinstating them without delay, and paying the wages they are owed and appropriate compensation. The Committee requests the Government to keep it informed on this matter.

- The Committee urges the Government to ensure that an independent investigation is carried out without delay into the allegations of assaults on SETRASSAJO workers by the company's private security services and into the alleged death threats used to urge workers to resign from their trade union. The Committee requests the Government to take measures to punish those guilty of the assaults and to provide protection to the threatened workers.

- 102.** In its communication dated 31 August 2007, the Government states that under the sanctioning process the company Servicios San José SA de CV was fined US\$550, namely US\$50 for each of the 11 violations of section 248 of the Labour Code, by having dismissed 11 workers who were union officials. With regard to the Committee's recommendation that the sanctions imposed should be sufficiently dissuasive, section 627 of the Labour Code clearly establishes that those guilty of Labour Code violations that do not have a specific penalty shall be fined up to US\$57.14 per violation, with the amount of the fine depending on the seriousness of the violation and the financial resources of the offender. The legally appropriate sanction was therefore imposed in this case. Furthermore, the unionized workers continue to receive the wages that had not been paid for reasons imputable to the employer, in the same amount and manner as when they were performing their duties.
- 103.** With regard to the Committee's recommendation that an independent investigation should be carried out without delay into the alleged assaults on SETRASSAJO workers by the company's private security services and into the alleged death threats used to urge workers to resign from their trade union, the Government recommends that the workers concerned lodge a complaint with the Attorney-General's Office without delay so that an investigation is launched to identify those responsible and criminal proceedings initiated, given that these allegations were made at the request of the plaintiff.
- 104.** *The Committee notes that, according to the Government, the dismissed union officials continue to receive their wages and the company Servicios San José SA de CV was fined US\$550. The Committee reiterates its previous recommendation that these union officials be reinstated without delay and paid outstanding wages (until the date of their reinstatement) and appropriate compensation. The Committee requests the Government to keep it informed on this matter and, in consultation with workers' and employers' organizations, to increase the legally recognized fines for violations of trade union rights. The Committee recalls that it has already pointed out that the exercise of trade union rights – whether the right to establish trade union organizations or the right to adequate and effective protection against acts of anti-union discrimination – is guaranteed neither by the legislation, whose fines do not appear to have any dissuasive effect, nor in practice. The Committee reminds the Government once again that it may avail itself of ILO technical cooperation for preparing future trade union legislation that has procedures for dealing with anti-union discrimination which are rapid and effective and provide for sufficiently dissuasive sanctions. On the other hand, with regard to the alleged assaults on SETRASSAJO workers by the company's private security services and the alleged death threats used to urge workers to resign from their trade union, the Committee requests the complainants to advise the workers concerned – as suggested by the Government – to lodge a complaint with the Attorney-General's Office without delay in order to punish those guilty of carrying out these assaults and threats and to protect the threatened workers.*
- 105.** *The Committee requests the Government to keep it informed of developments on these issues.*

**Case No. 2514 (El Salvador)**

106. At its June 2007 meeting, after observing that the question of reinstating a large number of officials dismissed by Baterías de El Salvador, on account of the establishment of a trade union, no longer arose in this case (according to the Government, the entire workforce still employed by the enterprise agreed to terminate their contracts of employment subject to the payment of their statutory benefits and to be transferred to ten different enterprises), the Committee made the following recommendation [see the 346th Report, para. 963]:

Deploring the serious anti-union nature of the dismissals of trade unionists of the SITRAEBES, the Committee requests the Government to inform it of any administrative or judicial sanctions imposed on the Baterías de El Salvador enterprise for violating the trade union rights enshrined in the legislation, as noted by the labour inspectorate, to indicate whether the Attorney-General's Office has been notified of the facts, as requested by the complainants, to keep it informed in this respect, and to confirm that all the dismissed trade unionists have been paid their statutory dismissal compensation.

107. In its communication dated 31 August 2007, the Government states that three proceedings to impose a fine are currently before the Labour Inspectorate; consequently, if the employer does not prove the inaccuracy, falseness or impartiality of the facts listed in the inspection reports, in the exercise of its right of audience, it will be fined accordingly.
108. With regard to whether the Attorney-General's Office has been notified of the facts, as requested by the complainants, the Government indicates that the Penal Code, more specifically section 246 on labour discrimination, states that: "Any person guilty of serious discrimination in respect of employment on the grounds of sex, pregnancy, origin, civil status, race, class, physical condition, religious or political ideas, membership or non-membership of trade unions and acceptance or otherwise of union agreements, and family ties with other workers at the enterprise, and who does not restore conditions of equality before the law, once requirements or administrative sanctions have been imposed, by paying the corresponding compensation, shall be punished with a prison sentence of six months to two years." In this regard, and from a legal standpoint, the rules of procedure for dealing with an offence of labour discrimination and providing notification are applicable if administrative proceedings have not restored conditions of equality before the law, once requirements or administrative sanctions have been imposed, through the payment of the corresponding compensation. In this regard, in this case, the proceedings to impose a fine are still under way, and legal steps have not therefore been taken to notify the Attorney-General's Office.
109. *The Committee notes the statements made by the Government. The Committee deeply regrets that the three proceedings to impose a fine in relation to the dismissal of a large number of union officials from Baterías de El Salvador have not been concluded, despite the fact that this complaint was presented to the Committee in August 2006, and hopes that the administrative procedures will be concluded without delay. The Committee requests the Government to keep it informed in this regard. The Committee notes the Government's statement that only once proceedings to impose a fine have been concluded can notification be given to the Attorney-General's Office as to whether the situation requires the implementation of the penal sanctions provided for in section 246 referred to by the Government. The Committee requests the Government to keep it informed in this regard.*

**Case No. 2521 (Gabon)**

110. The Committee last examined this case, which concerns allegations of interference in the activities of the Gabonese Confederation of Free Trade Unions (CGSL), suspensions of employment contracts, dismissals, threats, arbitrary arrests and detentions of trade

unionists, as well as illegal mass dismissals on the pretext of economic grounds, at its June 2007 meeting [see 346th Report, paras 996–1036]. In its recommendations, the Committee requested the Government: (a) to inform it as soon as the dispute within the CGSL is settled; (b) concerning the representativeness of the trade union organizations, to pursue its efforts to clarify the situation and establish a mechanism to determine whether trade union organizations are representative or not; (c) to keep it informed of the procedure under way before the labour court concerning the request for damages lodged against Mr Meye Sima, trade union official of the Free Federation of Energy, Mining and Allied Enterprises (FLEEMA) affiliated to the CGSL, and to provide copies of the judgements handed down in the case of Mr Thierry Kerry Nziengui, CGSL representative for Moyen Ogooué province, and the other former employees of the RIMBUNAN company; (d) to review the situation of CGSL members standing for election as staff representatives at the Gabon Services Company (SGS) who were dismissed for distributing leaflets calling for strike action, and seek their possible reinstatement in the enterprise [see 346th Report, para. 1036].

111. The Government sent a partial reply in a communication dated 9 August 2007. With regard to the dispute within the CGSL, the Government states that the two factions have concluded an agreement, under the arbitration of the Minister for Labour and Employment, to set up a provisional bureau pending a new congress. Moreover, as regards the question of the representativeness of trade unions, the Government points out that it requested assistance from the International Labour Office in its efforts to clarify the situation. In its communication, the Government also indicates that it will inform the Committee, once the new judicial term starts, of the situation concerning the claim for damages against Mr Meye Sima and the judgements handed down in the cases of Mr Thierry Kerry Nziengui and the other former employees of the RIMBUNAN company.
112. As regards the possible reinstatement of Mr Mavoungou Moukelia and Mr Juvénal Mbogou, CGSL members standing for election as staff representatives at the SGS, the Government indicates that their reinstatement is not certain inasmuch as their dismissal comes in the wake of calls for an illegal strike – especially under the terms of section 345 of the Labour Code, which states that any strike declared without fulfilling the obligation to give five days’ notice is illegal – and in view of the opinion of the employer, who considers that the dismissal occurred too long ago and that the breach of trust does not lend support to their reinstatement.
113. *The Committee notes the information supplied by the Government. As regards the reinstatement of Mr Mavoungou Moukelia and Mr Juvénal Mbogou, the Committee refers to its previous conclusions in this case in which it noted that the persons in question had been dismissed following the distribution of leaflets calling on the other workers to continue a strike in the enterprise, even though negotiations had just been held and work had returned to normal. In this regard, it recalled that, as a general rule, the distribution of leaflets calling on workers to take industrial action is a legitimate trade union activity. The Government was therefore invited to review the workers’ situation and seek their possible reinstatement. In view of the Government’s indications concerning the uncertainty around the reinstatement of the persons concerned, the Committee recalls that, as a general rule, persons who have been the subject of anti-union discrimination should have the possibility of being reinstated in their posts. However, if the judicial authority determines that reinstatement of workers dismissed in violation of freedom of association is not possible, measures should be taken so that they are fully compensated. The compensation should be adequate, taking into account both the damage incurred and the need to prevent the repetition of such situations in the future [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 843 and 844]. The Committee requests the Government to keep it informed of the resolution of the internal dispute within the CGSL and of any measure taken with regard to Mr Mavoungou*



*Moukelia and Mr Juvénal Mbogou. The Committee also requests the Government to keep it informed of the steps taken to clarify the situation regarding the representativeness of trade union organizations and establish a mechanism to determine the representativeness.*

- 114.** *As regards the proceedings under way in the labour court relating to the claim for damages filed against Mr Meye Sima and the cases of Mr Thierry Kerry Nziengui and the other former employees of the RIMBUNAN company, the Committee hopes that the judicial authorities will reach a decision rapidly and trusts that the Government will supply a copy of the judgements once they have been delivered.*

### **Case No. 2506 (Greece)**

- 115.** The Committee last examined this case, which concerns a “civil mobilization order” (requisition of workers’ services) of indefinite duration which put an end to a legal strike of seafarers on passenger and cargo vessels, at its June 2007 meeting [346th Report, paras 1037–1080]. On that occasion, the Committee adopted the following recommendations on issues that remained pending:

- (a) The Committee invites the Government and the PNO to engage in negotiations as soon as possible over the determination of the minimum service to be made available in case of strikes in the maritime sector, in conformity with national legislation on security personnel and freedom of association principles. The Committee requests to be kept informed in this respect.

...

- (c) The Committee requests the Government to take all necessary measures to ensure that negotiations with the PNO recommence as soon as possible and are conducted in line with collective bargaining agreements and processes, with a view to ending the dispute and reaching an agreement over the demands presented by the trade union. The Committee requests to be kept informed of developments in this respect.

- (d) In view of the allegations that over the last 32 years the Government has resorted to civil mobilization orders in order to end strikes in various sectors, the Committee, noting that the new law still allows for the requisition of services in case of danger to public health, which could therefore continue to be used as grounds for suspending strikes in the future, recalls that the responsibility for suspending a strike on the grounds of national security or public health should not lie with the Government, but with an independent body which has the confidence of the parties concerned [*Digest*, op. cit., para. 571] and requests the Government to take the necessary measures to ensure that any general suspension or termination of strike is decided in accordance with this principle. It requests the Government to keep it informed of developments in this regard.

- 116.** In communications dated 7 March and 23 August 2007, the Government stated that, as noted during the first examination of this case, the civil mobilization order of crews of merchant marine vessels, which had been the cause of the complaint, was suspended by Ministerial Decision No. 209/01.02.2007 (*Official Gazette* B’120). The State Legal Council ruled that the ministerial decision in question, which was of indefinite duration and was formally repealed on 1 February 2007, had stopped being in effect after 23 February 2006 at 6 p.m. when the strike ended.

- 117.** The Government indicated that new Act No. 3536/2007 concerning “Special regulations of Migration Policy Issues and other issues under the competency of the Ministry of the Interior, Public Administration and Decentralization” included provisions in article 41 to regulate the issue of requisition of personal services and goods to face emergency in times of peace. The Government observed that the provisions of Legislative Decree No. 17/1974, on the basis of which the civil mobilization order had been issued in the present case, would from now on only apply in times of war.

- 118.** The Government recalled its previous statements concerning the need to ensure the protection of islanders' health and the efforts it had made in this case to invite the Pan-Hellenic Seamen's Federation (PNO) to discuss seafarer's demands and to make safety personnel available, so that ships could sail with a view to meeting fundamental needs of islanders, in particular of vulnerable social groups.
- 119.** The Government added that, during the period under consideration, the Ministry had engaged in continuous and permanent consultation with the social partners competent for the merchant marine. Thus, communication, cooperation and contacts between the Government representatives, the Greek seafarer trade unions at all levels, and the ship owners' representatives were very constructive on issues relating to the merchant marine at both national and international levels. Joint committees – like the Merchant Marine Council, the administrative board of employment agencies for unemployed seafarers, the administrative boards of seafarer's social insurance institutes and bodies – continued to meet regularly.
- 120.** The Government commented on the Committee's conclusions relating to abuse by the Government of requisition measures during the last 32 years. It indicated that such requisition is also allowed in cases of emergency or immediate need, e.g. natural disaster, which should not be added together with cases of strike action, since they relate to different circumstances and conditions and take place with the full consent of citizens and organizations concerned.
- 121.** Concerning the establishment of an independent authority to bear the responsibility for suspending a strike on grounds of national security or public health, the Government declared itself favourable to such an institutional initiative. However, this would need to be provided by law. The Government also considered that the mechanism provided for under Act No. 3536/2007 (decision by the Prime Minister upon proposal by the Minister competent in the matter giving rise to an emergency, instead of the Minister of National Defence) as well as the rapid confirmation by courts of law of the legitimacy of the issued acts, provided for sufficient guarantees.
- 122.** *The Committee notes with interest the entry into force of Act No. 3536/2007 concerning "Special Regulations of Migration Policy Issues and other issues under the competence of the Ministry of the Interior, Public Administration and Decentralization" which provides in article 41 that the requisition of personal services is possible only in a "sudden situation requiring the taking of immediate measures to face the country's defensive needs or a social emergency against any type of imminent natural disaster or emergency that might endanger the public health". It also notes that the Legislative Decree No. 17/1974, on the basis of which the civil mobilization order had been issued in the present case, will from now on only apply in times of war. The Committee further notes that the decision to order a civil mobilization shall be taken by the Prime Minister on proposal by the Minister who has competence to deal with the specific emergency instead of the Minister of National Defence who had competence in all cases. It further notes the Government's indication that the rapid confirmation by courts of law of the legitimacy of the decision will provide for sufficient guarantees.*
- 123.** *Concerning its recommendation on the establishment of an independent authority to bear the responsibility for suspending a strike on the grounds of national security or public health, the Committee notes with interest the Government's indication that, in addition to the safeguards mentioned above (the possibility of having a rapid confirmation by courts of law of the legitimacy of such a measure), it would be favourable towards such an institutional initiative, but that it would need to be provided by law. The Committee encourages the adoption of legislation on this issue and requests to be kept informed of any development in this respect.*

124. *The Committee notes that no information has been provided with regard to its recommendation for negotiations to commence as soon as possible over the determination of the minimum service to be made available in case of strikes in the maritime sector, in conformity with national legislation on security personnel and freedom of association principles. The Committee recalls that this appears to be a recurrent issue in disputes between the Government and seafarers' trade unions and that the Committee had already made a recommendation on this issue in an earlier case concerning Greece [Case No. 2212, 330th Report, paras 749 and 755]. The Committee once again emphasizes that, although the ferry service is not an essential service, in view of the difficulties and inconveniences that the population living on islands along the coast could be subject to following a stoppage in ferry services, an agreement may be concluded on minimum services to be maintained in the event of a strike [346th Report, para. 1071]. The Committee recalls the importance of having a negotiated definition of what constitutes safety personnel (e.g. how many crossings per day/week, the necessary personnel for manning the ships, etc.) prior to a labour dispute, so that all parties can examine the matter with the necessary objectivity and detachment and with the participation of the relevant employers' and workers' organizations [346th Report, paras 1072–1073]. The Committee therefore invites once again the Government and the PNO to engage in negotiations as soon as possible over the determination of the minimum service to be made available in case of strikes in the maritime sector, in conformity with national legislation on security personnel and freedom of association principles. The Committee requests to be kept informed in this respect.*
125. *With regard to its recommendation for negotiations to recommence over the list of demands presented by the PNO, the Committee notes that according to the Government, during the period under examination, communication, cooperation and contacts between the Government representatives, the Greek seafarer trade unions at all levels – including the PNO – and the ship owners' representatives continued and were very constructive on issues relating to the merchant marine at both national and international levels. Joint committees continued to meet regularly. The Committee requests the Government to specify whether negotiations took place over the list of demands presented by the PNO and the relevant outcome.*

### **Case No. 2298 (Guatemala)**

126. The Committee last examined this case at its meeting in March 2007. On that occasion, the Committee requested the Government to provide a copy of the text of the decision of the Special Public Prosecutor of 3 August 2004 to reject the complaint lodged by trade union official Mr Agustín Sandoval Gómez regarding death threats, so that it might ascertain the reasons for the decision [see 344th Report, paras 74 and 75].
127. *The Committee notes that, in its communication dated 19 June 2007, the Government indicated that the Public Prosecutor had responded that, in accordance with legislation, only the parties to legal proceedings have access to the judicial records. In these circumstances, the Committee requests the Government to obtain, through the Trade Union Confederation of Guatemala, the consent of Mr Sandoval Gómez in order to obtain a copy of the decision of the Public Prosecutor of 3 August rejecting the complaint lodged by Mr Sandoval Gómez.*

### **Case No. 2397 (Guatemala)**

128. The Committee last examined this case at its meeting in March 2006 [see 340th Report, paras 878–889]. On that occasion, the Committee requested the Government: (a) to ensure that no leader of the Workers' Union of the National Literacy Committee – and in

particular its General Secretary – was dismissed or prejudiced on account of their legitimate trade union activities, and to keep it informed of the measures taken in this regard; and (b) to keep it informed of the result of the *amparo* proceedings lodged before the Supreme Court relating to the arbitral award handed down by the judicial authority which approved the collective agreement on working conditions.

129. The Committee notes the Government's communication dated 24 October 2007 reporting that the *amparo* proceedings are awaiting referral to the Constitutional Court in an appeal lodged by the Government of Guatemala and the National Literacy Committee. *The Committee requests the Government to keep it informed of the final outcome of the appeal relating to the arbitral award. The Committee once again requests the Government to ensure that no leader of the Workers' Union of the National Literacy Committee is dismissed or prejudiced on account of their legitimate trade union activities, and to keep it informed of the measures taken in this regard.*

### **Case No. 2413 (Guatemala)**

130. The Committee last examined this case at its meeting in June 2007. On that occasion, it made the following recommendations on matters which remained pending [see 346th Report, paras 55–65].
131. As regards the allegations concerning the appeal lodged by the enterprise to revoke the resolution recognizing legal personality and approving the by-laws of the Trade Union of Workers of the Finca El Cóbano Ingenio Magdalena SA (SITRAFECIMASA) and the resolution of the Ministry of Labour which, disregarding the rules of due process, modified the name of the trade union by deleting the reference to Ingenio Magdalena SA [see 346th Report, para. 60], the Committee had requested the Government to send it a copy of Order No. 48-2005, together with a copy of the resolution referred to by the complainant and the relevant labour inspection report, indicating why the workers who formed the trade union had not been interviewed during the inspection.
132. *The Committee takes note of the Government's communication of 27 September 2007 in which it indicates that although the workers were not interviewed during the appeal process initiated by the employer to revoke the resolution recognizing the legal personality of the new trade union, they were notified on 3 May 2005 of resolution No. 11-2005 of 25 April, which deemed the appeal to be admissible, and resolution 31-2005 of 9 May 2005, handed down by the General Labour Directorate, which ordered a partial modification of the name of the trade union, as the workers were employed at the Finca El Cóbano, an entity with no legal connection with Ingenio Magdalena. The Government indicates that, despite receiving notification of these resolutions, the workers did not avail themselves of the legal measures at their disposal to appeal against them. The Committee takes note of this information.*
133. As regards the allegations concerning the dismissal of 23 workers who had attempted to establish a trade union at the Finca El Cóbano (it is alleged that court reinstatement orders have been ignored by the enterprise) [see 346th Report, para. 61], the Committee had noted the information according to which the dismissed workers initiated 14 reinstatement actions, four of which were successful and the workers involved are awaiting reinstatement, two were dropped, two were closed and six are pending a decision regarding an *amparo* action (appeal for the protection of constitutional rights).
134. *The Committee notes that the Government has not sent any further observations concerning this matter. Under these circumstances, the Committee once again requests the Government to ensure compliance with any reinstatement orders handed down by the judicial authorities and to keep it informed in this regard.*

135. As regards the alleged lockout at Bocadelli SA following the submission of a draft collective agreement by the enterprise trade union [see 346th Report, para. 65], the Committee had requested the Government to continue taking steps to bring about an agreement between the parties.
136. *The Committee takes note of the Government's communication of 19 November 2007 according to which on 21 July 2006, the representatives of the Coalition of Workers of Bocadelli of Guatemala SA and the enterprise signed a conciliation agreement which included the payment of all benefits to all of the workers. The Government submits a copy of the conciliation agreement in question. The Committee notes this information.*
137. The Committee regrets that the Government has not sent its observations on the other matters which remain pending, and therefore reiterates its previous recommendations:
- As regards the alleged disrespectful statements made by the President of the Republic in the media concerning trade union leaders and violence against participants in the demonstrations, the Committee requests that an investigation be initiated and that it be kept informed in that regard [see 346th Report, para. 59].
  - As regards the alleged dismissal of two workers belonging to the Trade Union of Workers of the municipality of El Tumbador, San Marcos, in the context of a collective dispute during the negotiation of a collective agreement on working conditions, the Committee requests the Government to take steps to conduct an investigation into the alleged events and to keep it informed in this regard [see 346th Report, para. 64].
138. Lastly, the Committee had requested the complainant organization to send the names of the trade union leaders for whom arrest warrants had been issued following the demonstration held on 14 March 2005, so that the Government could provide information on the current status of proceedings against them [see 346th Report, para. 57]. *Once again, the Committee notes with regret that the relevant information has not been sent and requests the complainant organization to send it without delay.*

### **Case No. 2236 (Indonesia)**

139. The Committee last examined this case, which concerns allegations of anti-union discrimination by the Bridgestone Tyre Indonesia Company against four trade union officers suspended without pay, at its May–June 2007 meeting. On that occasion, the Committee noted with concern that more than four years had elapsed since the complaint of anti-union discrimination was first made, without any reported progress. In light of the apparent impasse in these proceedings due to the absence of the former Director-President, the Committee requested the Government to institute an independent investigation at the enterprise and with the workers concerned to determine whether they had been the subject of anti-union discrimination and, if the allegations were found to be true, but the trade union officers had already received formal notification of their dismissals, to ensure, in cooperation with the employer concerned, that the trade union officers were reinstated or, if reinstatement was not possible, that they were paid adequate compensation such as to constitute sufficiently dissuasive sanctions, taking into account the damage caused and the need to avoid the repetition of such acts in the future. In addition, with regard to the two proceedings regarding anti-union discrimination and dismissal of four trade union officers, the Committee once again requested the Government to inform it of the decision of the Supreme Court with respect to the appeal made by these trade union officers on the decision of the National Administrative High Court, as well as to transmit all relevant texts. Finally, noting the Government's indication that a collective labour agreement had been entered into between a new bargaining team and the company, the Committee

requested the Government to transmit a copy of the agreement without delay, as well as a copy of the decision of the Central Committee for Labour Dispute Settlement which had apparently replaced the union's old bargaining team.

140. In a communication of 21 September 2007, the Government indicates that it informally approached the Supreme Court to request that the case be decided as soon as possible. The Government adds that the career and ad hoc judges of the Supreme Court responsible for industrial relations dispute settlement need capacity building through training in order to understand the issues relevant to international labour standards and labour and employment matters.
141. *The Committee notes with regret that the Government provides no information with regard to the Committee's request for an independent investigation at the enterprise and with the workers concerned in order to determine whether they have been the subject of anti-union discrimination. The Committee recalls once again that there is no real prospect of having the complainant's grievance of anti-union discrimination examined by the courts; five years have elapsed since this complaint was first brought to the courts without any reported progress on the proceedings. The Committee recalls that respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 820]. The Committee once again requests the Government to institute an independent investigation at the enterprise and with the workers concerned to determine whether they have been the subject of anti-union discrimination and, if the allegations are found to be true, but the trade union officers have already received formal notification of their dismissals, to ensure, in cooperation with the employer concerned, that the trade union officers are reinstated or, if reinstatement is not possible, that they are paid adequate compensation such as to constitute sufficiently dissuasive sanctions, taking into account the damage caused and the need to avoid the repetition of such acts in the future. The Committee requests to be kept informed of developments in this respect.*
142. *With respect to the proceedings concerning the dismissal of the four trade union officers, the Committee notes that the Government approached the Supreme Court informally to ensure that a decision will be rendered soon on the appeal lodged by the trade union officers against the decision of the National Administrative High Court. The Committee hopes that the Supreme Court will issue its decision without further delay and requests the Government to keep it informed in this respect, and to transmit all relevant texts. The Committee also recalls that it has expressed regret at the fact that the two court proceedings – on anti-union discrimination and dismissal – went ahead simultaneously and once again requests the Government to confirm that no decision in favour of dismissal will be enforced prior to the resolution of the question of anti-union discrimination.*
143. *With regard to the Government's comments concerning the need for training of the newly appointed judges, the Committee reminds the Government that the technical assistance of the Office is at its disposal in this regard should it so desire.*
144. *Finally, the Committee notes with regret that the Government does not provide any further information on the decision of the Central Committee for Labour Dispute Settlement to replace the union's old bargaining team, which led to the adoption of a new collective labour agreement. The Committee once again requests the Government to transmit a copy of the collective bargaining agreement and the Central Committee decision without delay.*

**Case No. 2336 (Indonesia)**

145. The Committee last examined this case, which concerns several freedom of association violations at the Jaya Bersama Company such as its refusal to recognize the plant-level trade union affiliated to the Federation of Construction, Informal and General Workers (F-KUI), the anti-union dismissal of 11 trade union members, including all the officials, and acts of intimidation against employees, at its May–June 2007 meeting. On that occasion, the Committee noted with regret that two-and-a-half years had elapsed since the decision of the Central Committee for Labour Dispute Settlement ordering the payment of severance pay to the 11 dismissed workers without any progress made in securing its execution and urged the Government to take the necessary measures to ensure by all appropriate means that the decision is complied with. Noting moreover the Government’s indication that the company had apparently ceased its operations, the Committee also requested the Government to verify and inform it of the company’s operational status [see 346th Report, paras 72–74].
146. In a communication of 21 September 2007, the Government states that efforts were made in order to verify the status of the company. The Office Responsible for Manpower Issues of the District of North Jakarta will keep the Government informed of the progress of the investigations. After their completion, the Government will be in a position to request the employer to pay compensation through the District Court of North Jakarta.
147. *The Committee notes from the Government’s report that the Manpower Office of the District of North Jakarta is in the process of investigating the status of the company so that the Government may be in a position to secure the execution of the decision of the Central Committee for Labour Dispute Settlement which ordered the payment of severance pay to the 11 dismissed workers in August–November 2004. The Committee notes with regret that more than three years have elapsed since the decision of the Central Committee without any progress made in securing its execution and recalls once again that justice delayed is justice denied. The Committee once again urges the Government to take the necessary measures to ensure by all appropriate means the rapid conclusion of the investigation over the status of the company and to secure the execution of the Central Committee’s decision ordering the payment of severance pay to the 11 dismissed workers. The Committee requests to be kept informed in this respect.*

**Case No. 2441 (Indonesia)**

148. The Committee last examined this case, which concerns anti-union dismissal, harassment of and threats of violence against trade union leaders, and shortcomings in the legislation at its May–June 2007 meeting, where it requested the Government to: take necessary measures to reinstate Mr Sukanto without loss of wages or benefits; review section 158(1)(f) of the Manpower Act of 2003 to ensure that the term “gross misconduct” is not interpreted so as to include legitimate trade union activities; and conduct an independent investigation without delay into the allegations of harassment, threats and defamatory statements with a view to clarifying the facts, determining criminal responsibility, if any, and punishing those responsible. The Committee requested the Government to keep it informed of developments in this regard, including any court decisions handed down with regard to Mr Sukanto [see 346th Report, paras 75–81].
149. In a communication dated 21 September 2007, the Government indicated that the matter is pending before the Supreme Court. A final decision will be delivered soon and communicated to the Committee.

150. *The Committee recalls once again the circumstances surrounding Mr Sukamto's dismissal, which have never been contested by the Government. Mr Sukamto was dismissed due to the recommendation he made to the workers in respect of the employer's proposal on a wage increase. It was in this context that the Committee had requested the Government to ensure his reinstatement and to review the Manpower Act in force so as to ensure that the term "gross misconduct" may not be interpreted so as to include legitimate trade union activities [see 342nd Report, para. 620].*
151. *In these circumstances and recalling moreover the seriousness of the matters raised in the present case, the Committee once again strongly urges the Government to take immediate steps to implement all of its previous recommendations and, in particular, to reinstate Mr Sukamto without loss of wages or benefits; review section 158(1)(f) of the Manpower Act of 2003 to ensure that the term "gross misconduct" is not interpreted so as to include legitimate trade union activities; and conduct an independent investigation into the allegations of harassment, threats and defamatory statements with a view to clarifying the facts, determining criminal responsibility, if any, and punishing those responsible. The Committee requests the Government to keep it informed of developments in this regard, including any court decisions handed down with regard to Mr Sukamto.*

### **Case No. 1991 (Japan)**

152. The Committee last examined this case, which concerns allegations of anti-union discrimination arising out of the privatization of the Japanese National Railways (JNR) taken over by the Japan Railway Companies (the JRs), at its November 2006 meeting. Stressing that some of the issues in the present case, particularly those in the field of labour relations, did not lend themselves to strictly judiciary solutions, the Committee welcomed the communication from the complainant National Railways' Workers' Union (KOKURO) indicating its desire to find a negotiated political solution to the matters raised. It further took note of KOKURO's request for ILO assistance and advice in bringing the parties together to that end, and requested the Government to give serious consideration to receiving such assistance from the ILO with a view to reaching a conclusion satisfactory to all parties concerned in this long-standing labour dispute. The Committee requested the Government to keep it informed of developments in this matter [see 343rd Report, paras 106–119].
153. In their communication of 1 June 2007, the complainants KOKURO and the Railway Headquarters, All Japan Construction, Transport and General Workers' Union (Railway HQ, KENKORO) state that, since the Committee's last examination of this case, they had established a coalition comprising the four bodies of the 1,047 KOKURO and KENKORO members dismissed as a result of the privatization of the JNR, as well as the four groups of complainant unions and supporting organizations – the National Liaison Committee of KOKURO TOSODAN, the plaintiffs' group of the lawsuit against the Japan Railway Construction Corporation (TEKKENKODAN), the plaintiff's group of the lawsuit against the JR TT (the Japan Railway Construction Transport and Technology Agency – the legal successor to the JNR), the All National Railway Locomotive Engineers' Union (ZENDORO) SOGIDAN and the plaintiffs of the lawsuit against the JR TT, the KOKURO, Railway HQ of KENKORO, the Central Solidarity Committee for Support of the JNR Struggle, and the Joint Conference for JNR Struggle. This unity had in turn issued a written agreement stating that it would negotiate with the Government and the JR TT for a thorough settlement of the dispute. The complainants indicate that they had issued a statement on 16 March 2007: (1) demanding that the Government commence negotiations and make every effort toward a settlement based on the recommendations in the Committee's 343rd Report, and (2) declaring that the coalition's constituent groups would assume all necessary responsibilities regarding the settlement.



- 154.** According to the complainants, although the 15 September 2005 Tokyo District Court decision in the lawsuit against the Japan Railway Construction Corporation (TEKKENKODAN) was, on the whole, unsatisfactory, it was significant in that it recognized the existence of unfair labour practices – the first time a judicial authority had done so – ordered compensation for the plaintiffs, and clearly identified the party that would assume responsibilities in any settlement involving the non-hiring of the complainant’s members by the JRs. In the wake of this decision, 507 KOKURO members commenced a lawsuit claiming hiring discrimination before the Tokyo District Court, so that at present almost all of the 1,047 dismissed workers have become plaintiffs in one lawsuit or another naming the JRJT as defendant.
- 155.** The complainants indicate that they are prepared to start negotiations with the Government and the JRJT on a “concrete demands for a settlement” platform encompassing the issues of employment, pensions and compensation payment. A practical resolution to these unified concrete demands would be sought, taking into account the 22 December 2003 Supreme Court decision, the 15 September 2005 decision of the Tokyo District Court in the TEKKENKODAN lawsuit, and the ILO recommendations that “the workers concerned be fairly compensated” and that a negotiated political solution to the matters in the present case be concluded that is “satisfactory to all parties concerned”.
- 156.** With respect to the pending lawsuits, the complainants state that the broad intention of these actions is to promptly reach a political settlement. The complainants had issued a statement to the same effect on 5 December 2006, at the time of the filing of the KOKURO lawsuit against hiring discrimination, and had also stated, at the time of the filing of the unfair labour practices lawsuit on 27 December 2004, that the lawsuit had been filed as the Government had yet to set up negotiations for a settlement and that they would continue to demand to enter into negotiations. Though they were not in a position to choose between a resolution of the issues at hand by the courts or by a settlement, their absolute priority is a “political settlement through negotiations”; once negotiations were set up and progressed the lawsuits would be reconsidered accordingly.
- 157.** On 13 April 2007, the complainants requested the Ministry of Health, Labour and Welfare (MHLW) and the Ministry of Land, Infrastructure and Transport (MLIT) to: (1) make efforts towards a prompt settlement of the JR’s non-hiring case on the latter’s twentieth anniversary; and (2) to set up negotiations between the JRJT and the coalition of groups mentioned above. In response, however, the Government had merely stated that it would report the requests to the upper bodies and indicated that, having done everything it should have, it was not prepared to take any further steps. The Government also declined to comment on the ongoing lawsuits or respond to the Committee’s recommendations in its 343rd Report. The complainants further state that they had requested negotiations with the MLIT on 14 July 2006 and submitted the “concrete demands for settlement” to the MHLW on 14 September 2006. The Government’s responses were perfunctory, however, acknowledging only the formal receipt of the requests and thus demonstrating the Government’s insincere attitude towards reaching a settlement on the issues concerned. Furthermore, although the Government had claimed that it could not act unless all the parties concerned were united, its insincere attitude persists in spite of the fact that the complainants have now assembled, for the purpose of jointly negotiating a settlement, a unity of all the parties concerned.
- 158.** The complainants indicate that they strongly desire to reach a settlement with respect to the non-hiring of workers by the JRs, particularly in light of the twenty years that had elapsed since the incident occurred and the difficulties suffered by those dismissed and their families. As of 31 March 2007, 699 local councils, including 18 prefectural assemblies, have passed a total of 1,059 resolutions based on the Local Autonomy Law requesting an early settlement of the dispute. Finally, the complainants state that the conclusion of the

trial in the ZENDORO action before the Tokyo District Court concerning unfair labour practices will be on 25 July 2007, and that for the lawsuit against the JRJT on 20 September 2007; both decisions are anticipated to be handed down before the year's end.

- 159.** In a communication of 27 February 2008 the complainants indicate, in respect of the ZENDORO action, that on 23 January 2008 the Tokyo District Court issued a decision ordering the defendant JRJT to pay 5.5 million yen to each of the plaintiff ZENDORO members as compensation for damages incurred. The Court's decision recognized that unfair labour practices had been committed by the JRJT, in particular by discriminating against the union's members in drafting lists of candidates for hiring. The decision also condemned the JRJT for breaching its obligation to maintain neutrality among unions and causing serious psychological damage to the plaintiffs. The next case involving the JRJT would be decided by the District Court on 13 March 2008. The complainants state that the 23 January 2008 decision was nevertheless a problematic one, as the Court had rejected its core demands of compensation for lost wages and pension benefits. They add that the JRJT has appealed the decision to the Tokyo High Court. The complainants, emphasizing that it has been over 20 years since the workers were dismissed and concerned that everything cannot be settled in the courts, reiterated their desire to see a negotiated political settlement to their demands.
- 160.** In a communication dated 9 January 2008, the Government provides a summary of background information concerning the case that it had previously submitted and states, with respect to the current situation, that in December 2006 KOKURO and its 530 members filed a suit for compensation in the amount of 30.9 billion yen. This latest action included, more than 900 of the 1,047 dismissed union members are now involved in six cases pending in the Tokyo High Court, the Tokyo District Court and Yokohama District Court; the Tokyo District Court will render judgement on the ZENDORO case in late January 2008. In four of these cases, KOKURO and the other involved parties are appealing primarily to establish an employment relationship with the JRJT on the premise of JNR's unfair labour practice. They are also seeking compensation for damages caused by the unfair labour practice and fulfilment of the obligation to re-employ dismissed workers at their local JR companies.
- 161.** The Government contends that KOKURO and the other concerned parties were critical of the Four Party Agreement. The ILO had previously recommended that a negotiated solution be sought on the basis of this Agreement, which aimed for a political and humanitarian resolution to the dispute, but was considered by KOKURO and its affiliates to constitute an unfair labour practice. While seeking to further their objectives by means of the law, the coalition of four bodies and four groups interested in the dispute claim are, at the same time, claiming that it is not possible to resolve everything through court judgements and that they are therefore planning to unify their organizations for a political resolution, as well as to negotiate with the Government and the JRJT with "employment, pension and resolution money" as their unified demand.
- 162.** The JRJT claims, in respect of the pending cases, that KOKURO and the other concerned parties clearly acted to lower their work records and performance. They campaigned against reform of the JNR and were uncooperative throughout that process. Some also violated the rules of employment. Such reduced performance was reflected in their work records, which in turn served as the basis for the JNR's list of new employees; for this reason the percentage of members of KOKURO and other concerned parties not placed on the list was larger than those of others.

- 163.** The Government states that the plaintiffs in these cases are appealing in order to establish an employment relationship with the JR TT and hold local JRs liable for lost wages. However, the defendant JR TT maintains that the amount of five million yen per person for pain and suffering awarded in the first trial of the TEKKENKODAN case on 15 September 2005 was unreasonable, as it did not consider the hiring conditions of JNR workers by JR Hokkaido and JR Kyushu at the time of the division and privatization of JNR – which the Government had previously submitted information on to the Committee – nor did it consider the counselling and other re-employment support measures taken on behalf of those in need of re-employment. The plaintiffs’ and defendant’s opinions as to the appropriate compensation amount greatly diverge. Finally, the Government states that it has taken all necessary measures in respect of this matter, which was now pending in the courts between the plaintiffs and the JR TT, and that it would be extremely difficult to undertake any new measures.
- 164.** *The Committee takes note of the above information. It recalls once again that it has dealt with this case in some depth since 1998, with two detailed examinations on the merits (318th and 323rd Reports) and five follow-ups (325th, 327th, 331st, 334th and 343rd Reports). Since its first examination, and on each occasion throughout its treatment of this case, the Committee has consistently urged the parties concerned to engage in serious and meaningful consultations with a view to reaching a satisfactory solution to the underlying dispute. In light of its previous recommendations, and moreover in view of the complainants’ expressed desire to seek a settlement to the matters concerned, the Committee, while recognizing the divergence of views between KOKURO and the JR TT, observes that it is apparently not currently possible to bring the parties together with a view to rapidly finding a negotiated solution to these matters that have been pending for two decades now. Noting that six cases on the issues concerned are pending, the Committee trusts that the courts will bring a rapid resolution to this long-standing dispute. It requests the Government to keep it informed of developments in this respect, and to transmit copies of the court judgements in the various pending cases as soon as they are handed down.*

### **Case No. 2301 (Malaysia)**

- 165.** This case concerns the Malaysian labour legislation and its application which, for many years, have resulted in serious violations of the right to organize and bargain collectively, including: discretionary and excessive powers granted to authorities as regards trade unions’ registration and scope of membership; denial of workers’ right to establish and join organizations of their own choosing, including federations and confederations; refusal to recognize independent trade unions; interference of authorities in internal unions’ activities, including free elections of trade unions’ representatives; establishment of employer-dominated unions; arbitrary denial of collective bargaining. The Committee formulated extensive recommendations at its March 2004 meeting [see 333rd Report, para. 599] and last examined the follow-up to this case at its March 2007 meeting [see 344th Report, paras 118–126].
- 166.** In its communication of 19 September 2007, the Government states that its industrial relations system has enabled the country to move forward in creating employment and stabilizing socio-economic growth. Under the present laws, employees may join unions and unions may represent their members’ interests in the collective bargaining process; the system furthermore forbids employers from interfering with the right of workers to form and join trade unions and participate in lawful trade union activities. Its system of establishment unions, the Government adds, was modelled after the Japanese experience after noting the latter’s success in promoting harmonious employer–employee relationships.

- 167.** The Government states that checks and balances are built into the system, under which a hierarchical process of redress is available to aggrieved parties. Persons dissatisfied with a decision of the Director-General of Trade Unions (DGTU), for instance, may seek redress at the ministerial platform or through judicial review by the Malaysian High Court. Public sector employees also enjoy the right to collective bargaining, and in practice collective negotiations are carried out at the department and ministerial levels, with representatives of the unions concerned and all levels and categories of employee, at department or ministry joint council meetings held every three months. In these meetings representatives raise any issues regarding terms and conditions of employment, the welfare of public sector employees, and even the determination of wages in the public sector. The outcome of the National Joint Council (NJC) meeting will then be tabled at meetings between the NJC and the Congress of Unions of Employees in the Public and Civil Services (CUEPACS), an umbrella organization of public sector employees that has been granted the role of negotiating with the authorities on the overall aspects of terms and conditions of employment in the public sector.
- 168.** As regards the nine court challenges filed by several employers after the DGTU had ruled in favour of the unions in cases concerning collective bargaining rights, the Government attaches a table containing information (parties, year, subject, decision and status) on these cases and indicates that six of them have been resolved. For the remaining three cases, once they were resolved in the civil courts the Department would take the necessary steps to resolve the issues contained therein on the request of the trade unions.
- 169.** The Government indicates, with respect to the Committee's previous recommendation that workers and their organizations enjoy appropriate recourse to judicial redress with regard to decisions of the minister or administrative authorities affecting them, that such redress exists in the form of judicial review by the high courts. The Government further states that amendments to the Industrial Relations Act of 1967 and the Trade Unions Act of 1959 have been passed by the House of Representatives and were waiting to be tabled in the Senate. The Committee's previous recommendations on the legislation were not within the planned parameters of the proposed amendments to the Trade Unions Act of 1959; one of the proposed amendments, however, concerns the removal of a restrictive clause in the Trade Unions Act of 1959 that requires a member to have at least one year of experience in the establishment, trade, occupation or industry with which her trade union is connected.
- 170.** *The Committee recalls that it has commented upon the serious matters arising out of fundamental deficiencies in the legislation on many occasions, over a period spanning 16 years. It notes with deep concern that, in spite of its most recent request that the ongoing process of amending the industrial relations legislation take fully into account its recommendations, the proposed amendments to the Industrial Relations Act of 1967 and the Trade Unions Act of 1959 have been passed by the House of Representatives without consideration of those recommendations. Noting that the proposed amendments were waiting to be tabled in the Senate, the Committee once again urges the Government to fully incorporate its longstanding recommendations concerning the need to ensure that:*
- *all workers without distinction whatsoever enjoy the right to establish and join organizations of their own choosing, both at primary and other levels, and for the establishment of federations and confederations;*
  - *no obstacles are placed, in law or in practice, to the recognition and registration of workers' organizations, in particular through the granting of discretionary powers to the responsible official;*
  - *workers' organizations have the right to adopt freely their internal rules, including the right to elect their representatives in full freedom;*

- *workers and their organizations enjoy appropriate judicial redress avenues over the decisions of the minister or administrative authorities affecting them; and*
- *the full development and utilization of machinery for voluntary negotiation between employers or employers' and workers' organizations, with a view to regulating terms and conditions of employment by means of collective agreements is encouraged and promoted by the Government.*

**171.** *The Committee once again reminds the Government that it may avail itself of the ILO's technical assistance in the framework of the abovementioned project so as to bring its law and practice into full conformity with freedom of association principles.*

**172.** *The Committee notes the information regarding the court challenges filed by several employers after the authorities had ruled in favour of the unions in cases concerning collective bargaining rights. The Committee notes in particular that one case concluded in the signing of a collective agreement, and another with the employer voluntarily recognizing the union concerned; several other cases concluded with the Court overturning the Minister's decision to accord recognition to the union concerned. The Committee once again requests the Government to provide copies of the judgements handed down, so that it may examine the grounds on which the said decisions were made, and to take the necessary measures to ensure that final decisions in the cases still pending may be reached without further delay.*

**173.** *The Committee notes with regret that the Government provides no information concerning the 8,000 workers in 23 companies whose representational and collective bargaining rights were denied [see 333rd Report, para. 570]. The Committee once again urges the Government to rapidly take appropriate measures and give instructions to the competent authorities so that these workers may effectively enjoy rights to representation and collective bargaining, in accordance with freedom of association principles.*

### **Case No. 2234 (Mexico)**

**174.** At its meeting in March 2007, the Committee requested the Government to keep it informed of the final decision in the legal proceedings currently under way against the trade union official Mr Fernando Espino Arévalo and the other participants in the industrial action of 8 August 2002 in the metropolitan passenger train system [see 344th Report, para. 129]. The trade union official in question enjoyed constitutional immunity because he was a legislator.

**175.** In its communication dated 17 September 2007, the Government reported that a decision had been issued on 12 March 2007 confirming that criminal proceedings would not be pursued with regard to the complaint filed by the legal representative of the Public Transport Authority relating to the alleged perpetration of the offences of "coalition of public servants" and "attacks on means of communication" and that this decision remains final.

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

### **Case No. 2338 (Mexico)**

**177.** During its examination of the case in March 2006, the Committee requested the Government to take the necessary measures to ensure that the authorities of the State of Morelos carry out any inquiry into the alleged assault of workers of the enterprise CONFITALIA SA de CV who were on picket lines, and to request the Local Conciliation

and Arbitration Board of the State of Morelos to provide information on the reasons why it had not initiated the procedure for determining the circumstances of the strike [see Report 340, para. 138].

- 178.** At its meeting in June 2007, the Committee noted the Government's statement to the effect that the Local Conciliation and Arbitration Board of the State of Morelos had declared that cases Nos 02/580/01 and 02/481/01 fell within its purview. Both cases result from the holding of a strike in response to violations of the collective labour agreement concluded between the Progressive Trade Union of Mexican In-Bond Industry Workers (SPTIMRM) and the company CONFITALIA SA de CV. The Government specifies that on 28 April 2006, the plenary session of the Local Conciliation and Arbitration Board of the State of Morelos handed down a decision to the effect that, inter alia, it had ordered CONFITALIA SA de CV to make the following payments and settlements: wages due but unpaid; holiday pay for the entire period of service; payment of 75 per cent of the real amount of workers' wages, by means of paid holidays for the entire period of service; payment of wages due, from the date when work was suspended until 28 April 2006 when the relevant decision was handed down; payment of compensation amounting to three months' minimum salary as laid down in article 123, section A, clause XXI, of the Constitution of the United Mexican States; payment of a long-service bonus; and payment of compensation consisting of 20 days' wages for each year of service, in terms of the considerations and circumstances contained in the documentary evidence and the decision respectively.
- 179.** The Government added that according to the Local Conciliation and Arbitration Board of the State of Morelos, the SPTIMRM on 26 May 2006 initiated a direct *amparo* action (appeal for the enforcement of constitutional rights) against the ruling in question, deeming that it infringed the guarantees concerning grounds and reasons provided in articles 14 and 16 of the Mexican Constitution. On the same date, the official receiver, which represented CONFITALIA SA de CV because the company had declared bankruptcy, declined to comply with the final decision given by the Arbitration Board and initiated an *amparo* action in which it requested the suspension of the ruling in question. Currently, both *amparo* procedures are under way and have been referred to the competent collegiate circuit court, to allow this federal authority to examine and rule on the *amparo* cases in question. The Local Conciliation and Arbitration Board of the State of Morelos stated that it would comply with the decision of the competent collegiate circuit court and implement the final ruling.
- 180.** At its meeting in June 2007, the Committee made the following recommendation [see 346th Report, para. 125]:

The Committee notes this information and the decisions of the Conciliation and Arbitration Board of the State of Morelos which appear to cover payment of compensation and of salaries relating to the period of the strike, and which have been appealed, and requests the Government to communicate any decision handed down by the collegiate circuit court on the *amparo* actions brought by both parties. Furthermore, the Committee reiterates its previous recommendation that the authorities of the State of Morelos should conduct an inquiry into the allegations of attacks against workers of the enterprise CONFITALIA SA de CV and inform the Committee of the reasons why the Conciliation and Arbitration Board of the State of Morelos has not initiated the procedure for determining the circumstances of the strike.

- 181.** In its communication of 16 October 2007, the Government declared that the Local Arbitration and Conciliation Board of the State of Morales indicated that, in accordance with sections 920, 926, 930 and 937 of the Federal Labour Act, the strike procedure is divided into specific stages or phases, defined in general terms as: (1) *the preparation period*; (2) *the pre-strike period*; (3) *the strike*, understood as a work stoppage; (4) *a decision on non-existence or illegality* of the strike (if such a decision is requested); and, (5) *a ruling on liability*, where the Local Conciliation and Arbitration Board decides

whether the responsibility for the strike rests with the employer. Under these conditions, the Local Conciliation and Arbitration Board of the State of Morelos proceeded to make its decisions, to publish them and to initiate the implementation procedure. On their part, the parties involved, including the SPTIMRM, filed their petitions for the protection of their constitutional rights (*amparo*) which they thought appropriate, these being the same petitions on which rulings existed by the Second Collegiate Court of the 18th Circuit as follows:

No.	Labour Case	Appellant	Amparo Case No.	Ruling
1	02/580/01	Progressive Trade Union of Mexican In-Bond Industry Workers	AD 684/2006 26 May 2006	4 July 2007 Case dismissed
2	02/480/02	Progressive Trade Union of Mexican In-Bond Industry Workers	AD 680/2006 26 May 2006	No <i>amparo</i> or protection granted
3	02/481/02	Progressive Trade Union of Mexican In-Bond Industry Workers	AD 682/2006 26 May 2006	No <i>amparo</i> or protection granted
4	02/580/01	Confitalia and Grupo Covarra	AD 685/2006 26 May 2006	Grounds for <i>amparo</i> and protection
5	02/480/02	Confitalia and Grupo Covarra	AD 682/2006 26 May 2006	<i>Amparo</i> and protection granted in relation to the ruling on 20 days per year (which is overturned)
6	02/481/02	Adoc, SA de CV	AD 682/2006 26 May 2006	<i>Amparo</i> and protection granted in relation to the ruling on 20 days per year (which is overturned)

**182.** The Government concludes by indicating that according to the Local Conciliation and Arbitration Board of the State of Morales, the analysis carried out has satisfactorily determined the circumstances of the strike, and that these considerations became the basis of the relevant rulings.

**183.** *The Committee takes note of this information and requests the Government to send it the texts of the relevant court rulings.*

### **Case No. 2525 (Montenegro)**

**184.** The Committee last examined this case at its June 2007 session [see 346th Report, paras 1219–1243], concerning the exercise of the right to strike at the aluminium factory, and made the following recommendations:

- (a) The Committee requests the Government to amend the Law on Strike, in consultation with the social partners, so as to bring it into conformity with the principles of freedom of association and to keep it informed in this respect.
- (b) With regard to the damages claimed by the employer from the eight members of the strike committee, the Committee requests the Government and the complainants to provide further information on the employers' claim and specifically, on the authority to which the claim was submitted and on the outcome, if any, of such proceedings.

185. In a communication dated 31 August 2007, the Government indicates that if, after the assessment, it decides that there is a need to amend the Law on Strike, it will provide for it in the plan of activities for the upcoming year, of which it will inform the Committee.
186. With regard to the complainant's allegation that the enterprise hired armed security guards to intimidate strikers, the Government indicates that an inspection carried out by the Republican Labour Inspection on 16 June 2006 established that the strike committee and the participants failed to respect the decision of the enterprise on the minimum services to be maintained during the strike. In these circumstances, the management was obliged to ensure security of persons and property; to that end it had hired security guards from a specialized agency. While performing their duty of securing property, security guards were not disturbing the strikers.
187. With regard to the question of damages claimed by the employer from the eight members of the strike committee, the Government indicates that according to section 14(1) of the Law on Strike, "participation in a strike under conditions imposed by the legislation shall not represent a violation of the working duties, shall not represent grounds for initiation of the procedure to determine disciplinary and material responsibility of an employee or for removing an employee from work, and shall not result in cessation of his or her employment". According to paragraph 5 of the same section, "organizers and participants of the strike, which have not been organized in accordance with the law, shall not enjoy protection provided for in paragraphs (1), (3) and (4) of this section". The Government further explains that the procedure for compensation of damage may be initiated before the Basic Court in accordance with the relevant national regulations. The Government, as an executive authority, has no power to interfere with the work of the judiciary. Thus, the decision with regard to the compensation of damage claimed by the enterprise management from the strike committee which, during the strike failed to respect the provisions of the Law on Strike, is a matter for the relevant Court.
188. *The Committee notes the information provided by the Government. With regard to the Law on Strike, the Committee recalls that sections 10 and 10(a) of this Law provide that the minimum services, where negotiation has failed, are to be determined by the employer. The Committee considers that, unilateral determination by the employer of minimum service, if negotiation has failed, is not in conformity with the principles of freedom of association. The Committee is of the opinion that any disagreement in this respect should be settled by an independent body having the confidence of the parties concerned. It therefore once again requests the Government to take the necessary measures to amend the Law on Strike, in consultation with the social partners, so as to bring it into conformity with the principles of freedom of association and to keep it informed in this respect.*
189. *The Committee further requests the Government to keep it informed of the outcome of the proceedings with regard to the damages claimed by the employer from the eight members of the strike committee and to transmit any court judgements handed down in this regard.*

### **Case No. 2275 (Nicaragua)**

190. On its last examination of the case, at its November 2006 meeting, the Committee noted that the complainant (National Federation of "Heroes and Martyrs" Trade Unions of the Textile, Clothing, Leather and Footwear Industry (FNSHM)) stated with regard to the "Idalia Silva" Workers' Trade Union (STIS) in the company Hansae Nicaragua SA in the export processing zone that the Second Labour Court of Managua had handed down a ruling ordering that the case concerning dissolution of the trade union be shelved since neither of the parties had expedited the proceedings, and that a subsequent ruling ordered the dissolution of the trade union, followed by cancellation of the trade union's registration by the Ministry of Labour (notified on 28 November 2005) and pointed out the



contradiction between the two judicial decisions, which also violate the principle of double jeopardy. Moreover, the General Secretary of the trade union, Ruth Meza Orozco, was dismissed on 23 December 2005 on grounds that she was no longer covered by trade union immunity, and then Zoila Cáceres, Secretary of the organization, was also dismissed. The Committee requested the Government to reply without delay to that additional information. Also, the Committee requested the Government to send the rulings handed down and information concerning the alleged threats against Marjorie Sequeiro and Johana Rodríguez [see 343rd Report, paras 143–145].

- 191.** In its communication of 3 September 2007, the Government stated with regard to the state of the STIS in the company Hansae Nicaragua SA, that on 3 September 2004, the trade union held an extraordinary general assembly, in which it restructured its committee, which was registered including a list of 28 signatures of participating members. On 7 March 2005, in an extraordinary general assembly, the trade union again restructured its committee, including a list of 30 signatures. On 12 July 2005, the trade union held an extraordinary general assembly in which it elected to change its committee, which was then registered. In the meantime, the Department of Trade Union Associations received a total of 20 copies of requests to leave the union and six copies of requests from members of that union to leave their posts at the company Hansae Nicaragua SA. The Government adds that, in accordance with case No. 302 and ruling No. 128 of the Second District Labour Court of 12 July 2005, it was decided, based on articles 206, 213 and 347 of the Labour Code: (1) to go ahead with the dissolution of the STIS in the company Hansae Nicaragua SA, as requested by the general legal representative of the company Hansae Nicaragua SA; (2) once the ruling was final, to serve an official notice to the Department of Trade Union Associations of the Ministry of Labour. The ruling was not appealed and was referred for advice to the Managua District Court of Appeal. In ruling No. 176/2005 of 20 October 2005, the Labour Tribunal of the Managua District Court of Appeal ruled, in accordance with articles 271, 272 and 347 of the Labour Code, to uphold the ruling that had been referred for advice to the Second Labour Judge of the Managua District. On 1 December 2005, the Second Labour Judge of the Managua District ordered the Department of Trade Union Associations to cancel the STIS in the company Hansae Nicaragua SA, based on the aforementioned rulings. In compliance with the ruling, the Department of Trade Union Associations proceeded to remove the trade union from the trade unions' register maintained by the Department. *The Committee notes this information and understands that the reason for cancelling the registration was the reduction in the minimum number of workers needed to form a trade union (article 206 of the Labour Code). In this regard, the Committee cannot rule out that the 20 requests to leave the union and the resignations of union members from the enterprise were a result of anti-union activity. Therefore, the Committee requests the Government to take the necessary measures so that an investigation is carried out to determine the reasons behind the members leaving the union and resigning, which led to the cancellation of the union registration, and to keep it informed in this regard.*
- 192.** With regard to the alleged dismissal of Ruth Meza Orozco, the Government notes that the Regional Labour Inspectorate for the Agribusiness Sector had no record of the alleged cancellation of Ruth Meza Orozco's contract, in her capacity as General Secretary of the STIS, as mentioned in the complaint. With regard to the situation of Zoila Cáceres Rodríguez, the Government reports that on 7 October 2005, the Regional Labour Inspectorate for the Agribusiness Sector received a request from the human resources manager and the general legal representative of the company Hansae Nicaragua SA to cancel her contract as an employee and as the Secretary of the organization, based on articles 48 and 231 of the current Labour Code, Act No. 185. On 11 October 2005 the Regional Labour Inspectorate for the Agribusiness Sector issued an official notice to all parties to appear for conciliatory proceedings. On 18 October 2005, Ms Cáceres Rodríguez appeared and signed the request. On 19 October the trial began. On 23 November 2005, in

resolution No. 076-05, the Regional Labour Inspectorate for the Agribusiness Sector approved the request for dismissal made by the human resources manager and the general legal representative of the company Hansae Nicaragua SA, and notified both parties on 28 November 2005. Zoila Cáceres Rodríguez appealed this measure on 29 November 2005. On 30 November 2005, the Regional Labour Inspectorate for the Agribusiness Sector received the appeal and on 13 December 2005, the General Labour Inspectorate issued resolution No. 228-05 which rejected the appeal. *The Committee takes note of this information and requests the Government to report on the reason for the dismissal of the union official Zoila Cáceres Rodríguez and to send in the corresponding resolutions, as well as to indicate whether the official in question appealed the decision of the General Labour Inspectorate before the judicial authority.*

193. *Lastly, the Committee again requests the Government to send the rulings handed down and information concerning the alleged threats against union members Marjorie Sequeiro and Johana Rodríguez.*

### **Case No. 2354 (Nicaragua)**

194. The Committee examined this case at its March and November 2006 sessions and, on that occasion, expressed the hope that the judicial authority in the second instance would hand down a decision soon and requested the Government to keep it informed of the judgement rendered in relation to the dismissal of trade union leaders Norlan José Toruño Araúz and José Ismael Rodríguez Soto and, if a reinstatement order was issued, to take the necessary measures to comply with that order immediately [see 340th Report, paras 1143–1158; and 343rd Report, paras 146–148].
195. In a communication of 5 October 2007, the Government points out that the teachers in question filed an appeal against the judicial decision in the first instance with the Managua Appeals Court, which is currently pending judgement.
196. *The Committee takes note of this information and regrets the long time that has elapsed without a final judicial decision in relation to the dismissal of the trade union leaders in 2003. The Committee recalls that justice delayed is justice denied, hopes that the Managua Appeals Court will hand down a decision soon and requests the Government to send it a copy of the judgement rendered.*

### **Case No. 2006 (Pakistan)**

197. The Committee last examined this case at its June 2006 meeting when it strongly urged the Government to lift immediately the ban on trade union activities at Karachi Electric Supply Corporation (KESC) and to restore without delay the rights of the KESC Democratic Mazdoor Union as a collective bargaining agent [346th Report, paras 142–144].
198. In its communication dated 13 June 2007, the Government indicates that trade union activities in the KESC have started and that a referendum to determine the collective bargaining agent (CBA) has been ordered by the National Industrial Relations Commission (NIRC). In its subsequent communication, dated 6 November 2007, the Government indicates that there is no restriction on union activities in the KESC. The referendum to elect a new CBA is under way and the following unions, including the complainant trade union, are taking part in it: the KESC Ltd Democratic Mazdoor Union, the KESC Ltd Labour Union, the KESC Ltd Peoples' Workers' Union, the KESC Ltd United Workers' Front, the KESC Ltd Masawal Workers' Union and the KESC Ltd Employees' Power League. The Government further explains that, at first, the referendum was set, with the consent of all participating trade unions, for 25 November 2006. However, the referendum

could not be held due to the issuance of a prohibitory order by the chairperson of the NIRC. The KESC management has filed an appeal before the NIRC bench against the order of its chairperson. The referendum will proceed as soon as the case pending before the NIRC bench is decided. Further delay was due to the fact that the KESC Ltd Democratic Mazdoor Union applied to the NIRC chairperson with a request to grant voting rights to contract employees, which the NIRC allowed. Finally, all unions will be participating in the referendum. There is no ban or restriction on union activities in the KESC.

199. *The Committee takes due note of the information provided by the Government. The Committee, stressing the need for social dialogue to be re-established, expects that the referendum for determining the CBA will take place in the very near future and requests the Government to keep it informed of its outcome.*

### **Case No. 2229 (Pakistan)**

200. The Committee last examined this case at its November 2005 meeting [see 338th Report, paras 275–287]. On that occasion, it took note of the intent of the Government to amend several provisions of the Industrial Relations Ordinance (IRO) and to resolve the issue concerning the labour judiciary system and expected that the measures taken will enable the workers of the Employees' Old-Age Benefits Institution (EOBI) to enjoy the right to establish and join organizations of their own choosing. The Committee further once again requested the Government to provide information on the alleged acts of anti-union discrimination against trade union officers of the EOBI Employees' Federation of Pakistan and on the measures taken to conduct an independent investigation in this respect.
201. In its communications dated 13 June and 6 November 2007, the Government indicates that the draft Bill containing amendments to the IRO was submitted to the Cabinet for its consideration to resolve the grievances of the workers, including the complainant. The Cabinet established a committee to consider the amendments where the matter is presently pending.
202. *The Committee takes note of the information provided by the Government in respect of the legislative amendments. Recalling its previous requests to the Government, the Committee urges it to amend the IRO as soon as possible so as to bring it into full conformity with Conventions Nos 87 and 98, ratified by Pakistan. It requests the Government to inform the Committee of Experts on the Application of Conventions and Recommendations, to which it refers the legislative aspects of this case, of the developments in this regard.*
203. *The Committee regrets that once again, the Government has failed to provide its observations on the alleged acts of anti-union discrimination against trade union officers of the EOBI Employees' Federation of Pakistan and on the measures taken to conduct an independent investigation in this respect. The Committee emphasizes that the Government should recognize the importance for their own reputation of formulating detailed replies to the allegations brought by complainant organizations, so as to allow the Committee to undertake an objective examination [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 24]. The Committee reiterates its previous request and strongly urges the Government to be more cooperative in the future.*

### **Case No. 2520 (Pakistan)**

204. The Committee examined this case at its November 2007 meeting [see 348th Report, paras 1016–1036] and on that occasion it formulated the following recommendations:

- (a) Deploring that it has not received the Government's observations, despite the time that has elapsed since the submission of the complaint, the Committee strongly urges the Government to be more cooperative in the future.
- (b) The Committee requests the Government to take the necessary measures to revoke the Sindh Registrar's Cancellation Order so as to reinstate the registration of the KSLU and of any other unions that may have been dissolved due to the administrative control of the employer concerned by the Ministry of Defence Production. The Committee requests the Government to keep it informed of the steps taken in this regard.
- (c) The Committee requests the Government to review and amend section 12(3) of the IRO, 2002, so that the failure to seek or obtain collective bargaining agent status does not constitute grounds for the cancellation of a trade union's registration.
- (d) The Committee requests the Government to initiate an investigation into the obstacles to collective bargaining encountered by the KSLU during the period 2003–06 and to promote future collective bargaining with the union, if it still found to be representative of the workers at the Karachi Shipyard and Engg Works Ltd.

**205.** In its communication dated 6 November 2007, the Government indicates that the Karachi Shipyard and Engineering Works (KS&EW) Ltd has been engaged to carry out defence and strategic tasks and has been transferred under the control of the Ministry of Defence Production. In view of the change of the status of KS&EW, the Industrial Relations Ordinance 2002 (IRO) became inapplicable in terms of its section 1(4). Accordingly, the Registrar of trade unions cancelled the registration of all trade unions at KS&EW. Trade unions, including the union enjoying the collective bargaining agent status (CBA), have filed constitutional petitions before the Sindh High Court in Karachi challenging the decision of cancellation of registration, where the matter is currently pending.

**206.** *The Committee notes the information above and regrets that no measures have been taken by the Government to implement the Committee's recommendations. With regard to the deregistration of the Karachi Shipyard Labour Union (KSLU), the Committee, referring to the previous examination of this case [see para. 1032], once again emphasizes that civilian workers in the manufacturing establishments of the armed forces should have the right to establish organizations of their own choosing without previous authorization, in conformity with Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 227]. It further recalls that in Case No. 2229, mainly concerning the IRO 2002, the Committee stressed that the guarantee of the right of association should apply to all workers and that the members of the armed forces who can be excluded from the application of Convention No. 87 should be defined in a restrictive manner; civilian workers in the manufacturing establishments or other installations or services of the armed forces should have the right to establish and join organizations of their own choosing [see 330th Report, para. 941]. The Committee had previously concluded that the cancellation of the KSLU's registration runs contrary to the freedom of association principles mentioned above. It therefore once again requests the Government to take the necessary measures to revoke the Registrar's order, so as to reinstate the registration of the KSLU and of any other unions that may have been dissolved due to the administrative control of the enterprise concerned by the Ministry of Defence Production. The Committee requests the Government to keep it informed of the steps taken in this regard.*

**207.** *With regard to the Committee's requests to review and amend section 12(3) of the IRO 2002, so that the failure to seek or obtain collective bargaining agent status does not constitute grounds for the cancellation of a trade union's registration, the Committee notes with regret that no information was provided by the Government. With reference to the abovementioned Case No. 2229 and the follow-up information submitted by the Government thereon, the Committee expresses the hope that section 12(3) will be amended along with other provisions of the IRO, as requested by the Committee, in the framework of*

*the draft legislative amendments under way. It requests the Government to inform the Committee of Experts on the Application of Conventions and Recommendations, to which it refers the legislative aspects of this case, of the developments in this regard.*

- 208.** *The Committee regrets that no information was provided by the Government with regard to the Committee's previous request to initiate an investigation into the obstacles to collective bargaining encountered by the KSLU during the period 2003–06 and to promote future collective bargaining with the union, if it still found to be representative of the workers at the Karachi Shipyard and Engg Works Ltd. The Committee emphasizes that the Government should recognize the importance for their own reputation of formulating detailed replies to the allegations brought by complainant organizations, so as to allow the Committee to undertake an objective examination [see **Digest**, op. cit., para. 24]. The Committee reiterates its previous request and strongly urges the Government to be more cooperative in the future.*

### **Case No. 2510 (Panama)**

- 209.** At its meeting in June 2007, the Committee made the following recommendations [see 346th Report, para. 1259]:

- The Committee requests the Government to examine, in conjunction with the complainant federation, the situation regarding the Secretary-General of the Association (which is in the process of being established) of Officials of the Interoceanic Regional Authority (AFARI), Ms Vidalia Quiroz, who contrary to the other reinstated union leaders, is receiving, according to the allegations, a lower salary in the new institution to which she has been reassigned than she earned previously. The Committee requests the Government to ameliorate, correct and resolve the situation if it finds that anti-union discrimination occurred. The Committee requests the Government to keep it informed of developments in this respect.
- The Committee requests the Government to ensure that the leaders of the AFARI have been paid the salaries and other benefits due to them and to keep it informed of developments in this respect.

- 210.** In its communication of 17 November 2007, the National Federation of Public Employees and Public Service Enterprise Workers (FENASEP) rejects the previous statements made by the Government and indicates that Act No. 9 on administrative careers provides that the leaders of legally-recognized associations of public officials “cannot be subject to reductions in the Government labour force” and that the salaries owed to the union leaders, as agreed with FENASEP, have not been paid in full.

- 211.** In its communication of 17 October 2007, the Government reiterates that the alleged dismissals of public officials were a result of the Interoceanic Regional Authority ceasing to exist, which meant that contracts were terminated on 31 December 2005 and replaced by temporary contracts at the Ministry of Economy and Finance from 3 January 2006. The Government adds that it does not owe any legal benefits to the former public officials. The trade union leaders are not entitled to the 13th-month payment of December 2006 as they only worked until 13 July 2006. The former public officials – including trade union leaders such as Ms Vidalia Quiroz – were recruited to work for one year in the Social Investment Fund. The Government indicates that, after being consulted about the difference in salary with regard to her previous post, Ms Vidalia Quiroz accepted her post and new functions as at that time there was no similar position with the same salary as the one she received at the Interoceanic Regional Authority. The Government reiterates that salaries and benefits have been paid in full.

212. *The Committee takes note of this information and, in view of the differing accounts given by the Government and the complainant organization, invites the parties to discuss these issues in the bipartite committee set up by the Government and FENASEP.*

### **Case No. 2285 (Peru)**

213. The Committee last examined this case at its session in March 2007. The case refers to allegations that taxes were being levied on the Federation of Peruvian Light and Power Workers (FTLFP) as a form of anti-union harassment [see 338th Report, paras 295–299 and 344th Report, paras 164–166]. At that session, the Committee took note of the additional information provided by the FTLFP on the taxes that were, according to the FTLFP, being claimed from time to time and the allegation that the National Public Records Office was hindering and preventing the inclusion of the national congresses of the FTLFP in the public register (inclusion of the Executive Committee in the register). The Committee requested the Government to send its observations on the matter [see 344th Report, para. 166].
214. In its communications of 12 March and 26 October 2007, the Government stated that the requirement to pay taxes did not violate the provisions of trade union legislation and that it was the responsibility of the complainant federation to submit an application for exemption from the property tax. With regard to the inclusion in the register, on 13 January 2006, the Secretary-General and the Legal Defence Secretary of the FTLFP had requested the Ministry of Labour and Employment Promotion for certified copies of various documents, which had been provided on 18 May 2006. The Government indicates that the issue referred to in the complaint had occurred earlier, when in 2005 the Secretary-General of the complainant federation had requested certified copies when he no longer occupied the position, but had nevertheless identified himself as Secretary-General. Moreover in a communication dated 3 March 2008, the Government indicated that it would provide new information.
215. *The Committee takes note of the information provided by the Government and invites the complainant organization to submit an application for exemption from the property tax which, according to the Government, it is entitled to do. Given that the tax issue raised by the complainant organization is of a technical nature and has a certain complexity, as is shown by the enclosed documents and the variety of different taxes, the Committee also requests the Government to take measures to enable the National Public Records Office and the complainant organization to examine the issue of the organization's tax obligations in order to avoid any possible discrimination.*

### **Case No. 2386 (Peru)**

216. The Committee last examined this case at its March 2007 meeting [see 344th Report, paras 170–173], at which it regretted that despite the time that had elapsed, the Government had not sent the information requested in connection with the following recommendations:
- (a) The Committee requests the Government to promote collective bargaining with the Unified Trade Union of Electricity Workers of Lima and Callao (SUTREL) in the Edelnor S.A.A. enterprise and to keep it informed of the outcome of the appeal lodged against the arbitral award which confirmed the validity of the collective agreement concluded with the non-unionized workers in the enterprise.
  - (b) The Committee requests the Government, if it is found that the workers of the Cam-Peru S.R.L. enterprise are affiliated to SUTREL and that this is the most representative trade union, to take measures to promote collective bargaining between this trade union and Cam-Peru S.R.L. Moreover, the Committee requests the Government to keep it

informed of the outcome of the proceedings for protection of constitutional rights (*amparo*) initiated by SUTREL against the decision of the administrative authority which found that the enterprise's refusal to engage in collective bargaining was justified.

- (c) The Committee requests the Government to ensure that Cam-Peru S.R.L. deducts trade union dues as ordered by the judicial authority. As regards the failure to deduct trade union dues by Edelnor S.A.A., the Committee requests the Government to provide a copy of any ruling handed down in this regard, and to guarantee respect for the principle that the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided. The Committee requests the Government to keep it informed of developments in both enterprises.
- (d) The Committee urges the Government to carry out an inquiry concerning the payment of a bonus to workers for withdrawing from SUTREL and, if the complainants' allegations are confirmed, to take the necessary measures to remedy the anti-union practices observed and their consequences. The Committee requests the Government to keep it informed of the results of this inquiry.
- (e) As regards the alleged threats by Edelnor S.A.A. to restrict the activity of the SUTREL trade union branch with regard to the distribution of its newspaper, the Committee reminds the Government of the resolution concerning trade union rights and their relation to civil liberties, adopted by the International Labour Conference in 1970, which defines freedom of opinion and of expression, among others, as essential for the normal exercise of trade union rights. The Committee requests the Government to investigate the matter and, if necessary, to take the necessary measures to ensure that these rights are guaranteed.
- (f) Lastly, recalling that trade union leave should not be unreasonably denied and that this matter is regulated by Peruvian legislation, the Committee requests the Government to ensure compliance with the legislation on this subject and to keep it informed of developments in this regard.

**217.** Furthermore, the Committee requested the Government to send its observations concerning the comments submitted by the Unified Trade Union of Electricity Workers of Lima and Callao (SUTREL) in its communication dated 21 September 2006. Specifically, SUTREL alleges that the Compañía Americana de Multiservicios Peru SRL (Cam-Peru) enterprise is refusing to: (1) comply with the ruling of the Supreme Court of Justice of 20 January 2006 ordering recognition of the right of workers to join SUTREL, recognition of their trade union leaders and respect for the right to bargain collectively; (2) comply with the Subdirectorate Decision of 14 July 2005 and Directorate Decision No. 07-2006-MTPE/2/12.2 of 9 January 2006, issued by the administrative labour authority, which found that Cam-Peru's opposition to the list of claims for the period 1 January to 31 December 2005 was unfounded; (3) respond to the call from the labour authority to participate in conciliation in relation to collective bargaining in the context of case No. 122384-2004-DRTPEL-DPSC-SDNC; (4) submit to arbitration for the settlement of the 2005 list of claims, thereby giving rise to a serious labour dispute, which could have unforeseen consequences; (5) recognize the right of members of SUTREL to engage in collective bargaining, by opposing the submission of the list of claims for the period 1 January to 31 December 2006, despite the fact that its position was held to be unfounded by the first-level labour authority in a decision of 23 June 2006; (6) deduct the extraordinary trade union dues, as duly requested by the trade union by notarized letters dated 13 March and 3 July 2006, in accordance with the agreement adopted by the assemblies of the SUTREL workers; and (7) receive and attend to communications sent by SUTREL drawing its attention to labour, social, economic, cultural and/or safety issues as they arise, therefore forcing SUTREL to send such communications through a notary.

**218.** The Committee notes the communication dated 22 March 2007 from the General Confederation of Workers of Peru (CGTP) reiterating the allegations made by SUTREL, in particular those relating to the refusal of Cam-Peru to engage in collective bargaining.

- 219.** In a communication dated 12 March 2007, the Government points out with regard to Cam-Peru that it was indicated by means of official letter No. 976-2006-MTPE/9.1 that the reply from the 12th Civil Court in Lima was still pending concerning the outcome of the *amparo* appeal initiated by SUTREL against the Cam-Peru. By means of official letter No. 2003-28131-0-0100-J-CI-12, the assigned judge of the 12th Civil Court of Lima (High Court of Lima) stated that ruling No. 8 of 19 May 2004 handed down by that court set aside the *amparo* appeal and that a ruling of 26 August 2005 of the First High Civil Chamber of Lima upheld the original ruling, as a result of which ruling No. 11 ordered that the proceedings be discontinued.
- 220.** In a communication dated 27 October 2007, the Government states that through an official letter dated 10 May 2007 it drew the attention of Edelnor SAA to the 338th Report of the Committee, approved by the Governing Body at its 294th Session (Geneva, November 2005) and containing the Committee's examination of Case No. 2386 in paragraphs 1229-1256, and referred to the recommendations contained in paragraph 1257. By means of a communication dated 23 May 2007, in which it refers to the recommendation to promote collective bargaining with SUTREL in the enterprise, the enterprise submitted a copy of the collective agreement dated 21 March 2005 which was concluded with SUTREL and is valid until 31 December 2008. According to the enterprise, this document disproves the statement concerning the refusal of the enterprise to engage in collective bargaining with SUTREL. With regard to the Committee's request to be kept informed of the outcome of the legal proceedings initiated in connection with the arbitral award which confirmed the validity of the collective agreement concluded with the non-unionized workers in the enterprise, the enterprise points out that there may have been a mistake as this collective agreement was never challenged, and the legal proceedings referred to in the Committee's report actually relate to the appeal against the arbitral award lodged by SUTREL before the judicial authority by means of the administrative appeal under case No. 038-2004, which was declared unfounded in the first instance and upheld in the second instance, as can be seen, according to the enterprise, from the accompanying documents.
- 221.** The Government affirms that it is also important to highlight the statement in its report by the Regional Directorate of Labour and Employment Promotion in Lima-Callao in relation to this case: namely, that no summons was issued against Edelnor SAA in any of the legal proceedings instituted by the bargaining commission of the trade union branch of workers of Cam-Peru SRL and SUTREL. An analysis of the aforementioned report shows that the successive lists of claims presented by the complainant trade unions have one thing in common: they were rejected by the administrative labour authority, since the objection lodged by Cam-Peru was found to be justified in all cases except the one corresponding to the list of claims from 2005. In the latter case, an unnumbered subdirectorate decision dated 14 July 2005, upheld by Directorate Decision No. 07-2006-MTPE/2/12.2 dated 9 January 2006, declared the objection lodged by Cam-Peru SRL unfounded, and therefore the collective bargaining called for by the negotiating commission of the trade union branch of workers of Cam-Peru SRL of SUTREL was found to be justified, and Cam-Peru was ordered to engage in collective bargaining. In this regard it should be pointed out that arrangements were made on 15 February 2006 to begin collective bargaining, in accordance with the Industrial Relations Act, approved by Supreme Decree No. 010-2003-TR and the regulations issued thereunder. A request was then made by the workers' representatives that the employer be required to submit the collective bargaining process to arbitration. On 21 February 2007, the parties were instructed to continue the collective bargaining process, without prejudice to their right to submit the dispute to arbitration, in accordance with the provisions of section 61 of the single consolidated text of the Industrial Relations Act, approved by Supreme Decree No. 010-2003-TR. By means of appeal No. 055971-2007, Cam-Peru SRL stated its non-acceptance of the arbitration ordered by the Subdirectorate for Collective Bargaining on 9 March 2007. In this regard it



should be pointed out that, as stated by Cam-Peru SRL in its communication of 15 May 2007, an administrative appeal was lodged in relation to this procedure, which is currently pending, and information on the outcome of this appeal will be submitted to the Committee as soon as it is available. Finally, with regard to the list of claims relating to 2006, which constitutes Case No. 213678-2005-DRPEL-DPSC-SDNC, the decision of the Subdirectorate for Collective Bargaining dated 17 January 2007 found the objection lodged by Cam-Peru SRL in relation to the list of claims covering 1 January to 31 December 2006 to be justified. This decision is based mainly on the fact that, in response to the legal action instituted by the Unitary Trade Union of Workers of Electrolima, Electrical Concessionary and Related Enterprises (SUTEECEA), which relates directly to the matter covered by the objection lodged in so far as it principally concerns the recognition of trade union representation, the judicial authority found, in order to resolve the proceedings, that Cam-Peru SRL does not carry out individualized activities in the water, gas and/or energy fields, but instead complementary activities, as a result of which the enterprise could not be deemed to be carrying out work mainly in the electrical field. The ruling issued by the administrative labour authority also refers to paragraph 5.3 of section 5 of the General Administrative Procedure Act, which provides that, in specific cases, the purpose or content of the Administrative Act may not contradict, inter alia, final court orders. Furthermore, section 204 of this Act provides that Acts which have been upheld by a final court order, inter alia, shall under no circumstances be open to revision by the administrative authorities. This ruling was upheld by subdirectorate decision No. 020-2007-MTPE/2/12.2 of 26 March 2007, which ordered that the proceedings be discontinued. The Government indicates that file No. 293989-2007 MTPE/2/12.210 on the list of claims filed by SUTREL for the period 2008 is under review and was rejected by the Cam-Peru SRL company on the basis that the trade union cannot represent its workers given that they belong to a branch of activity other than the electricity sector. It also indicates that on 30 November 2005 a collective agreement was reached for the period 1 January 2006 to 31 December 2009. The Government indicates that according to the trade union the company belongs to the electricity sector as indicated by the Supreme Court in its decision of 20 January 2006. The trade union also presented a list of claims to the Edelnor SAA company but the latter opposed it. The trade union indicates that through Deed No. 31344-2008, the Edelnor SAA company ceded its activities relative to electricity to Cam-Peru SRL. The file in question is pending for decision. *The Committee notes this information and requests the Government to take the necessary measures to promote collective bargaining between SUTREL and Cam-Peru.*

- 222.** The Government points out that arrangements have been made for inspection activities to verify the request made by the Committee on Freedom of Association with regard to: ensuring that Cam-Peru SRL is deducting trade union dues as ordered by the judicial authority; the failure by Edelnor SAA to deduct trade union dues and the payment of a bonus to workers who withdraw from SUTREL; and the alleged threats by Edelnor SAA to restrict the activity of the trade union branch of SUTREL with regard to the distribution of its newspaper. The Government states that considering the severe difficulties which have arisen following the earthquake which affected the normal performance of the duties of the institution, these inspection activities have suffered some delay. Currently, inspections are being carried out in Edelnor SAA and Cam-Peru, based on inspection orders Nos 5555 and 5557 respectively. In the case of Edelnor SAA, violations of social and labour laws have been found. It remains now to issue the report. With regard to Cam-Peru, according to the latest information, the investigation is under way. The company has been ordered to present the relevant documents and the outcome will be communicated in due time. *The Committee requests the Government to keep it informed of the outcome of the investigations conducted into these allegations.*

**Case No. 1914 (Philippines)**

223. The Committee last examined this case at its March 2002 session [see 327th Report, paras 101–103]. The case concerns the dismissal of approximately 1,500 leaders and members of the Telefunken Semiconductors Employees' Union (TSEU) further to their participation in strike action from 14 to 16 September 1995. A first order for the reinstatement of these workers was issued by the Department of Labor and Employment (DOLE) in October 1995. In December 1997 the Supreme Court issued a decision ordering the immediate reinstatement, without exception, of all the TSEU workers concerned. In the light of this development, the Secretary of Labor and Employment issued a Writ of Execution on 26 August 1998 directing the immediate reinstatement of the workers in the company's payroll in the event that actual or physical reinstatement was impossible. However, on 18 December 2000, the Supreme Court issued a decision declaring the strike illegal and dismissing the request for reinstatement of the workers and the payment of back wages. At the last examination of this case in March 2002, the Committee recalled that an excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of trade union leaders and members dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned [see *Digest of decisions and principles of the Freedom of Association Committee*, fourth edition, 1996, paras 738 and 749]. Expressing its profound regret at the inordinately long delays in carrying out the reinstatement of the workers concerned, the Committee insisted that every effort be made to ensure that all these workers be reinstated in their functions or, if reinstatement is no longer a feasible solution, due to the long period since the dismissal, that they be paid full compensation in this regard.
224. In a communication dated 18 March 2007, the TSEU indicates that, 11 and a half years later, the workers are still fighting their case before the courts. The management refused to implement the Supreme Court decision of 12 December 1997 and the relevant Writ of Execution of the Secretary of Labor, through successive appeals which led to the declaration of the strike as illegal – a ruling which devastated the workers. They continued the action for the payment of retirement benefits. The complainant describes the various stages of the judicial proceedings, which had lasted for four and a half years at the time of the communication (March 2007). The issue is still not resolved and is currently pending before the Court of Appeals 16th Division. The complainants explain that they are entitled to the retirement plan which was included in their collective bargaining agreement and had already reached the requisite age length of service even prior to the strike of 14 September 1995 which led to their dismissal. The complainant pleads for the payment of the retirement benefits to the workers.
225. In a communication dated 8 January 2008, the Government indicates that: (1) the issue of payment of retirement benefits does not relate to the principles of freedom of association and/or collective bargaining; and (2) the matter is pending with the courts and may not therefore be ripe for the Committee's consideration. The Government therefore considers that the Committee should deny an examination of this communication.
226. *The Committee recalls that during the last examination of this case it insisted that every effort be made to ensure that all the 1,500 workers be reinstated in their functions or, if reinstatement was no longer a feasible solution, due to the long period since the dismissal, that they be paid full compensation in this regard. The Committee observes from the absence of relevant information in the communications of the parties that nothing was done in this regard. The Committee must therefore express its profound regret at the manifest absence of equity in this case, due to the excessively long period of time over which the issue of reinstatement was pending (five years), the final decision which*

*reversed a series of earlier rulings in favour of the workers, including from the Supreme Court, and the particularly large number of workers dismissed (some 1,500).*

**227.** *The Committee observes that now the workers in question try to obtain, through judicial proceedings, the payment of retirement benefits to which they are, in their view, entitled as they had already reached the requisite length of service before their dismissal. The issue has been pending before the courts for five and a half years. The Committee observes, moreover, that judicial proceedings may continue even further, as the issue is at the moment before the Court of Appeals. The Committee also considers that the issue is linked to freedom of association to the extent that these workers are denied their retirement benefits as a result of their dismissal pursuant to the strike staged in September 1995. In these circumstances, the Committee requests the Government to intercede with the parties with a view to reaching without further delay, a settlement for the payment of retirement benefits to the dismissed workers. The Committee requests to be kept informed of steps taken in this regard as well as any other developments in this case, including judicial decisions rendered.*

### **Case No. 2291 (Poland)**

**228.** The Committee last examined this case, which concerns numerous acts of anti-union intimidation and discrimination, including dismissals, by the management of two companies (Hetman Limited and SIPMA SA), lengthy proceedings and non-execution of judicial decisions, at its March 2007 meeting [see 344th Report, paras 174–183]. On that occasion the Committee: (1) requested the Government to specify whether the final court decision ordered the reinstatement of Zenon Mazus in addition to payment of compensation and take measures to verify whether the judgement was executed with regard to both issues; (2) noted with interest that the court ordered the reinstatement of Marek Kozak to his post and payment of compensation for time off work and requested the Government to verify that the judgement has been executed; (3) requested the Government to keep it informed of the progress of the proceedings against 19 senior managers of the SIPMA SA enterprise and expressed the firm hope that they will finally commence without further delay; (4) with regard to the disputes in the Hetman Limited enterprise, requested the Government to specify the relationship of Jan Przepolewski to the Hetman Limited enterprise and to clarify the substance of the offences with which Jan Przepolewski is accused, it further expressed the firm hope that the proceedings will move forward at a swift pace and requested the Government to transmit a copy of the judgement once handed down; and (5) requested the Government to carry out an investigation and communicate the findings on the industrial relations climate between the SIPMA SA enterprise and the NSZZ “Solidarność” Inter-Enterprise Organization in the Middle East Region and, if the findings demonstrate a need, to intercede with the parties so that the union may exercise its activities with respect to this enterprise without any interference or discrimination by the employer against its members or delegates.

**229.** In a communication dated 18 September 2007, the Government indicates, with regard to the payment of compensation and reinstatement of Zenon Mazus and Marek Kozak at the SIPMA SA (points (1) and (2) above), that the labour courts do not store the data regarding the enforcement of legally valid court verdicts and the prevailing regulations do not impose on the parties a duty to notify the court about the enforcement of the considered claims. However, in the event of failing to voluntarily abide by a legally valid verdict ordering the reinstatement, there is a possibility to take a legal action and seek the enforcement of the verdict by a warrant of execution. The District Court in Lublin has no record of a petition-based case brought by Zenon Mazus or Marek Kozak requesting the enforcement of the court verdict ordering their reinstatement at the SIPMA SA enterprise.

- 230.** Concerning the SIPMA SA enterprise (point (3) above), the Government indicates that the case against 19 representatives of the enterprise management, accused of malicious and repeated violation of employees' rights, is still pending before the District Court in Lublin. The Government provides details from which it emerges that the hearings have been adjourned on several occasions and the latest hearings had been set for 23, 25 and 26 July 2007.
- 231.** With regard to the disputes in the Hetman Limited enterprise (point (4) above), the Government indicates that Jan Przepolewski was the president of the Hetman Ltd Management Board. On 5 January 2007, the court of first instance handed down in his regard a one and a half-year suspended sentence for malicious and repeated violation of employees' rights and a fine of PLN 22,000. The defendant challenged the verdict. The date of the appeal was set for 14 September 2007.
- 232.** *The Committee notes the information submitted by the Government with regard to points (1) and (2) of its recommendations to the effect that the courts do not hold any information on whether the defendant (the SIPMA SA enterprise) complied with the judgement which adjudicated to the plaintiffs (Zenon Mazus and Marek Kozak) compensation for time off work and ordered their reinstatement. It notes with interest that the court ordered the reinstatement of Zenon Mazus and requests the Government to indicate the current status of employment of both trade unionists.*
- 233.** *With regard to point (3) of its recommendations, the Committee notes that the hearings concerning charges brought against 19 senior managers of the SIPMA SA enterprise have been adjourned on several occasions and the latest hearings had been set for 23, 25 and 26 July 2007. The Committee recalls that the penal case against 19 senior managers of SIPMA SA has been pending since 14 October 2003 and once again emphasizes that justice delayed is justice denied [344th Report, para. 181]. The Committee firmly trusts that the proceedings will be concluded without any undue delay and requests the Government to keep it informed of progress made and to transmit a copy of the judgement once handed down.*
- 234.** *With regard to the disputes in the Hetman Limited enterprise (point (4) above), the Committee notes the Government's indication that Jan Przepolewski was the President of the Hetman Ltd Management Board. On 5 January 2007, the court of first instance handed down in his regard a one and a half-year suspended sentence for malicious and repeated violation of employees' rights and a fine of PLN 22,000. The defendant challenged the verdict. The date of the appeal was set for 14 September 2007. The Committee requests the Government to keep it informed of the progress made in respect of the appeal proceedings and to transmit a copy of the judgement once handed down.*
- 235.** *The Committee notes with regret that the Government does not provide any information on point (5) of its recommendations. In light of the various violations brought before it by the complainant, the Committee once again requests the Government to carry out an investigation and communicate the findings on the industrial relations climate between the SIPMA SA enterprise and the NSZZ "Solidarność" Inter-Enterprise Organization in the Middle East Region and, if the findings demonstrate a need, to intercede with the parties so that the union may exercise its activities with respect to this enterprise without any interference or discrimination by the employer against its members or delegates.*

### **Case No. 2395 (Poland)**

- 236.** The Committee last examined this case, which concerns several freedom of association violations at the Hydrobudowa-6 SA company (decision to discontinue the deduction of trade union fees of the NSZZ "Solidarność" trade union in the enterprise and anti-union

dismissals of its chairperson and a member of the executive committee in violation of the relevant legislation) and the serious delays in the proceedings concerning the reinstatement of the abovementioned trade union officials, at its March 2007 meeting [see 344th Report, paras 184–191]. On that occasion, the Committee requested the Government: (1) to provide information on the exact grounds justifying the unilateral decision by the enterprise management to terminate check-off facility and to transmit the text of the decision of the Warsaw District Public Prosecutor's Office concluding to the absence of justification for resumption of the discontinued proceedings pursuant to the present complaint; (2) to keep it informed of the progress of the proceedings instituted by the dismissed trade union leaders, Sylwester Fastyn and Henryk Kwiatkowski, and to transmit the decision of the Appellate Court in the case of the latter; and (3) to give consideration in full consultation with the social partners concerned to the establishment of prompt and impartial procedures, in order to ensure that trade union officials and members have the right to an effective remedy by the competent national tribunals for acts of anti-union discrimination.

- 237.** In a communication dated 18 September 2007, with regard to the re-establishment of the check-off facility at the Hydrobudowa-6 SA company in favour of the NSZZ "Solidarność" trade union, the Government reiterates the previously provided information and forwards copies of letters of the Regional Prosecutor's Office dated 18 and 24 February 2005 addressed to the NSZZ "Solidarność" Enterprise Commission No. 1771 at Hydrobudowa-6 SA and to the NSZZ "Solidarność" National Commission, respectively, informing that the Public Prosecutor considered that the complaint did not contain any new information, which would have provided grounds to resume the discontinued proceedings.
- 238.** With regard to the claim filed by Sylwester Fastyn examined by the Warszawa Praga-Północ District Court on 28 June 2007, the Government indicates that the case records, together with the appeal of the defendant against the verdict of 21 December 2006, will be submitted to the Warszawa-Praga District Court in Warsaw for appeal. With regard to the proceedings instituted by Henryk Kwiatkowski, the Government refers to the information it had previously provided: while the Warsaw-Praga District Court ordered reinstatement of Mr Kwiatkowski and adjudicated compensation for time off work, in appeal, the Warsaw-Praga District Court reversed the sentence by means of a judgement dated 26 January 2006 and dismissed the case. The Regional Court for Warszawa-Praga in Warsaw, hearing the appeal of the Hydrobudowa-6 SA (defendant) against the verdict of the District Court, shared the position of the employer that the dismissal of Mr Kwiatkowski did not relate to his trade union activities, but to a breach of section 100(1) of the Labour Code (refusal to perform overtime work on two occasions on 12 and 13 February 2002).
- 239.** The Government further indicates that the recommendations and conclusions of the Committee on Freedom of Association regarding this case were discussed by the Tripartite Commission Team for Cooperation with the International Labour Organization on 25 April 2007. In particular, the team discussed the need to establish, in consultation with the social partners, rapid and impartial procedures providing effective protection to members and leaders of workers' organizations and decided that the case should be handled by an appropriate Tripartite Commission Focus Team (team for the labour code and collective bargaining). Furthermore, the Government indicates that the Ministry of Justice has prepared a number of amendments to the Code of Civil Procedure of 17 November 1964 aimed at simplification and improvement of civil proceedings and ultimately, increasing its effectiveness and reducing the time of hearings in civil cases. Draft laws and regulations will also apply to separate proceedings relating to the Labour Code.

- 240.** *Noting that no new information has been provided with regard to recommendations (1) and (2) above, the Committee once again requests the Government to indicate the exact grounds justifying the unilateral termination of the check-off facility at the Hydrobudowa-6 SA. Moreover, noting with regret that the proceedings instituted by the dismissed trade union leaders Henryk Kwiatkowski and Sylwester Fastyn in 2002 have still not been concluded and emphasizing once again that justice delayed is justice denied, the Committee firmly trusts that the proceedings concerning Henryk Kwiatkowski and Sylwester Fastyn will be concluded without further delay. It requests the Government to keep it informed of the progress of the proceedings and to transmit the decision of the Appellate Court in the case of Sylwester Fastyn and the decision of the Supreme Court in the case of Henryk Kwiatkowski, who, according to the information previously provided by the Government, appealed the decision of the District Court.*
- 241.** *The Committee notes with interest the information provided by the Government with regard to the issues discussed under the auspices of the Tripartite Commission and the draft amendments to the Code of Civil Procedure. The Committee requests the Government to transmit the relevant draft amendments to the Committee of Experts on the Application of Conventions and Recommendations. The Committee further requests the Government to keep it informed of the outcome of the discussions on developing rapid and impartial procedures providing effective protection to trade union members and leaders by the team for the labour code and collective bargaining.*

### **Case 2474 (Poland)**

- 242.** The Committee last examined this case at its March 2007 session [see 344th Report, paras 1097–1158] and made the following recommendations:
- (a) The Committee expects that the measures now taken by the Government will effectively speed up the judicial proceedings concerning the dismissal of two trade union leaders (Mr Marcin Kielbasa and Mr Slawomir Zagrajek) and requests the Government to keep it informed of the progress of the proceedings as well as their final outcome.
  - (b) The Committee urges the Government to reiterate and intensify its efforts, under the auspices of the Tripartite Commission, to ensure that the principles of freedom of association and collective bargaining are applied, particularly as regards the effective recognition of unions and the provision of adequate protection against acts of anti-union discrimination and interference. The Committee firmly expects that the situation of the respect of trade union rights in Poland will indeed improve with the approval of a national social agreement between the Government and the social partners and requests the Government to keep it informed of the developments in this regard.
  - (c) The Committee requests the Government, in consultation with the social partners, to provide for an impartial and independent method for verifying trade union representativeness order to avoid the problems that occurred in the case of Frito Lay Poland Ltd.
- 243.** In a communication dated 18 September 2007, the Government provided information in respect of proceedings relating to the dismissal of Mr Marcin Kielbasa from UPC Poland Ltd and on the alleged violations of trade union rights at Frito Lay Ltd.
- 244.** In respect of proceedings relating to the claim filed by Mr Kielbasa against UPC Ltd on 7 October 2004 to the then District Court for the Warszawa Praga in Warsaw to declare the termination of his contract of employment ineffective, the Government indicates that due to the reorganization of the Warsaw labour courts, the case was subsequently heard by the District Court for the Capital City of Warsaw. However, on 12 July 2006, the parties signed a settlement agreement, according to which the contract of employment was terminated by mutual agreement due to the liquidation of the position and Mr Kielbasa was

to be paid a redundancy gratuity within seven days following the entry into force of a decision to dismiss the case. The decision dismissing the case was made on 12 July 2006. Neither party has challenged it.

- 245.** The Warszawa-Mokotów District Prosecutor carried out preliminary proceedings in order to determine whether the termination of employment contract with Mr Kielbasa, the Chairperson of the enterprise trade union, an employee covered by special protection, was an instance of anti-union discrimination. On 4 August 2006, due to the absence of features of prohibited act, pursuant to article 17(1)(2) of the Code of Penal Procedure, the proceedings were dismissed. Mr Kielbasa has not appealed this decision. The Regional Prosecutor in Warsaw confirmed the legitimacy of the decision.
- 246.** With regard to the alleged violation of trade union rights at Frito Lay Poland Ltd, the Government indicates that by a decision of 21 July 2006, the District Prosecutor closed the investigation of this case, concluding that the acts of hindering trade union activities and misusing of data on trade union membership, as alleged by the trade union, were not committed. This decision was challenged by the NSZZ “Solidarność”. On 19 June 2007, the District Court for the Capital City of Warsaw dismissed the complaint and upheld the decision of the District Prosecutor.
- 247.** The court proceedings concerning the reinstatement of Mr Sławomir Zagrajek at Frito Lay Ltd with payment of the lost remuneration during the period of unemployment are pending before the District Court in Pruszków. The case was filed on 28 December 2005 and no verdict has yet been delivered. The defendant in this case filed a petition for the admission as evidence of testimonies given by almost 400 witnesses on the circumstances of submission of declarations of trade union membership and for stay of proceedings until the penal case pending before the District Court in Grodzisk Mazowiecki concerning, among other things, forgery of employees’ signatures on the declarations of trade union membership is heard.
- 248.** In 2006, the situation in Frito Lay Poland Ltd Company was a subject of a good will mission of social dialogue undertaken by the Mazowieckie Voivodship Commission. After fulfilling the mission in July 2006, the parties did not apply to the Voivodship Commission for further assistance.
- 249.** The Government further indicates that the recommendations and conclusions of the Committee on Freedom of Association regarding this case were discussed by the Tripartite Commission Team for Cooperation with the International Labour Organization on 25 April 2007. The team focused on two issues ensuing from the recommendations of the Committee: firstly, on the need to establish, in consultation with the social partners, rapid and impartial procedures providing effective protection to members and leaders of workers’ organizations; and secondly, on the development, in consultation with the social partners, of impartial methods of verification of a number of trade union members. On the first issue, the team has decided that the case should be handled by an appropriate Tripartite Commission Focus Team (team for the labour code and collective bargaining). Furthermore, the Government indicates that the Ministry of Justice has prepared a number of amendments to the Code of Civil Procedure of 17 November 1964 aimed at simplification and improvement of civil proceedings and, ultimately, increasing its effectiveness and reducing the time of hearings in civil cases. Draft laws and regulations will also apply to separate proceedings relating to the Labour Code. In relation to the second recommendation, the Government informs that the PKPP LEWIATAN, will present suggestions regarding the changes of procedures of verification of the number of trade union members at the sitting of related focus teams of the Tripartite Commission.

250. *The Committee notes the information provided by the Government. It notes, in particular, the settlement agreement between Mr Kielbasa against UPC Ltd with regard to the termination of his contract of employment. The Committee regrets that no decision has yet been reached in the case of termination of employment contract of Mr Zagrajek, trade union leader at Frito Lay Ltd, filed over two years ago. The Committee once again recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned. Justice delayed is justice denied [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 105 and 826]. The Committee expects that the case will be soon decided by the Court and requests the Government to keep it informed of its final outcome.*
251. *With regard to the alleged violation of trade union rights at Frito Lay Poland Ltd, the Committee notes that: the District Prosecutor concluded to the absence of any violation and closed the investigation on 21 July 2006; this decision was challenged by the NSZZ “Solidarność” and that on 19 June 2007, the District Court for the Capital City of Warsaw dismissed the complaint and upheld the decision of the District Prosecutor. The Committee requests the Government to provide copies of both decisions.*
252. *The Committee notes with interest the information provided by the Government with regard to the issues discussed under the auspices of the Tripartite Commission and the draft amendments to the Code of Civil Procedure. The Committee requests the Government to transmit the relevant draft amendments to the Committee of Experts on the Application of Conventions and Recommendations. It requests the Government to continue providing information on concrete measures taken to ensure that the principles of freedom of association and collective bargaining are applied, particularly as regards the effective recognition of unions and the provision of adequate protection against acts of anti-union discrimination and interference. The Committee further requests the Government to provide information on any progress reached with regard to the development of an impartial and independent method for verifying trade union representativeness, in consultation with the social partners.*

### **Case No. 2383 (United Kingdom)**

253. The Committee last examined this case at its May–June 2007 meeting [see 346th Report, approved by the Governing Body at its 299th Session, paras 177–186]. The Committee had requested to be kept informed of developments concerning the following issues: (a) the progress of consultation with private contractors on the establishment of appropriate mechanisms to compensate prisoner custody officers in private sector companies to which certain of the functions of the prison have been contracted out, for the limitation of their right to strike; and (b) the progress of consultations with a view to improving the current mechanism for the determination of prison officers’ pay in England, Wales and Northern Ireland. The Committee had regretted the lack of progress in respect of the above and requested the Government to vigorously pursue its efforts with regard to these matters.
254. In a communication dated 1 November 2007, the Government indicates that on 3 November 2006, officials of the prison service and the complainant Prisoner Officers’ Association (POA) met with Brendan Barber of the Trades Union Congress (TUC) to explore avenues for talks on the issue of the Prison Service Pay Review Body (PSPRB) mechanism, as well as on wider issues relating to improving industrial relations, as per a settlement agreement of September 2006. On 19 January 2007, prison service officials met with Alan Cave of the Workforce Foundation for scene-setting discussions that were due to



take place with the POA as well, prior to engaging in joint talks on agreed identified issues.

- 255.** A dispute raised by the POA in regard to the voluntary additional hours scheme (Contract Supplementary Hours – CSH) initiated discussion under the Joint Industrial Relations Procedural Agreement (JIRPA). This dispute, and a POA action seeking to gain a Declaratory Order in the High Court that the prison service had breached the JIRPA by excluding issues of dispute from the arbitration process, led the POA to fail to engage with taking the agreed talks further. Both the CSH dispute and action seeking a Declaratory Order became protracted, with both parties seeking to resolve issues through the courts. Key court decisions provided an agreed Consent Order in regard to the JIRPA processes and in a separate hearing constrained the POA from seeking to use union disciplinary processes against volunteers seeking to work additional voluntary hours.
- 256.** As a result of the Court’s decision, the POA decided that the JIRPA implemented in 2005 was not working in their interests and, in accordance with a provision in the agreement, gave 12 months’ notice of withdrawal, effectively removing any constraint upon the POA taking strike action as of May 2008 and thereby establishing comparable rights to other groups of workers in the United Kingdom. Following a ballot of their members, and with only 45 minutes notice, at 7 a.m. on 29 August 2007 the POA took strike action. The prison service obtained an interim injunction from the High Court, as the POA are bound by the JIRPA until 8 May 2008, and the POA instructed its members to return to work that evening. 11,485 staff took strike action, directly affecting 124 of the 129 establishments in England and Wales.
- 257.** The POA action concerned the Government’s decision to stage the 2007/2008 pay award recommended by the PSPRB. This decision was taken in line with the Government’s broader economic policy, and was applied to recommendations from all pay review bodies other than that governing the armed forces; it is in line with the Government’s response to ILO recommendations that while the recommendations of the PSPRB could not be binding, they would only be departed from on grounds of affordability.
- 258.** On 31 August 2007, Ministers met with the POA and made it clear that the 2007/2008 pay settlement would not be reopened. The POA made a commitment that there would be no further industrial action at that time. It was agreed that planned discussions on pay and workforce reform and TUC-sponsored talks on improving industrial relations would continue. Ministers met with the POA again on 17 September 2007 and a further meeting was scheduled for 30 October 2007 so that a joint assessment of progress could be made. The TUC-sponsored talks between the prison service and the POA continued, but little progress has been made: the POA had clearly stated that they would not sign a voluntary agreement constraining their right to take industrial action, and the Ministers maintained that if a voluntary agreement that includes protections against industrial action was not in place, they would take steps to reintroduce a statutory ban on prison officer strike action, honouring the understanding given to Parliament. The Ministry of Justice – as opposed to the prison service – is now taking forward work to look at future appointments to the PSPRB.
- 259.** In summary, the Government indicates that the POA and the prison service had been engaged in managing a series of disputes between them, which have been protracted and required legal intervention through the courts in accordance with the JIRPA. These disputes have been time-consuming and strained the relationship between the concerned parties, so that it was not possible to fully engage in the discussions agreed upon as part of the dispute settlement of September 2006; some preliminary work did commence, but more extensive negotiations were put aside as the parties focused on the ongoing disputes that became apparent in November 2006 and required determination by the Courts. The

unlawful strike action undertaken by the POA on 29 August 2007 has further strained relations between the POA and the prison service. The Ministers have indicated that they wish to see the parties restore mechanisms to ensure the required protection for the operational delivery of the prison service, and TUC-facilitated talks aimed at achieving this are ongoing. Finally, the Government indicates that the National Offender Management Service (NOMS) is considering legal advice with respect to the private sector issues raised in the instant case.

**260.** *The Committee takes note of the information provided by the Government. It regrets to note that relations between the concerned parties have deteriorated since its previous examination of the case and that in spite of TUC-sponsored preliminary talks on the PSPRB mechanism, little progress has been made with respect to improving the current mechanisms for the determination of prison officers' pay in England, Wales and Northern Ireland. As concerns the consultations with private contractors on the establishment of appropriate mechanisms to compensate private custody officers in private sector companies for the limitation of the right to strike, the Committee further regrets that little progress has been made in this respect, apart from the Government's indication that the NOMS was reviewing legal advice on the issues concerned. The Committee once again requests the Government to vigorously pursue its efforts in respect of all of the above, and to keep it informed of developments.*

### **Case No. 2473 (United Kingdom)**

**261.** The Committee last examined this case at its May–June 2007 meeting [see 346th Report, approved by the Governing Body at its 299th Session, paras 1464–1547]. On that occasion, the Committee requested the Government to pursue its review of the Employment Relations (Jersey) Law 2007 (ERL) in full and frank consultations with the employers' and workers' organizations concerned, and in particular to take the necessary measures so as to:

- ensure that a union remains registered until a final decision has been taken by a judicial authority, in the event of a cancellation of registration;
- clarify the situations in which a union's registration may be cancelled;
- ensure that the Royal Court may review the substance of cases on appeal;
- ensure that workers are not sanctioned for legitimate trade union activity and ensure effective protection against penalizing workers for such activity;
- revise the definition of a collective agreement so as to ensure that the determination of the bargaining level is left to the determination of the parties and ensure that, where unions do not represent a "substantial proportion" of the workers, they may bargain at least on behalf of their own members;
- revise the definition of an employment dispute so as to remove the requirement of a pre-existing collective agreement and remove the requirement that the employer must employ at least 21 employees for a recognition dispute to qualify as a collective dispute;
- ensure that compulsory arbitration is only imposed in cases of essential services, public servants exercising authority in the name of the State or where both parties agree; and
- ensure that secondary action and socio-economic protest action are not prohibited.

---

The Committee also reminded the Government that it may avail itself of technical assistance from the Office in respect of the matters raised in the present case.

- 262.** In its communication of 18 October 2007, the Government indicates that the Minister for Employment and Social Security in Jersey (the “Minister”) has considered with great care the comments of the Committee and appreciated that the Committee had noted the extensive consultations held with all interested groups prior to the enactment of the ERL. The process of consultations would be continued and informed by the Committee’s comments. The Minister stresses the importance of consultations within the legislative process of a small jurisdiction, such as Jersey, where it is essential that legislation enjoys the broad acquiescence of the people and that the views of those who have been consulted be respected; the ERL does not represent the views of one party, but rather the views of independent members of the Parliament whose views, in turn, would be greatly influenced by the outcome of the public consultations that had taken place.
- 263.** As concerns the issue of union registration, the Government states that the legislation provides sufficient protection against deregistration. Under articles 10(1) and 14(1) of the ERL, the Registrar may refuse to register a union or cancel a union’s registration if the said union had, as one of its purposes, the objective of acting unlawfully; as a matter of law, however, the Registrar may not refuse to register or deregister a union on grounds of unlawful activity. The Government further states that as the Registrar is a public authority for the purposes of the Human Rights (Jersey) Law, 2000, he is obliged by law to exercise his powers in a manner compatible with the articles of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe – in particular article 11 regarding the right to freedom of assembly and association. Additionally, article 15 of the ERL provides for a right of appeal to the Royal Court against any exercise of administrative discretion by the Registrar; on any such appeal, the Royal Court of Jersey and the higher appellate courts, as public authorities, would also be obliged to discharge their duties in a manner compatible with the 1950 Convention. Furthermore, the ERL contains no restriction on the right to appeal to the Court and article 15(3) provides that the Royal Court may confirm or reverse decisions of the Registrar. The Government states that for the above reasons it did not consider amending the legislation relating to registration necessary, but would consult upon the views expressed by the Committee.
- 264.** In regards to the Committee’s request to ensure that a union remains registered until a final decision has been taken by a judicial authority, the Government indicates that article 14(7) of the ERL provides that a cancellation of registration shall not have effect until the expiry of 21 days from the day after notification to the union of the Registrar’s decision, and article 15(2) gives the union concerned 21 days within which to appeal. Article 14(8) of the ERL provides that a cancellation of registration shall not have effect until the appeal is disposed of and, furthermore, the Royal Court has a general power to extend time limits under Rule 1/5 of the Royal Court Rules, 2004.
- 265.** As concerns sanctions for engaging in legitimate trade union activities, the Minister – after consultations with the Employment Forum on the subject – has issued instructions for an amendment to the legislation which would require that an employee who was found to have been unfairly dismissed on grounds of having taken industrial action would be entitled to reinstatement, or to compensation in lieu of reinstatement.
- 266.** As concerns the definition of a collective agreement, defined under article 1 of the ERL as one between an employer, or an organization of employers that is representative of a substantial proportion of employers in the trade or industry and employees who are representative of a substantial proportion of the employees engaged in the trade or industry concerned, the Government indicates that the term “substantial proportion” is of

longstanding use in Jersey, providing the basis upon which industrial disputes and reporting issues are dealt with under the Industrial Disputes (Jersey) Law, 1956. To the Minister's understanding, the term "substantial proportion" would not require in excess of 50 per cent of the employees to be represented, but rather that the representation would need to cover a significant minority of employees. Although no legal decisions on the scope of the term have been handed down, the Minister proposes to consult with interested parties as to whether an amendment to the ERL in this respect would be appropriate.

- 267.** As regards the requirement that an employer employ at least 21 employees for a recognition dispute to qualify as a collective dispute, the Government states that previous consultation on this matter took place through the consultation document "Fairplay in the Workplace: Trade Union issues" in 2001, which sought views on whether the right to statutory recognition should only apply to businesses over a certain size. The opinions received were divided fairly evenly on this point and the Minister considers that views are likely to remain polarized between small employers and trade unions; however, the Minister would hold further consultations on the matter to ascertain whether views have changed.
- 268.** As concerns the resolution of collective disputes, the Government states that the Jersey Employment Tribunal (JET) has very limited jurisdiction to make a binding award in the absence of both parties' consent. Unless article 22(2) of the ERL applies, the JET only has jurisdiction if both parties consent; furthermore, article 22(2) only allows the JET to exercise jurisdiction where, inter alia, a party to a dispute is acting unreasonably in complying or not complying with an available procedure as defined in article 22(3). Additionally, article 22(4) of the ERL requires that in deciding whether a party is acting unreasonably, regard must be had to whether the relevant handbook has been agreed upon by the parties, including the employees. Unless the available procedure is set out in a code of practice, therefore, a party could only act unreasonably within the meaning of the article in relation to a procedure it had previously agreed upon. According to the Government, the powers of the JET to make a declaration are limited to what is provided by article 23(2) of the ERL, and the JET has no power to make a declaration on issues of pay, for example, unless both sides consent. If the JET purports to exercise jurisdiction not conferred on it by the ERL or the parties, any party may apply to the Royal Court for an order setting aside the JET's decision for lack of jurisdiction.
- 269.** As concerns the codes of practice, the Government states that there has been extensive consultation with the Employment Forum and attaches a further draft of the proposed codes. The Government indicates that the allegation that small businesses employing ten or fewer employees are exempt from allowing employees the right to join or form a trade union is incorrect and false: the threshold is fixed at 21 or more employees for unions wishing to use industrial action to achieve recognition. There is also no prohibition, either in the ERL or the codes, against membership of a trade union. Such a prohibition would be inconsistent with the terms of the Human Rights (Jersey) Law, 2000. Furthermore, sanctions are available under the Employment Law, 2003, in respect of any employer who penalizes an employee for joining a union. According to the Government, unions are well-placed to achieve voluntary recognition through the force of economic argument, including that force of argument which draws on the full employment that has existed in Jersey almost continuously for the last 30 years.
- 270.** In respect of secondary action undertaken by unions, the Government asserts that all member states set limitations on the freedom of trade unions to organize industrial action. These limitations reflect the local conditions, including the industrial relations traditions and practices of the member State or territory concerned. In Jersey's circumstances, where collective agreements are not legally enforceable and where bargaining is decentralized, it is necessary for secondary action to be prohibited. In a small and geographically isolated

economy such as Jersey's, the widening of industrial action to involve others not party to the primary dispute would be extremely disruptive to the life of the island and to the provision of necessary services to citizens. The Minister therefore does not propose to change the law in this respect and considers the prohibition on secondary action to be consistent with Jersey's international obligations.

271. *The Committee notes the detailed information provided by the Government, and in particular the Government's indications relating to a number of points where it intends to continue to consult with the social partners and search for a consensus. In particular, the Committee notes that, according to the Government, a union's right to appeal decisions of the Registrar is an unrestricted one and that, as regards cancellation, a union remains registered until a final decision has been taken by a judicial authority in the event of a cancellation of registration. The Committee once again requests the Government to ensure that the Royal Court may fully review the substance of cases on appeal.*
272. *The Committee further notes with interest the Government's indication that the Minister, following consultations with the Employment Forum, has issued instructions for an amendment to the legislation providing for reinstatement, or to compensation in lieu of reinstatement, in cases of unfair dismissal. The Committee requests the Government to transmit a copy of the amendment as soon as it is drafted.*
273. *As concerns the requirement that a union represent a "substantial proportion" of the employees in the trade or industry concerned to sign a collective agreement, the Committee notes the Government's statement that the term "substantial proportion" would not require a union to represent in excess of 50 per cent of the employees concerned, but rather that the representation would need to cover a significant minority of employees. Further noting that no decisions regarding the scope of this term have been handed down, and that consultations would be held with interested parties on the subject of amending the ERL in this respect, the Committee once again recalls that whether a union represents a substantial proportion of employees should be based on objective and pre-established criteria, so as to avoid any opportunities for partiality or abuse, and that where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 976].*
274. *The Committee takes note of the latest draft codes of practice transmitted by the Government. It also notes that, as set out in code 1 of the draft codes, for unions wishing to engage in recognition disputes before the JET the employer concerned must have employed an average of at least 21 employees in the 13 weeks immediately preceding the day on which the dispute arises. The Committee considers the requirement that the employer concerned have at least 21 employees in order for a union to have recourse to the recognition dispute procedure to run contrary to the principle of free and voluntary collective bargaining. It accordingly requests the Government to take the necessary steps so as to ensure that unions may initiate recognition disputes before the JET even where the employer concerned has less than 21 employees.*
275. *The Committee notes that according to the Government further consultations would be held concerning the definition of an employment dispute. It once again requests the Government to take the necessary measures to revise the definition of an employment dispute so as to remove the requirement of a pre-existing collective agreement, as well as the requirement that the employer must employ at least 21 employees for a recognition dispute to qualify as a collective dispute.*

276. *As regards the issue of compulsory arbitration at the request of one party, the Committee – while noting the Government’s indications concerning the scope of the JET’s power to issue binding awards – must nevertheless reiterate that the JET’s power under articles 22–24 of the ERL to issue a declaration, in the absence of the consent of both concerned parties, which incorporates terms and conditions specified therein into individual contracts of employment is tantamount to compulsory binding arbitration contrary to the principle of voluntary negotiation. It once again requests the Government to take the necessary measures to amend the legislation so that compulsory arbitration is only imposed in cases of essential services, public servants exercising authority in the name of the State or where both parties agree.*
277. *Finally, the Committee notes with regret the Government’s indication that it considers the prohibition on secondary action necessary, so as not to disrupt the life of the island or the provision of necessary services to citizens, and that it does not propose to amend the legislation in this respect. Recalling that a ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association, the Committee once again requests the Government to take the necessary measures to ensure that sympathy strikes, as well as social and economic protest action, are protected under the law.*
278. *The Committee encourages the Government to continue to pursue vigorously its dialogue with the social partners on the above matters with a view to bringing the Employment Relations Law into full conformity with Conventions Nos 87 and 98 and draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*

### **Case No. 2380 (Sri Lanka)**

279. The Committee last examined this case at its March 2007 meeting [see 344th Report, paras 192–198]. On that occasion the Committee noted that the cases of five workers allegedly dismissed from the Workwear Lanka (Pvt) Ltd were pending before the labour tribunal, as was a case concerning the dismissal of 202 workers following their participation in a strike. The Committee, expecting that the competent authorities would process these cases without delay and that, if the allegations of anti-union discrimination were confirmed, suitable measures would be taken to remedy any effects of the discrimination, requested the Government to keep it informed and to transmit any copies of the decisions as soon as they were handed down by the labour tribunal. It further requested the Government to provide information on the grounds on which the tribunal dismissed the application of one worker fired in December 2003, as well as to indicate the measures taken to ensure the right to exercise its activities.
280. In a communication of 21 September 2007, the Government states that the case concerning the dismissal of 202 workers had been heard 28 times, but was yet to be concluded. Section 17 of the Termination of Employment of Workmen Act provides that the proceedings at any inquiry held by the Commissioner for the purposes of the Act may be conducted by the Commissioner in any manner, not inconsistent with the principle of natural justice, best adapted to elicit proof or information concerning matters that arise at the said inquiry. Furthermore, the Supreme Court has held on several occasions that not permitting sufficient time for the parties to establish their case is against the principle of natural justice; in this regard inquiring officers are supposed to give opportunity and sufficient time to the parties to establish their cases. The Government adds that most of the hearing dates in the above case were requested by lawyers retained by the trade union, one of whom had also fallen ill for a period.

281. The Government indicates that, of the five cases before the labour tribunal, the case of Ms Chandrani Rupika was settled with the payment of 50,000 rupees to her; the remaining four cases are pending. As regards the labour tribunal's dismissal of the application of one dismissed worker, this application, which concerns Ms Chathurika, was dismissed due to long absenteeism.
282. As concerns the Committee's previous comments on the legislation, the Government states that the Ministry of Labour Relations and Manpower is currently reviewing the legislation in the context of overall labour law reforms in the country. This matter is accordingly being looked into by the subcommittee appointed by the National Labour Advisory Council (NLAC). The views of the trade unions regarding the legislative reforms have been mixed, and so far no final decision has been taken.
283. *The Committee notes the above information. With respect to the case concerning the 202 workers dismissed following a strike and the four cases before the labour tribunal, all of which are still pending, the Committee recalls that justice delayed is justice denied; it once again requests the Government to keep it informed of developments in this regard and to transmit copies of the decisions as soon as they are handed down. It further requests the Government to transmit a copy of the labour tribunal's decision to dismiss Ms Chathurika's application on grounds of long absenteeism.*
284. *The Committee, while noting the information on the review of the labour legislation, regrets that the Government provides no information concerning the branch of the Free Trade Zones and General Services Employees' Union at Workwear Lanka (Pvt) Ltd. It once again requests the Government to ensure that the union may exercise its activities, even if it does not represent 40 per cent of the workers concerned, and to inform it of the steps taken in this regard.*

### **Case No. 2419 (Sri Lanka)**

285. The Committee last examined this case at its March 2007 meeting. On that occasion the Committee, recalling that the workers concerned were either dismissed or locked out in January 2005 and that the arbitration procedures were opened in June 2005, expressed the expectation that the competent authorities would process this case without delay and that, if the allegations of anti-union discrimination were confirmed, would take suitable measures to remedy any effects of anti-union discrimination, including, in light of the closing of the factory, ensuring full compensation such as to constitute a dissuasive sanction against any recurrence of such acts. The Committee further requested the Government to keep it informed in this respect [see 344th Report, paras 199–202].
286. In a communication of 21 September 2007, the Government states that, of the workers involved in the arbitration procedure, 96 workers have left the procedure, with 83 remaining. A copy of the 7 March 2007 arbitration proceeding is attached to the communication and indicates that the trade union has accepted this position. The Government adds that arbitration inquiries were held on ten occasions between 4 September 2006 and 13 September 2007; though the parties are in agreement to settle the dispute, no final agreement on the conditions of settlement have been reached.
287. *The Committee takes note of the above information. It regrets to note that, although the workers concerned were either dismissed or locked out in January 2005 and that the arbitration procedure was opened in June 2005, the latter has yet to be concluded. The Committee once again recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination constitutes a denial of justice and therefore a denial of the trade union rights of the*

persons concerned. Where cases of alleged anti-union discrimination are involved, the competent authorities dealing with labour issues should begin an inquiry immediately and take suitable measures to remedy any effects of anti-union discrimination brought to their attention [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 826 and 835]. The Committee once again expresses the hope that the arbitration procedure will be concluded without delay and, if the allegations of anti-union discrimination are confirmed, that the arbitration award will include suitable measures to remedy any effects of anti-union discrimination including, in light of the closing of the factory, ensuring full compensation such as to constitute a dissuasive sanction against any recurrence of such acts. The Committee requests the Government to keep it informed in this respect.

### **Case No. 2171 (Sweden)**

**288.** The Committee last examined this case, which concerns a statutory amendment enabling workers to remain employed until the age of 67 and prohibiting negotiated clauses on compulsory early retirement, at its March 2007 session [see 344th Report, paras 203–206]. The Committee noted with deep regret that, despite its recommendation for a negotiated solution to be found in the near future with regard to the statutory amendment of collective agreement clauses on compulsory early retirement, no official meeting had taken place on this subject since February 2005, and once again strongly urged the Government to pursue in a meaningful manner negotiations with the social partners concerned so as to determine a solution acceptable to all concerned, particularly as regards the application of those agreements still in force, which are not in conformity with the statutory retirement age.

**289.** In a communication dated 3 September 2007, the Government states that in September 2006 a new government was appointed, and that it is in favour of the right to remain employed until the age of 67 and has no intention to amend the legislation that enables this, or to take any further action in this regard. The Government adds that it looks forward to continued constructive and open dialogue with the ILO in the years to come.

**290.** *The Committee notes with deep regret that, in spite of its recommendation for a negotiated solution to be found in the near future with regard to the statutory amendment of collective agreement clauses on compulsory early retirement, the Government has declared its categorical intention not to take any further action in this respect. Recalling that more than six years have now elapsed since the filing of this complaint, the Committee once again strongly urges the Government to pursue in a meaningful manner negotiations with the social partners concerned so as to determine a solution acceptable to all concerned, particularly as regards the application of those agreements which may still be in force and which are not in conformity with the statutory retirement age. The Committee requests to be kept informed of all steps taken in this respect.*

### **Case No. 2537 (Turkey)**

**291.** The Committee last examined this case at its May–June 2007 meeting [see 347th Report, paras 1–26]. On that occasion, it made the following recommendations:

- (a) The Committee requests the Government to take all necessary measures as soon as possible to bring its legislation into conformity with Convention No. 87, ratified by Turkey and in particular:
  - (i) to amend section 5 of the Public Employees' Trade Unions Act No. 4688 as well as the Regulation on the Determination of Branch of Activity of Organizations and Agencies, which determine the branches of activity according to which public employees' trade unions may be established, so as to ensure that these branches are



not restricted to any particular ministry, department or service, including local governments;

- (ii) to amend the Regulation of 2 August 2005 (which amends the Regulation on the Determination of Branch of Activity of Organizations and Agencies) so as to maintain Yapi-Yol Sen members concerned by this complaint within the branch of activity entitled "Public works, construction and village services" in conformity with the nature of their functions and their willingness to remain affiliated to Yapi-Yol Sen;
- (iii) to amend section 16 of the Public Employees' Trade Unions Act No. 4688 so as to ensure that trade union office is not terminated by reason of the transfer of a trade union leader to another branch of activity, or his/her dismissal or simply the fact that a trade union leader leaves the work.

The Committee requests the Government to keep it informed in respect of all the above.

- (b) The Committee requests the Government to take all necessary measures to ensure that the lost membership of Yapi-Yol Sen is immediately restored and the check-off system reinstated and trusts that, pursuant to the appeal lodged by the complainant on this case, the Court will take the relevant freedom of association principles embodied in Convention No. 87 into account in rendering its decision. The Committee requests the Government to keep it informed in this respect and to transmit any court decisions as soon as they are handed down.

**292.** In a communication dated 18 October 2006, the Government indicates that the Rural Services Department was abolished by Act No. 5286 promulgated on 13 January 2005 and, pursuant to transitional section 1 of this law, its staff at headquarters were transferred to the Ministry of Agriculture and Rural Affairs, its staff in the provinces of Istanbul and Kocaeli were transferred to the principal municipalities of these two cities, and those in the other provinces were transferred to the other provincial administrations. The name of the department was then deleted from the list appended to the Regulation of 7 September 2001 (*Official Gazette* No. 24516) on the Determination of Branch of Activity of Organisations and Agencies in the framework of the Public Employees' Trade Unions Act, pursuant to a new Regulation of 2 August 2005 (*Official Gazette* No. 25894).

**293.** By Decision No. 2006/2052 of 4 August 2006, the Tenth Chamber of the Council of State dismissed, in accordance with section 15(b)(1) of Act No. 2577, the complaint from Yapi-Yol Sen, which lodged an appeal with the General Assembly of the Administrative Dispute Chambers of the Council of State. The case is in progress.

**294.** Section 4 of Act No. 4688, which covers the establishment of trade unions, states that unions of public servants may be established on the basis of branches of activity by the officials employed in those branches. The aim of these unions is to operate throughout the country. More than one union can be set up in a branch of activity. The union may not be set up on the basis of the workplace or the occupation. Therefore, an official's occupation and post are irrelevant in determining union membership. The union of officials can only be set up on the basis of branches of activity, not occupation or workplace. Whatever their titles or posts, officials may only be members of a union which operates in a branch of activity encompassing the official's institution.

**295.** After the abolition of the Rural Services Department, the name of the latter was deleted from the list of branches of activity on which it previously appeared. After the deletion, the transfer of its staff to other public institutions was based on security of employment as recognized by statute. Hence there is no obstacle to being affiliated to a different branch of activity from the one joined on entry into service. After the transfer referred to above, the continuation of the officials' membership in their previous union might block the process to determine the competent unions and the system laid down by Act No. 4688.

296. The number of officials is not the same in every branch of activity. There are branches to which hundreds of thousands of officials may belong (for example, education, training and science), but branches also exist which barely comprise 10,000 officials (for example, art and culture). The purpose of this procedure is not to prevent the exercise of trade union rights or deprive a union of its dues, but to make unions operational through a branch-based approach.

297. *The Committee notes with regret that the Government has not supplied any information on the measures taken to give effect to its recommendations. It notes the Government's statement that the Tenth Chamber of the Council of State rejected the complaint of Yapi-Yol Sen, which lodged an appeal. The case is in progress before the General Assembly of the Administrative Dispute Chambers of the Council of State. The Committee again requests the Government to take all necessary measures to ensure that the lost membership of Yapi-Yol Sen is immediately restored and the check-off system reinstated. The Committee hopes that the Council of State, further to the appeal lodged by the complainant organization in the present case, will take into consideration the principles of freedom of association embodied in Convention No. 87 when it issues its decision. The Committee requests the Government to keep it informed in this respect and send as soon as possible a copy of the appeal decision issued by the Council of State.*

### **Case No. 2249 (Bolivarian Republic of Venezuela)**

298. At its March 2007 meeting, the Committee regretted that, despite the seriousness of the case, the Government had not sent information relating to the following recommendations [see 344th Report, paras 237–243]:

- bearing in mind the importance of due process of law being respected, the Committee trusts that the trade union leader, Carlos Ortega, will be released without delay and requests the Government to send it the decision handed down by the authority hearing the appeal. The Committee also requests the Government to send it a copy of the sentence handed down by the court of first instance (with all the reasons and conclusions therefor) in respect of the trade union leader Carlos Ortega (the Venezuelan Workers' Confederation (CTV) has sent only a copy of the record of the public hearing at which the decision of the court and the sentence were made public);
- the Committee requests the Government to recognize FEDEUNEP and to take steps to ensure that it is not the object of discrimination in social dialogue and in collective bargaining, particularly in the light of the fact that it is affiliated to the CTV – another organization that has encountered problems of recognition which the Committee has already examined in the context of this case. The Committee requests the Government to keep it informed of any invitation it sends to FEDEUNEP in the context of social dialogue. The Committee recalls the principle that both the government authorities and employers should refrain from any discrimination between trade union organizations, especially as regards recognition of their leaders who seek to perform legitimate trade union activities [see *Digest*, 1996, para. 307];
- with regard to the dismissal of over 23,000 workers from PDVSA and its subsidiaries in 2003 for having taken part in a strike during the national civic work stoppage, the Committee notes the Government's statements, and specifically that only 10 per cent of the appeals lodged with the labour inspectorate and other judicial authority have not yet been ruled upon. The Committee deeply regrets that the Government has disregarded its recommendation that it enter into negotiations with the most representative workers' federations in order to find a solution to the dismissals at the PDVSA and its subsidiaries as a result of the organization of or participation in a strike during the national civic work stoppage. The Committee reiterates this recommendation;

- the Committee calls on the Government to take steps to vacate the detention orders against the officials and members of UNAPETROL, Horacio Medina, Edgar Quijano, Iván Fernández, Mireya Repanti, Gonzalo Feijoo, Juan Luis Santana and Lino Castillo, and to keep it informed in this respect;
- the Committee considers that the founders and members of UNAPETROL should be reinstated in their jobs since, in addition to the fact that they were participating in a civic work stoppage, they were dismissed while they were undergoing training;
- with regard to the alleged acts of violence, arrests and torture by the military on 17 January 2003 against a group of workers from the PDVSA enterprise – leaders of the Beverage Industry Union of the State of Carabobo – who were protesting against the raiding of the enterprise and the confiscation of its assets, which was a threat to their source of work, the Committee notes that the complaints submitted by José Gallardo, Jhonathan Rivas, Juan Carlos Zavala and Ramón Díaz are currently under investigation and stresses that the allegations refer to the detention and torture of these workers, as well as of Faustino Villamediana. While regretting that the proceedings currently pending at the Office of the Attorney-General with respect to four workers have not been concluded despite the fact that the events go back to December 2002 or January 2003, the Committee firmly hopes that the authorities will rapidly conclude the investigations and requests the Government to keep it informed of any decision that is taken;
- the Committee requests the Government to send it the decision adopted by the labour inspectorate regarding the reassessment of the dismissal of trade unionist Gustavo Silva and draws attention to the delays in the conduct of these proceedings;
- with regard to the dismissal of FEDEUNEP trade unionist Cecilia Palma, the Committee requests the Government to inform it whether she has appealed against the ruling of 1 September 2003 and, if so, to keep it informed of the outcome of her appeal; and
- in general, the Committee deeply regrets the excessive delay in the administration of justice with regard to several aspects of this case and emphasizes that justice delayed is justice denied and that this situation prevents the trade unions and their members from exercising their rights effectively.

**299.** Furthermore, the Committee reiterated its previous recommendations and urged the Government to send the requested information urgently and without delay, and to give effect to these recommendations [see 344th Report, para. 243].

**300.** In its communications of 2 March and 27 September 2007, the complainant, UNAPETROL, indicates that the auditing body of the PDVSA enterprise summoned around 200 dismissed workers – including union officials – who participated in the 2002-03 work stoppage in the petroleum sector as part of investigations into the losses of millions of dollars incurred during the stoppage. According to UNAPETROL, these were undefined and vague accusations, which lacked proof, and are yet another example of anti-union persecution.

**301.** UNAPETROL adds that the public summons issued by the enterprise puts forward conclusions relating to the national civic work stoppage which are not within its remit, when stating that “an analysis of the information contained in the written and audiovisual mass media showed that the prerequisites for workers to initiate strike procedures were not met ...”.

**302.** The complainant also points out that there is a substantial amount of proof, which was duly presented to the Attorney-General’s Office – as well as records of public statements made by UNAPETROL spokespersons and public hearings in which they participated – relating to inappropriate operational procedures, acts of negligence, incompetence and the use of physical violence at various operational sites of the enterprise just after the dismissals had taken place and once members of the national armed forces had taken control of the facilities, and that this proof attests to the absolute innocence of all the dismissed workers. The evidence has been completely omitted and ignored by the Tax Auditor’s Office, the

PDVSA Operational Audit Unit and even the Attorney-General's Office. In this connection, UNAPETROL sent the following:

- copies of the document presented by a group of lawyers and representatives of these workers to the Attorney-General's Office in April 2003, containing certificates of safe transfer for installations that were later found to be damaged, once officials of the regime had taken control of operations; and
- documents presented to the Tax Auditor's Office and the PDVSA Operational Audit Unit by Messrs Víctor Ramos and Horacio Medina, the internal control secretary and the president of UNAPETROL, who were summoned to meetings on 16 and 22 December 2006, respectively. According to UNAPETROL, the documents demonstrate how these workers were subjected to an act of persecution and retaliation while they were totally defenceless. Furthermore, union officials Edgar Quijano and Rodolfo Moreno, the labour assistance secretary and the vice-president of the disciplinary tribunal of UNAPETROL, were publicly summoned to meetings on 12 April and 28 June 2007; Horacio Medina, president of UNAPETROL, was also summoned.

**303.** Although UNAPETROL also alleges the further dismissal of over 1,500 workers by the PDVSA enterprise, it points out that these were politically motivated dismissals and related to the signing of the referendum on the recall of the President of the Republic (the Committee recalls that its remit covers anti-union dismissals only, and not politically motivated ones).

**304.** In its communication of 18 May 2007, the CTV refers to statements made by the President of the Republic, in which he said that "in the revolution, the differences between the trade unions and the revolutionary party must disappear; the trade unions must disappear", and other statements attacking the independence of trade unions, such as: "If they want to be autonomous, then we will have tamed trade unions; they want their own guidelines and standards." This attitude explains the continual interference by the authorities (the National Electoral Council, and so on) in union elections and in collective bargaining procedures.

**305.** In its communications of 3 May and 19 September 2007, the Government responds to the allegations made by the CTV by invoking the right of all citizens to freedom of speech and by pointing out that the statements were made at a meeting to swear in the supporters of a partisan political act to promote the formation of the United Socialist Party of Venezuela and cannot, therefore, be considered as an official act; on the contrary, Hugo Chávez, as a citizen, was exercising his political and social rights and supporting the idea that a trade union organization must be the mouthpiece of a political party. Convention No. 87 and freedom of association enjoy excellent health in the Bolivarian Republic of Venezuela, with the registration of 300 new trade unions so far that year. As it did in its reply during the previous examination of the case in March 2007, the Government criticizes UNAPETROL for presenting allegations after allowing the proceedings initiated with the Supreme Court of Justice to lapse in May 2006 through an absence of procedural activity for over one year (and that these proceedings referred to the refusal to register the organization). According to the Government, the case should be closed.

**306.** *The Committee notes this information from the Government concerning the new allegations made by the CTV. Nonetheless, the Committee recalls that the resolution concerning the independence of the trade union movement, adopted on 26 June 1952 by the International Labour Conference, states that: "When trade unions in accordance with national law and practice of their respective countries and at the decision of their members decide to establish relations with a political party or to undertake constitutional political action as a means towards the advancement of their economic and social*

*objectives, such political relations or actions should not be of such a nature as to compromise the continuance of the trade union movement or its social and economic functions irrespective of political changes in the country.” The Committee hopes that, in future, this principle will be taken fully into account.*

- 307.** *Lastly, the Committee regrets that the Government has not provided information relating to the recommendations which it formulated in March 2007 and which it therefore reiterates. The Committee requests the Government to respond specifically to the allegations made by UNAPETROL in the communications of 2 March and 27 September 2007, given that it has merely reiterated the information already given on the lapsing of the judicial proceedings concerning the refusal to register the organization.*

\* \* \*

- 308.** Finally, the Committee requests the governments concerned to keep it informed of any developments relating to the following cases.

<b>Case</b>	<b>Last examination on the merits</b>	<b>Last follow-up examination</b>
1890 (India)	June 1997	November 2007
1962 (Colombia)	–	November 2006
2017 (Guatemala)	March 2002	June 2007
2050 (Guatemala)	March 2002	June 2007
2086 (Paraguay)	June 2002	June 2007
2087 (Uruguay)	March 2005	June 2007
2088 (Bolivarian Republic of Venezuela)	March 2004	November 2007
2134 (Panama)	March 2003	November 2007
2153 (Algeria)	March 2005	November 2007
2160 (Bolivarian Republic of Venezuela)	June 2002	November 2007
2227 (United States)	November 2003	November 2007
2259 (Guatemala)	March 2006	November 2007
2262 (Cambodia)	November 2007	–
2286 (Peru)	June 2005	November 2007
2302 (Argentina)	November 2005	November 2007
2304 (Japan)	November 2004	June 2007
2326 (Australia)	November 2005	November 2007
2364 (India)	November 2005	November 2007
2372 (Panama)	June 2007	–
2390 (Guatemala)	June 2006	November 2007
2394 (Nicaragua)	March 2006	November 2007
2414 (Argentina)	March 2006	June 2007
2447 (Malta)	June 2006	–
2449 (Eritrea)	November 2007	–
2459 (Argentina)	June 2007	–
2482 (Guatemala)	June 2007	–
2499 (Argentina)	November 2007	–
2501 (Uruguay)	November 2007	–
2511 (Costa Rica)	June 2007	–
2512 (India)	November 2007	–
2515 (Argentina)	November 2007	–
2526 (Paraguay)	November 2007	–

309. The Committee hopes these governments will quickly provide the information requested.
310. In addition, the Committee has just received information concerning the follow-up of Cases Nos 2046 (Colombia), 2068 (Colombia), 2096 (Pakistan), 2139 (Japan), 2169 (Pakistan), 2176 (Japan), 2188 (Bangladesh), 2242 (Pakistan), 2252 (Philippines), 2256 (Argentina), 2273 (Pakistan), 2297 (Colombia), 2330 (Honduras), 2388 (Ukraine), 2399 (Pakistan), 2400 (Peru), 2402 (Bangladesh), 2430 (Canada), 2433 (Bahrain), 2435 (El Salvador), 2436 (Denmark), 2452 (Peru), 2455 (Morocco), 2460 (United States), 2466 (Thailand), 2472 (Indonesia), 2477 (Argentina), 2480 (Colombia), 2485 (Argentina), 2488 (Philippines), 2494 (Indonesia), 2497 (Colombia), 2500 (Botswana), 2502 (Greece), 2517 (Honduras), 2519 (Sri Lanka), 2523 (Brazil), 2527 (Peru) and 2551 (El Salvador), which it will examine at its next meeting.

CASE NO. 2513

DEFINITIVE REPORT

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

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

*Allegations: The complainant organizations dispute a resolution issued by the Office of the Under-Secretary for Labour of San Juan Province declaring the direct action taken by the staff of the Social Welfare Fund to be illegal and a resolution of the Social Welfare Fund ordering deductions corresponding to the days of work stoppage from the salaries of the employees who participated in the industrial action*

311. The complaint is contained in a communication from the Confederation of Argentine Workers (CTA) and the Association of State Workers (ATE) of July 2006.
312. The Government sent its observations in a communication of 23 October 2007.
313. Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainants' allegations**

314. In their communication of July 2006, the CTA and the ATE alleged a violation of Convention No. 87 following the declaration in resolution No. 032-ST of 20 April 2006, issued by the Office of the Under-Secretary for Labour and Social Security of San Juan Province, that the direct action organized by the Association of State Workers in that province was illegal.

- 315.** The complainants state that Argentina ratified Convention No. 87 in 1960, Articles 3 and 10 of which guarantee the right to strike, and that article 14bis of the Argentine Constitution guarantees trade unions the right to strike as a fundamental right. Moreover, the International Covenant on Economic, Social and Cultural Rights specifically provides that States parties are obliged to ensure the right to strike (article 8.1(d)). The first paragraph of section 75.22 of the National Constitution, which provides that international treaties, including ILO Conventions, take precedence over national laws, completes this circle of protection for freedom of association. Furthermore, section 67.3 of the Constitution of San Juan Province states: “Trade Union Guarantees. The State guarantees the following rights to trade unions: ... (3) The right to strike, as a way of protecting the rights of workers and social guarantees. No repressive measures may be taken against the participants of a strike, if they present no obvious threat to public safety.”
- 316.** The complainant organizations indicate that, despite the provisions relating to formal protection of the right to strike, the Office of the Under-Secretary for Labour of San Juan Province issued the following resolution:

Resolution No. 032-ST, dated 20 April 2006: “In view of: File No. 208-0949-C-06, entitled “Social Welfare Fund: Report on industrial action by staff” and Addendum No. 208-1005-C-06; Considering: ... that this body is competent to intervene in the dispute in question, it is necessary to investigate the direct action taken by the staff members of the Fund who belong to the Association of State Workers (ATE), by assessing the conduct of the parties to the conflict .... Therefore: the Director of Labour Relations, on behalf of the Office of the Under-Secretary for Labour, resolves: Section 1: To declare illegal the direct action taken in relation to the Social Welfare Fund by the staff members of the Fund who belong to the Association of State Workers (ATE), based in Rivadavia Street No. 524 (East), San Juan City, as indicated in the recitals above. Section 2: To order the abovementioned association and the staff members involved in the direct action, with the requirement of submitting authenticated copies of the relevant documents to the National Ministry of Labour, Employment and Social Security, to apply the sanctions that are deemed appropriate, considering if necessary the removal of the trade union status of the association. Section 3: To notify the parties involved in the dispute, by providing them with a copy of this resolution, in accordance with the provisions of Section 103 et seq. of Act No. 5976. Section 4: This is hereby a resolution of the Office of the Under-Secretary for Labour. Let it be enforced, published and filed. Signed: Dr Roberto L. Correa Esbry – Director of Labour Relations on behalf of the Office of the Under-Secretary for Labour of San Juan Province.

Subsequently, the Executive Board of the Social Welfare Fund issued the following resolution:

Resolution No. 263 of 8 May 2006: “In view of File No. 708-00006892-A-06 and File No. 708-0000706-A-06, relating to the Social Welfare Fund; Considering: ...that attached hereto is resolution No. 032-ST of 20 April 2006, in which the Office of the Under-Secretary for Labour declares illegal the direct action taken by the staff members of the Social Welfare Fund who belong to the trade union ATE, and orders the Fund and the staff members involved to lift the direct action, with the requirement of submitting authenticated copies of the documents relating to the action taken to the National Ministry of Labour and Social Security, to apply the sanctions that are deemed appropriate; resolves: Section 1: To order the Finance Office to dock the salaries of the employees of the Social Welfare Fund that participated in the industrial action for the days of work stoppage, with the exception of the staff of the Casino del Parque, in accordance with the provisions of Decree No. 0036, dated 20 September 2002, from their May 2006 pay packet. Section 2: The Administrative and Accounting Departments will take the measures within their competence. Section 3: This is hereby a resolution of the Executive Board. Let it be published and filed.

- 317.** The complainant organizations indicate that, prior to the issuance of the abovementioned resolutions, on 20 April 2006 the Executive Council of the Association of State Workers (CPD ATE San Juan) decided on behalf of the workers of the Social Welfare Fund to take

direct action in the form of a work stoppage on 20, 21 and 22 April 2006 and subsequently informed the National Ministry of Labour and Social Security of that decision. As agreed by the staff of the Social Welfare Fund, the Director of the Fund was informed on 20 April 2006 of the intended action. In the absence of a response from the employer, an assembly of employees of the Social Welfare Fund decided to continue the industrial action and notified the National Ministry of Labour and Social Security of the decision on 24 April 2006.

- 318.** They add that the National Ministry of Labour and Social Security was informed in a note of the workers' decision to continue the industrial action in the form of a work stoppage on 25 April 2006. In the absence of a response to the demands of the staff of the Social Welfare Fund, the staff assembly decided to extend the industrial action, in the same form, to 26 April 2006 and informed the National Ministry of Labour and Social Security of the decision in a note dated 26 April 2006. On 27 April 2006, in a note of the same date, an assembly of Social Welfare Fund staff decided to suspend the industrial action that had been taken with respect to wage claims in anticipation of a response from the relevant authorities. During this period, the Director of the Social Welfare Fund informed the Office of the Under-Secretary for Labour of the Province of the measures that had been taken by the staff and the Office issued resolution No. 032-ST-06, declaring the strike to be illegal. Subsequently, in resolution No. 263 of the Social Welfare Fund, the Fund ordered salary deductions corresponding to the days of work stoppage by the staff. This measure was adopted, taking into account that the Office of the Under-Secretary for Labour of the Province had declared the direct action to be illegal.
- 319.** The complainants state that the main demand of the workers of the Social Welfare Fund of San Juan Province related to the regulation of their salaries to ensure economic stability and that it was only the indifference to and lack of interest in providing a response that prompted the workers to initiate industrial action. In this case, the workers are seeking collective talks and it is the employer – in other words, the provincial authority – that is making this impossible. There is no question of there being an absence of a legislative framework. Argentina in general, and San Juan Province in particular, have an abundance of regulations in this field.
- 320.** The complainants state that the Association of State Workers has trade union status and members who work in the municipality of San Juan and that the case involves industrial action organized and carried out by a group of workers whose demands relate solely to salaries and working conditions and who are entitled to strike in a way that is organized and carried out collectively. The complainants add that, neither the case file prepared for inspection nor any of the background information suggest that any dispute settlement process was initiated by the employer. Rather, it was the workers who consistently called for collective bargaining and gave notice of the intended action in the face of the employer's silence and the provincial and national authorities were duly informed of every initiative. They also maintain that the matter of a wage increase and the need for collective bargaining were central issues in every petition and communication regarding the direct action. The case involves unwarranted interference by the national authorities that constitutes a violation of freedom of association and violates Convention No. 87.

## **B. The Government's reply**

- 321.** In its communication of 23 October 2007, the Government rejects claims that the principles of freedom of association have been violated in San Juan Province. The Government states that the national authorities intervened in accordance with international labour standards, Conventions Nos 87 and 98, which permit the national authorities to intervene in disputes in exceptional circumstances and for a certain period, which is the basis for this legitimate intervention involving the deduction of salaries corresponding to



the days not worked following the declaration that the industrial action was illegal, as stipulated in section 1 of resolution No. 263 of 8 May 2006.

- 322.** The Government states that no ministerial office in San Juan Province was informed in good faith of the situation of unrest and dispute mentioned in the complaint. It is not true to say that the authorities of San Juan Province remained silent; rather, the complainants failed to present the necessary information, which might mislead the Committee in its examination of the facts. According to the Government, the complainants make reference to notifications relating to the dispute that were never presented to the relevant jurisdiction (administrative authority). They failed to establish a dialogue with the provincial authorities and, more deliberately, avoided the opportunity to reach a negotiated settlement with those authorities, which constitutes a violation of the principles of freedom of association, as this omission is preventing the initiation of the dispute settlement procedure.
- 323.** The Government adds that the submissions were always sent to the San Juan regional office of the National Ministry of Labour. Consequently, the allegations of the complainants have an irreparable flaw of nullity vis-à-vis the provincial authorities. It was the trade union sector that refused to enter into dialogue. It is worth noting that Section 102 of Act No. 5902 provides: “In the event that parties are unable to settle a dispute, either party, prior to taking direct action, should give 24 hours’ notice to the Office of the Under-Secretary for Labour. As a result of such a communication, or acting ex officio, if deemed appropriate, taking into account the nature of the dispute, the Under-Secretary for Labour may decide to initiate the compulsory conciliation procedure immediately”. It is clear that the conciliation procedure provided for under San Juan legislation was omitted deliberately, in order to justify the direct action as a foregone conclusion.
- 324.** The Government underscores that the industrial action was taken without consultation, without warning and without any prior claim or petition being submitted and it is clear that the available procedures established under the laws in force for achieving a negotiated settlement were not exhausted. In the above context, the provincial authorities were entitled, in what was an emergency situation caused by sudden action in a body responsible for safeguarding human life, safety and health, to take measures to avoid a situation that might jeopardize the guarantees that international legislation requires it to protect. In fact, the Social Welfare Fund is involved in various aspects of the provision of public assistance, such as designing housing schemes, providing medical and healthcare assistance to pensioners in the province and offering credit, all of which are channelled towards a social segment of the population in emergency situations. The Government points out that the national authorities were in a situation of necessity because, as the Committee will appreciate, the mechanisms of intervention in the dispute had been disrupted. In this respect, section 107 of Provincial Act No. 5976 provides: “The implementing authority may order the immediate cessation of the direct action undertaken by the parties to the dispute. To this end, the implementing authority has the power to decide, through a justified resolution taking cognizance of the dispute, that the situation must revert to that which existed prior to the action or events causing the dispute ...”. The application of section 107 is subject to National Act No. 14786, in accordance with the provisions of section 101 of the Provincial Act, which states: “Notwithstanding the national legislation in force on this matter, disputes shall be settled through conciliation, mediation or arbitration procedures.” Act No. 14786 on compulsory conciliation reserves the right of the Government to restrict with regard to two parties in dispute the application of such a provision, in accordance with the principles of freedom of association, for a full period of 15 days which may be extended for a further five days or for a portion of that time. Its aim is not to introduce changes but to restore the situation to the way it was the day before the events causing the dispute. The intervention is not by the employer authority, because the other party refused to give it such status, by not making the formal

submissions required by law to facilitate dispute proceedings, and it is this that justifies this intervention. According to the Government, all the complainants' submissions bear the seal of the national jurisdiction (administrative authority), which cannot be considered as an error, but rather a deliberate move to prevent the province from being a necessary party in the dialogue.

325. With regard to the declaration that the strike was illegal, the Government indicates that, from the background information provided, it should be noted that the national authorities intervened on a temporary basis and that during that period, which is provided for under law, the aim was to restore the conditions existing prior to the events that caused the dispute. The declaration of the illegality of the work stoppage in the province is valid, as there is no question of whether or not there is an independent body to make such a declaration of illegality, by virtue of the fact that the provincial authorities are not recognized as being the employer, on the grounds that, according to the Office of the Under-Secretary for Labour of San Juan Province, this is a political matter. Lastly, the Government underscores that, as indicated by the Committee, strikes may be restricted in relation to services that, if interrupted, could jeopardize the life, safety or health of all or part of the population. If the social objectives of the Social Welfare Fund of the San Juan Province are taken into account, this last principle applies in the case in question.

### C. The Committee's conclusions

326. *The Committee observes that the complainant organizations dispute resolution No. 032-ST dated 20 April 2006 issued by the Office of the Under-Secretary for Labour of San Juan Province declaring the direct action of the staff of the Social Welfare Fund to be illegal (ordering the cessation of the direct action or the application of appropriate sanctions – including the removal of trade union status) and resolution No. 263 of 8 May 2006 issued by the Social Welfare Fund ordering deductions corresponding to the days of work stoppage from the salaries of employees who participated in the industrial action (according to the complainants, on 20 April 2006, the Executive Council of ATE San Juan decided on behalf of the workers of the Social Welfare Fund, to carry out a work stoppage with respect to wage claims on 20, 21 and 22, 25 and 26 April 2006 and the National Ministry of Labour and Social Security and the Director of the Social Welfare Fund were informed of that decision – the relevant communications are attached to the complaint – this decision was adopted in the face of the indifference to and lack of interest in providing a response and an opportunity for discussion).*
327. *The Committee notes that, according to the Government: (1) the complainants did not inform the ministerial office of the San Juan Province of the dispute and therefore did not enter into dialogue and avoided the opportunity to achieve a negotiated settlement with the provincial authorities; (2) the direct action (work stoppage) was taken without consultation, without warning and without any prior claim by the complainants; (3) the provincial authorities were entitled to take action in what was an emergency situation caused by sudden action in a body responsible for safeguarding human life, safety and health, (according to the Government, the Social Welfare Fund is involved in designing housing schemes, providing medical and healthcare assistance to pensioners in the province and offering credit, etc., all aimed at a social segment of the population in emergency situations, meaning that a restriction could be placed on the strike); (4) all the complainants' communications were sent to the national jurisdiction (the Committee understands this to mean national administrative authority), preventing the province from being a necessary party in the dialogue; and (5) the declaration of the illegality of the work stoppage is valid, as there is no question about whether or not there is an independent body to make such a declaration, by virtue of the fact that the provincial authorities are not recognized as being the employer.*

**328.** *With regard to the notification of the dispute, the Committee observes from the documentation provided by the complainant organizations, that the dispute had been notified to the Social Welfare Fund (the direct employer of the striking workers) and the regional representative of the National Ministry of Labour itself. Nevertheless, the Committee notes that no national or provincial authority tried to mediate with or conciliate the parties during the five-day strike in question.*

**329.** *In any case, with regard to the declaration that the stoppage of activities by workers of the Social Welfare Fund was illegal, which subsequently led to the decision of the Fund authorities to dock the workers' salaries for the days of work stoppage, the Committee regrets that it must recall that, on many occasions – including in connection with a case relating to Argentina [see 338th Report, Case No. 2373, para. 378] – it has emphasized that the declaration of illegality of actions such as strikes should not be a matter for the Government but for an independent body that enjoys the confidence of both parties. Under these circumstances, the Committee expects that the Government will respect this principle in the future.*

### **The Committee's recommendations**

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

- (a) The Committee regrets the declaration of illegality of the work stoppage by the workers of the Social Welfare Fund of San Juan Province, on the basis of a decision made by a non-independent body.*
- (b) For this reason, the Committee questions the decision by the Fund authorities to dock the salaries of the workers for the days of work stoppage on the basis of a declaration of illegality by a non-independent organ.*
- (c) The Committee emphasizes that the declaration of illegality of actions such as strikes should not be a matter for the Government but for an independent body that enjoys the confidence of both parties and expects that the Government will respect this principle in the future.*

CASE NO. 2535

DEFINITIVE REPORT

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

- the Union of Education Workers of Río Negro (UNTER) and**
- the Confederation of Education Workers of Argentina (CTERA)**

*Allegations: The complainant organizations dispute the call for compulsory conciliation and the subsequent wage deductions by the administrative authority of Río Negro Province corresponding to the days of strike action*

**331.** The complaint is contained in a communication from the Union of Education Workers of Río Negro (UNTER) and the Confederation of Education Workers of Argentina (CTERA) of December 2006.

- 332.** The Government sent its observations in a communication of 26 October 2007.
- 333.** Argentina has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. The complainants' allegations**

- 334.** In their communication of December 2006, the UNTER and the CTERA reported that, in 2005, teachers in Río Negro Province, through their trade union representatives, had called for the introduction of vouchers as part of their basic pay and for equal treatment to other workers (private teachers and other workers employed by a private enterprise) with respect to family allowances. They had also requested a wage review. According to the complainant organization, while the authorities of Río Negro Province had always recognized the legitimacy of the teachers' claim, they did not acknowledge that the teachers' situation definitely needed to be improved. In September 2005, a four-day work stoppage was held calling for a wage review and, on 6 October 2005, more than 3,000 teachers protested in the city of Cipolletti in Río Negro Province. The Governor of Río Negro publicly announced his decision to withhold any action until after the legislative elections on 23 October. This announcement coincided with the call by the trade union UNTER for an open-ended work stoppage.
- 335.** The complainants add that, as the election period had passed without any proposals being made, many trade union leaders began to remind the Governor of the need for dialogue. The Ombudsperson urged the Governor of the Province to adopt the necessary measures to ensure that the people of Río Negro enjoyed the right to education. Furthermore, she invited various sectors of the educational community to participate in round-table discussions or mediation forums that might be held to reach a swift settlement to the dispute with the teachers' union UNTER. The Bishop of Viedma also became involved. Furthermore, the trade union leaders held a meeting with the legislators in an attempt to initiate dialogue.
- 336.** The complainants indicate that, while the stoppage was under way, the Ministry of Education and Culture of the Province called on retired teachers to give classes and that a representative of the UNTER requested the Minister for Labour of the Province to refrain from implementing the intended measure of calling on retired teachers to give classes. On 1 November 2005, the teachers of Río Negro demonstrated in the city of Viedma. After an impressive demonstration involving some 3,000 teachers, the Ministry of Labour of the Province ordered compulsory conciliation on 2 November 2005.
- 337.** On 3 November 2005, the Minister of Labour publicly defended the implementation of wage deductions corresponding to the days of work stoppage. On 4 November, after the issuance of the compulsory conciliation order, the Governor "indicated that sanctions would be imposed on the trade union and on the teachers who did not immediately accept the conciliation process" for failure to fulfil their duty as public officials. When the trade union indicated that it accepted the compulsory conciliation order and ended the industrial action, the Government used deductions as a retaliatory measure against the workers and in order to prevent similar action in the future, advancing pay to teachers without prior reference to the information sheets that are submitted between the 25th and the last day of each month.
- 338.** The complainants indicate that, on 9 November 2005, the governors and head teachers of educational establishments in the zone of Choele Choel publicly expressed their views, indicating that the wage deduction was not only illegal but was also "a form of harassment". It was so indiscriminate that, by way of example, they cited the case of a

head teacher who had been on leave at the time of the work stoppage and yet had been subjected to a deduction amounting to 90 per cent of her salary. This feeling of harassment was criticized at management level in several areas. In some places, head teachers were informed that the deducted money would be reimbursed if they reported the staff members who had participated in the work stoppage in the schools under their charge.

- 339.** The complainant organizations state that the direct action taken by the education workers was legitimate and was at no point declared illegal. Nevertheless, the systematic and persistent approach taken by the provincial officials towards the workers' enjoyment of their right to strike involved threatening the workers in an attempt to instil fear into them permanently and pitting them against each other in an attempt to divide the trade union. The non-payment of wages was used as a form of punishment to prevent the enjoyment of the right to petition and the right to strike, both of which are constitutional rights.
- 340.** The complainant organizations indicate that article 73 of Act No. 3803 provides: "A compulsory conciliation order implies for parties the immediate cessation of any direct action that may have been organized, restoring the conditions that prevailed the day prior to the initiation of the dispute or the day prior to the events that caused the action." All sanctions should have been lifted, restoring the conditions that had prevailed the day prior to the start of the dispute. However, the Government decided to implement the deductions without limitation or respect for the situation of the workers. The deductions were applied to all teachers, regardless of whether or not they had worked, been on leave or participated in the stoppage. Article 46 of the abovementioned Act provides: "In any conciliation process brought before this body, the parties are obliged to negotiate in good faith. This involves, among other issues, holding hearings during established times, exchanging whatever information is needed for the most effective analysis of the issues under consideration and making every effort to reach mutually acceptable agreements, without hindering in any way the work of the body or the advancement of the negotiations."
- 341.** The complainant organizations consider that examination of the described events reveals a serious violation of constitutional rights and furthermore highlights the biased position of the Ministry of Labour, which communicated in the media its decision to proceed to dock the pay of the teachers for exercising their right to strike and their right of petition. The Ministry confirmed its decision to dock pay at the time the compulsory conciliation order was announced. There is no question that these decisions and announcements were made by a body that is part of the employer government. It is clearly unable to retain the impartiality and neutrality which should supposedly be a characteristic of the body responsible for the conciliation process. The Government has not taken any steps to establish an impartial court to settle such collective disputes and has become both judge and party to the case, defending actions that are clearly and blatantly unconstitutional.
- 342.** According to the complainants, docking pay for the days of the strike was used as a form of punishment. Just as it is possible to use salaries to reward certain behaviour, in this case they were used to sanction those who exercised the right to petition and to strike and there is only one way to remedy such conduct, and that is to reimburse the deducted sums of money. The situation and reasons behind these deductions and the context in which they were made demonstrate that they were a punishment and that the intention was to punish. This damage is irreparable given that salaries are a source of sustenance. In this case, the perception that "wages were docked for days not worked" is unfounded, considering that there are so many examples of teachers who were on sick leave and head teachers who went to work but had their pay docked for not reporting those who had participated in the strike, as well as teachers on a low wage, all of whom had to suffer for a month without receiving any pay at all.

- 343.** The complainants emphasize that the administrative authority was liable or at fault for the cause of the claim, as it knows that salaries cannot contain non-remunerative elements, which was one of the demands of the trade union, and that it is unfair under the terms of the National Constitution that education workers should be remunerated in different ways for the same work. The difference in family allowances is clearly marked between workers in public education and those in private education, with teachers in the public sector receiving much lower allowances. The requested redistribution of income is an imperative of social justice and essential for increasing equality. Furthermore, the provincial government is responsible for prolonging the work stoppage, as its decision not to hold talks led to the open-ended work stoppage, which it thought would simply collapse in the course of time. This was the basis of its policy of doing nothing and of the impossibility of dialogue which characterized its conduct.
- 344.** The complainant organizations allege that the attitude of the provincial authorities is damaging to the principle of legality and violates the right to collective bargaining by ordering as a punishment unlimited wage deductions from the workers who exercised their right to petition and their right to strike as well as from those workers who refused to report their colleagues who participated in the strike.

## **B. The Government's reply**

- 345.** In its communication of 26 October 2007, the Government provided the following account of the events leading up to this case: (1) the teachers of Río Negro Province requested the introduction of grocery and/or food vouchers as part of their basic pay and equal treatment to other workers in the private sector in respect of wage improvements; (2) with respect to the demands of the trade unions and, in the absence of a government response, the organizations in question decided to proceed with the direct action, consisting of a four-day work stoppage; (3) the Ombudsperson intervened, urging the Governor of the Province to take the necessary measures to ensure that all the people of Río Negro enjoyed the right to education; (4) while the work stoppage was under way, the Ministry of Education and Culture of the Province announced that retired teachers were being called on to give classes; (5) on 1 November 2005, a demonstration was held in the city of Viedma amid leaks that the provincial authorities would not acknowledge the outstanding wages relating to the work stoppage; (6) on 2 November 2005, the Ministry of Labour of the Province issued a compulsory conciliation order; (7) the trade union indicated that it accepted the issuance of Act No. 14786 on compulsory conciliation and therefore cancelled the direct action that was being taken.
- 346.** With regard to the alleged facts, the Government highlights the following: (1) the complainant organizations proceeded with the direct action, without any type of restriction in that respect from the provincial government, with the exception of the deduction of pay for the days not worked; (2) subsequent to these measures, a negotiating committee was established and the social partners agreed in the context of a negotiating process that the provincial authorities should acknowledge and/or reimburse any pay that had been deducted for days not worked.
- 347.** The Government adds that legislation in a large number of countries provides that all conciliation and mediation processes must be exhausted before a strike can be called. The spirit of these provisions is compatible with Article 4 of Convention No. 98, which is aimed at encouraging the full development and utilization of machinery for the voluntary negotiation of collective agreements. Trade union organizations should call for the initiation of negotiations before, rather than after, taking direct action to avoid disrupting the start of the academic year, giving some consideration to the implications of preventing children from attending school.

348. The Government reports that, following lengthy negotiations in the context of the joint committee that was established to that effect, preliminary agreements were reached with regard to the views presented by the parties and also with regard to a list of issues to be pursued by the joint members. It is worth pointing out that the joint discussions did not focus solely on the issue of salaries but on a range of issues linked to the educational policy of Río Negro Province, such as wage policy, the occupational health department, family allowances, the issuance of certificates of service, the presentation of training projects, opportunities for recruitment and promotion, the school calendar and compliance with Act No. 3831 on student tickets. The joint negotiations were held in accordance with the provisions of Convention No. 98. As a result of the negotiations, the Ministry of Labour of the Province decided to give official status to the agreements that had been reached in a joint accord of 7 February 2006 and also in joint accords of 21 February 2006 (on wage policy, the occupational health department, family allowances, certificates of service, training, educational projects and the municipal infrastructure of educational establishments); 24 April 2006 (on the provision of compensation vouchers, the new Family Allowances Act, municipal maintenance and construction work, school transport in Río Colorado and teacher mobility); and 4 December 2006 (on increasing wages by introducing a 70 dollar bonus, on a non-remunerative basis). Furthermore, it was in this context that resolution No. 1223/2007 was issued, establishing leave of absence for union members standing as candidates in the executive elections of the Union of Education Workers of Río Negro. The social partners have taken Convention No. 98 into consideration, in the sense that collective bargaining is the most suitable way of handling differences between disputing parties and that, through such meetings, solutions will be found that will benefit not only those who are directly involved but also society as a whole.

### C. The Committee's conclusions

349. *The Committee observes that the complainant organizations in the present case state that, after the teachers of Río Negro Province had carried out a four-day work stoppage and a demonstration involving more than 3,000 people in September 2005 calling for a wage review, the administrative authority of the Province issued a compulsory conciliation order on 2 November 2005 and that, at the time when this administrative measure had been implemented, the provincial government proceeded to dock pay for the days of the work stoppage in an act of reprisal and intimidation.*

350. *First of all, the Committee notes that, according to the Government: (1) the trade union organizations took direct action without any type of restriction, with the exception of the deduction of pay for the days not worked; and (2) subsequently, a negotiating committee was established between the social partners and it was agreed in the context of a negotiating process that the provincial authorities should acknowledge and/or reimburse any pay that had been deducted for days not worked by the teachers. The Committee notes with interest that the dispute was resolved and that the parties reached agreement on the various issues mentioned by the Government (wage policy, occupational health, family allowances, school transport, etc.).*

351. *Although the dispute has been resolved, the Committee observes that it has recently had to examine various cases relating to Argentina's public sector, involving objections to orders by the provincial authority for compulsory conciliation between the parties to a dispute, when the provincial authority is a party to the dispute. In this respect, once again the Committee reiterates that it is necessary to entrust the decision of initiating the conciliation procedure in collective disputes to a body which is independent of the parties to the dispute [see 344th Report, Case No. 2458, para. 302; 336th Report, Case No. 2369, para. 212; 338th Report, Case No. 2377, para. 403; and 342nd Report, Case No. 2420, para. 221] and requests the Government to take measures in this regard.*

## The Committee's recommendation

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

*The Committee reiterates that it is necessary to entrust the decision of initiating the conciliation procedure in collective disputes, in particular in the public sector, to a body which is independent of the parties to the dispute and requests the Government to take measures in that regard.*

CASE NO. 2549

DEFINITIVE REPORT

### **Complaint against the Government of Argentina presented by the Association of State Workers (ATE)**

***Allegations: The complainant alleges that the authorities of the Unified Autarchic Provincial Social Security Institute (IPAUSS) decided to transfer workers from one branch office to another in order to undermine a strike***

**353.** The complaint is contained in a communication from the Association of State Workers (ATE) dated 5 March 2007.

**354.** The Government sent its observations in a communication dated 10 September 2007.

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

#### **A. The complainant's allegations**

**356.** In its communication dated 5 March 2007, ATE alleges that the authorities of the Unified Autarchic Provincial Social Security Institute (IPAUSS) decided to transfer workers from the Ushuaia branch office, in the Province of Tierra del Fuego, to the Buenos Aires office, whose workers were engaged in a strike.

**357.** The complainant states that, on 14 December 2006, IPAUSS was informed of the decision taken by an assembly of the workers at its Buenos Aires branch to cease work until certain conflicts were resolved. This direct action was also communicated to the Ministry of Labour, Employment and Social Security. ATE states that the demands being made were in response to systematic irregularities within the Institute that had been reported to its president. In particular, ATE rejected the removal and replacement of Ms Zalazar as head of the IPAUSS Buenos Aires office, as well as the appointment to the post of interim coordinator of persons from outside the institution, considering as it did that those posts should be filled by in-house staff with adequate competencies in the area of institutional management.



**358.** ATE states that the direct actions were undertaken by a majority of the workers in the sector and that, by way of a response, the Institute's authorities have taken measures aimed at reducing the effectiveness of the actions and intimidating the workers. ATE alleges that the IPAUSS authorities decided, within the framework of those measures, to transfer workers serving with the Ushuaia and Río Grande branch, in the Province of Tierra del Fuego, to the Buenos Aires branch, with a view to undermining the strike (from the documentation sent by ATE it emerges that ten workers were transferred between December 2006 and January 2007, for periods of up to five days and on different dates). ATE asserts that the replacement of striking workers is a violation of freedom of association.

## **B. The Government's reply**

**359.** In its communication of 10 September 2007, the Government outlines the alleged facts as follows:

- (1) the Tierra del Fuego branch of the ATE union sent IPAUSS a registered letter informing it of the cessation of work on 14 December 2006 to demonstrate its rejection of decision No. 497/2006 of 13 December 2006 appointing staff from outside the institution to the post of interim coordinator and rejecting the promotion of Ms Graciela Zalazar – despite her being a regular in-house staff member with the necessary competencies – to the post of head of the IPAUSS branch;
- (2) the complainant objects to the cancellation of the appointment of an official and the filling of other posts with staff from outside the institution and alleges that all of this is a political manoeuvre aimed at neutralizing the complaint that the union has been making with respect to the serious situation confronting that branch and the IPAUSS health-care institution on account of constant shortcomings in the medical services they are supposed to be providing to the participants; and
- (3) on the basis of these arguments the strike was declared, and the IPAUSS authorities are alleged to have decided to transfer workers from the Ushuaia and Río Grande branch to the Buenos Aires branch to undermine the strike.

**360.** As regards the appointment of the interim coordinator of IPAUSS, the Government states that, in line with the information sent by the Undersecretariat of Labour of the province in question, within the framework of the duties conferred under Act No. 641 and Act No. 22140 and its implementing Decree No. 17976/80, it is the board of directors of IPAUSS that has the authority to appoint staff at the policy-making level, the so-called "cabinet staff" and their concordantes, i.e. the team of public officials who work in association with them. Both the branch and the institution's coordination unit fall into this category, being officials to whom the right of stability at the cabinet level does not extend.

**361.** Concerning the specific reference to Ms Zalazar, the Government states that it is important to note that she has been working from 1994 to the present as a staff member holding various posts of different categories, up until the adoption of provision No. 63/04 appointing her a delegate in Buenos Aires. In line with the organizational structure of IPAUSS, the category of delegate forms part of the cabinet staff. This category of official is not covered by the principle of job stability, in line with what is outlined in the previous paragraph. The post in question is of a political nature, with the official expressing opinions on behalf of the State. Therefore, when the official is replaced in the post and ceases to perform the function, he/she automatically returns to his/her regular category, i.e. to his/her permanent position among the regular staff. It is in this situation that Ms Zalazar currently finds herself, being fully active in the post that corresponds to her

length of service and level of promotion, it being emphasized that no obstacles have ever been put in the way of her administrative career, as has been shown.

- 362.** The Government states that the administrative acts that are being challenged, which are covered by the abovementioned acts, in no way constitute a violation of freedom of association and do not conceal any attempt to undermine the direct action taken by the union. The Government points out that the direct action lasted for over 45 days. In regard to the services to be provided to the participants, IPAUSS sent the minutes of a meeting held on 7 March 2007, in which a Commission for the Audit and Internal Management of IPAUSS was set up through presidency provision No. 269/07. This document deals fundamentally with the union's serious accusation regarding the shortcomings on the part of the companies responsible for providing services under the medical coverage in question, with the agreement to set up a commission for the audit and internal management of IPAUSS.
- 363.** Regarding the allegation that the IPAUSS authorities ordered the transfer of workers serving in the Ushuaia and Río Grande branch to the Buenos Aires branch with a view to undermining the strike being carried out by the workers in the provincial branch, the Government states that by Territorial Act No. 442 of 1990, the Social Services Institute of the National Territory of Tierra del Fuego, AeIAS (ISST), was established with the main objective of providing medical services to the staff of the Territory's Central Administration and Government; autarchic and/or decentralized entities; territorial legislature; municipalities, retirees and pensioners of the Territorial Social Security Institute, as well as the close family members of the aforementioned categories. Also, Territorial Act No. 244 of 1984 provided for the establishment of the Territorial Social Security Institute. In 1990, the National Territory of Tierra del Fuego acquired the status of province, and Act No. 534 of 1991 was passed, establishing IPAUSS. In 2004, Provincial Act No. 641, through the merging of the two institutes, laid down in its article 3 the purpose of the institution: the management and administration of the entire retirement pension and social services system covering the staff of the three authorities of the provincial state, its municipalities and town councils, autarchic and decentralized entities and companies with majority state ownership, according to their type, pursuant to article 2 of Act No. 641, IPAUSS has its registered office in the provincial capital, Ushuaia, with branches in the city of Río Grande and the autonomous city of Buenos Aires; and an office in the capital of the Province of Córdoba. It is clear from the foregoing that IPAUSS encompasses a considerable number of participants, both active and retired, many of whom live in different administrative areas of the Republic of Argentina. The total number of participants is in the order of 45,000, of which 2,600 live outside the province.
- 364.** The Government points out that the existence of the aforementioned branches and offices, remote from the original headquarters, justifies the secondment of permanent staff for the purpose of handling administrative or social security-related matters, all of which is in the interests of the close relationship that exists between the tasks and responsibilities associated with the coverage and health of those concerned. In the specific case at hand, the transfers that were ordered took place in the context of a particular set of circumstances brought about by direct action on the part of the workers from the Buenos Aires branch. The Government emphasizes that Provincial Act No. 22140, in its articles 43 and 45, lays down rules for the assignment of services, whereby officials and employees of the institution are sent "on assignment" to carry out specifically assigned tasks. In this particular case, the tasks carried out at the central office in the city of Buenos Aires to which the staff in question were assigned neither discredit them – as it is argued – nor turn them into some kind of expatriates, inasmuch as the institution's workforce is a single body. The Government states that the transfers "on assignment" were of short duration (no longer than five days) and not large scale, but rather on an alternating basis, the aim being

to ensure the continuity and constancy of the Institute's priority functions in the interests of guaranteeing the health service that it has an obligation to provide to its participants.

**365.** The Government concludes by emphasizing that, to avoid falling into anti-trade union conduct, the presidency of IPAUSS made the appropriate administrative approaches to the province's Undersecretariat of Labour in order to issue a decision as to the lawfulness or otherwise of the direct action being taken, no sanction having thus far been imposed on those having taken part in it. In other words, the free exercise of trade union rights has been respected since the assigned workers belong to the Institute's workforce, and the duration of the assignments is clearly recorded in the acts being challenged. In short, credence cannot be given to any of the points raised in regard to alleged actions running counter to freedom of association; all of the measures taken by the board of directors were taken in the exercise of its duties and within the bounds of the legal framework by which it is governed, with the sole aim of guaranteeing the service, without intimidating the workers participating in the direct action or seeking to undermine the effectiveness of that action.

### **C. The Committee's conclusions**

**366.** *The Committee notes that in this case the complainant organization alleges that the authorities of IPAUSS decided to transfer workers in the service of the Ushuaia and Río Grande branch, in the Province of Tierra del Fuego, to the Buenos Aires branch in order to undermine the strike being conducted by the latter's workers (according to the complainants, the strike had been called in response to systematic irregularities within the Institute, including the removal of the head of the Buenos Aires branch and appointment of staff from outside the institution).*

**367.** *The Committee notes, in relation to the grounds for the strike, that the Government: (1) has sent detailed information explaining the reasons for the decision that Ms Zalazar, who had been appointed delegate and formed part of the cabinet staff, should cease carrying out those duties and return to her regular post within the permanent staff; and (2) has reported that the IPAUSS authorities and the representatives of the workers from the Buenos Aires branch came to an agreement on 7 March 2007 for resolving the conflict, with the establishment of a commission, to include workers' representatives, for the audit and internal management of IPAUSS. The Committee notes with interest that the conflict has been resolved.*

**368.** *With regard to the alleged transfers of workers in service with the Ushuaia and Río Grande branch to the Buenos Aires branch with a view to undermining the strike being conducted by the workers of the latter branch, the Committee notes the Government's information that: (1) the purpose of IPAUSS is the management and administration of the entire retirement pension and social services system covering the staff of the provincial state, its municipalities and town councils, autarchic and decentralized entities and companies with a majority state ownership; (2) the existence of branches and offices remote from the original headquarters justifies the secondment of staff for the purpose of handling administrative or social security related matters; (3) the transfers were ordered within the context of a particular set of circumstances brought about by direct action which had lasted for over 45 days; and (4) the duration of the transfers did not exceed five days, and they were not large scale but alternating, the aim being to ensure the continuity and constancy of the Institute's priority functions in the interests of guaranteeing the health service that it has an obligation to provide to its participants. In this respect, the Committee is of the view that in the specific circumstances of this case, social security is a service in which it might be necessary to consult with the parties on the establishment of a minimum service, particularly in the event of a lengthy strike, as the Government points out. The Committee recalls that a certain minimum service may be requested in the event*

*of strikes whose scope and duration would cause an acute national crisis, but in this case, the trade union organizations should be able to participate, along with employers and the public authorities, in defining the minimum service [Digest of decisions and principles of the Freedom of Association Committee, fifth edition, 2006, para. 609]. There would thus appear to be no grounds for complaint in regard to the transfers for a short period of time of a small number (ten) of workers to which the complainant organization objects. In these conditions, the Committee will not pursue its examination of these allegations.*

## **The Committee's recommendation**

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

CASE NO. 2561

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

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

- **the Congress of Argentine Workers (CTA) and**
- **the International Trade Union Confederation (ITUC)**

***Allegations: The complainant organization alleges the forced entry by unknown persons and theft of computers at the office of the director of the legal service of the CTA and the CTA's headquarters in the federal capital, as well as the stoning of the home of the General Secretary of the provincial council of the ATE in Santa Cruz and telephone threats***

**370.** The complaint is contained in a communication from the Congress of Argentine Workers (CTA) dated April 2007. The International Trade Union Confederation (ITUC) associated itself to the complaint in a communication dated 25 April 2007.

**371.** The Government sent its observations in a communication dated 26 October 2007.

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

### **A. The complainants' allegations**

**373.** In its communication of April 2007, the CTA states that as part of a campaign of intimidatory action directed at certain organizations connected with the defence of human rights in general and trade union rights in particular, on Sunday 18 February 2007 a number of unidentified individuals broke into the offices of Dr Horacio Meguira, Director of the national legal service of the CTA. They went directly to Dr Meguira's own office and, significantly, did not bother to take any valuables but confined themselves to taking

his computer and the fax machine which contained in its memory details of all calls sent and received. It is clear from the nature of what was taken – the fax equipment and a number of documents – that this was no ordinary robbery but something which must objectively be viewed as deliberate intimidation directed against members of the CTA. In the light of this, the CTA sought to instigate a judicial investigation into the crime. The case is being examined by the Criminal Investigation Department No. 7.

- 374.** The complainant organization adds that during the weekend of 10 and 11 March 2007, the CTA headquarters in the federal capital, located at Carlos Calvo 2365, were robbed of computers, although other valuables and money were not touched. According to the CTA, the modus operandi in this case bears a close resemblance to the one adopted by the individuals who broke into the offices of Dr Meguira. The CTA states that a report has been made to the police and interviews have been sought with the heads of security and human rights within the Buenos Aires municipal administration.
- 375.** Lastly, the CTA alleges that in the early morning of 23 March 2007, stones were thrown at the home of Mr Alejandro Garzón, the general secretary of the Santa Cruz provincial executive council of the ATE, and both he and his family received telephone threats from unidentified individuals who said that they were going to attack him or his family. A complaint was made to the police, and the National Executive Council of the ATE has sent out letters making it clear that the national and Santa Cruz provincial authorities are responsible for the personal safety of Alejandro Garzón and his family, and of any other workers who exercise their constitutional right to strike, demonstrate and express themselves. The CTA considers that the alleged acts constitute intimidation and harassment carried out with the intention of restricting or obstructing the exercise of trade union rights by union bodies, union officials and the workers they represent.

## **B. The Government's reply**

- 376.** In its communication of 26 October 2007, the Government, referring to the case of Mr Garzón, denies that the alleged facts are in any way linked with the provincial authorities or that there can be even the suspicion of restrictions on trade union activities in the province. The Government emphasizes that the Deputy Minister of Labour and Social Security of the province has not been faced with any court summons, nor have the local offices from the province interior. The Government indicates that the complainant organization does not refer to the place where the complaint was lodged, which has made it difficult to trace. The Government also states that on 31 May 2007, a conciliation hearing took place at the headquarters of the Deputy Minister for Labour and Social Security of Santa Cruz Province, attended by the ATE in the person of Mr Alejandro Garzón. An agreement was concluded recognizing the arrears of wages due during the dispute, and the workers undertook to refrain from further coercive action until such time as the joint meetings with the provincial government were concluded.
- 377.** The Government states that, as regards the incidents alleged to have occurred in the offices of Dr Miguera and at the CTA premises, the investigating attorney has carried out all the necessary procedures in connection with the complaint and that currently new elements are expected to come to light which should make it possible to identify those responsible for the acts in question. The Government states that it will keep the ILO informed of any progress made in the judicial investigation, to the extent that this is allowed under criminal proceedings.

### C. The Committee's conclusions

378. *The Committee notes that in the present case, the complainant organization alleges that against a background of intimidation, unidentified individuals entered the offices of the director of the CTA legal service in February 2007 and the headquarters of the CTA in the federal capital in March, appropriating only computers and, in the director's office, a fax machine. The complainant organization also alleges that the residence of the General Secretary of the provincial executive council of ATE in Santa Cruz, Mr Alejandro Garzón was attacked with stones and he and his family received telephone death threats.*
379. *As regards the forced entry by unidentified individuals into the office of the director of the CTA's legal service in February 2007 and of the national headquarters of the CTA in March, with the theft of computers and, in the director's office, of a fax machine, the Committee takes note of the Government's information that the investigating attorney has carried out all the necessary procedures in connection with the case, and new elements are expected to come to light which should make it possible to identify those responsible for the acts in question. The Committee recalls that the inviolability of trade union premises is a civil liberty which is essential to the exercise of trade union rights [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 178]. Under these circumstances the Committee, while deploring the alleged acts, expects that the investigation to which the Government refers will be concluded soon and will make it possible to identify and punish those responsible for the acts in question. The Committee requests the Government to keep it informed in this regard.*
380. *As regards the allegation that the residence of Mr Alejandro Garzón, the General Secretary of the Santa Cruz Executive Council of ATE, was attacked with stones and that he and his family received telephone death threats, the Committee takes note of the Government's denial that the alleged acts have anything to do with the provincial authorities, or that there could be any suspicion of restrictions on freedom of association in the province. The Committee also takes note of the Government's statements to the effect that: (1) the Department of Labour and Social Security in the province has not been the subject of any legal complaints, nor have the local offices of the province interior; (2) the complainant organization does not refer to the place where the complaint was lodged, which has made it difficult to trace; (3) on 31 May 2007, a conciliation hearing took place at the headquarters of the Department of Labour and Social Security of Santa Cruz Province, attended by the ATE in the person of Mr Alejandro Garzón. An agreement was concluded acknowledging the arrears of wages that had fallen due during the dispute, and the workers undertook to refrain from further coercive action until such time as joint meetings with the provincial government were concluded. Given the claim by the ATE that it lodged a formal complaint with the police, the Committee requests the Government to inform it of the action taken in connection with this complaint and the outcome of the investigations, stating in particular whether or not those responsible have been identified and punished.*
381. *In general, the Committee recalls that "a climate of violence, coercion and threats of any type aimed at trade union leaders and their families does not encourage the free exercise and full enjoyment of the rights and freedoms set out in Conventions Nos 87 and 98. All States have the undeniable duty to promote and defend a social climate where respect of the law reigns as the only way of guaranteeing respect for and protection of life." [see **Digest**, op. cit., para. 58]. The Committee requests the Government to keep it informed in this regard.*

## The Committee's recommendations

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

- (a) *With regard to the forced entry by unidentified individuals at the offices of the Director of the CTA's legal service in February 2007 and at the headquarters of the CTA in the federal capital in March 2007, with the theft of computers, and (at the office of the Director of the legal service) of fax equipment, the Committee expects that the investigation to which the Government refers will be concluded in the near future and will make it possible to identify and punish those responsible. The Committee requests the Government to keep it informed in this regard.*
- (b) *With regard to the allegation that stones were thrown at the residence of Mr Alejandro Garzón, General Secretary of the Provincial Executive Council of the ATE in Santa Cruz, and he and his family received telephone death threats, the Committee, noting the ATE's statements to the effect that it has made a formal complaint to the police, requests the Government to inform it of the action taken in connection with this complaint and the outcome of the investigations, stating in particular whether or not those responsible have been identified and punished.*

CASE NO. 2562

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

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

- **the Confederation of Argentine Workers (CTA) and**
- **the Confederation of Education Workers of Argentina (CTERA)**

*Allegations: The complainant organizations allege that a teacher was killed by police during a demonstration by education workers in Neuquén Province and object to Decree No. 448 on educational emergency, issued in 2007 by the provincial authorities, authorizing the appointment of teachers on an interim basis until the end of the strike*

**383.** The complaint is contained in a communication from the Confederation of Argentine Workers (CTA) and the Confederation of Education Workers of Argentina (CTERA) of 25 April 2007.

**384.** The Government sent its observations in a communication of 19 October 2007.

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

#### A. The complainants' allegations

386. In their communication of 25 April 2007, the CTA and the CTERA report a situation of unusual severity, with adverse effects not only on the education workers in Neuquén Province that belong to the Association of Education Workers of Neuquén (ATEN), a trade union that forms part of the CTERA, but also on all workers in Argentina, which is the reason for submitting the complaint.
387. The complainants refer to the police repression against education workers in the abovementioned province on 4 April 2007, which resulted in the murder of teacher Carlos Fuentealba. According to the complainants, in addition to the violation of the right to life as a result of the crime committed because of the political decision by the Governor of the province to suppress the mobilization of teachers, as a result of the extreme violence that has been reported, the teachers of Neuquén Province have been denied the right to strike. Furthermore, the issuance by the provincial authorities of Decree No. 448 on “educational emergency”, dated 20 April 2007 and published in the *Official Gazette* of the Province No. 3031, specifically provides for the appointment of teachers on an interim basis until the end of the strike called by ATEN, a first level trade union affiliated to CTERA.
388. The complainants indicate that, in accordance with the statutes of the CTA and the CTERA, which have been duly registered with the National Ministry of Labour, and with the specific provisions of Act No. 23551 on trade union associations, trade unions are guaranteed, in terms of collective freedom of association, the right “to formulate their own action plans and to carry out any lawful activity to defend the interests of workers. In particular, they may exercise the right to bargain collectively, the right to participate, the right to strike and the right to take other forms of legitimate trade union action” (article 5(d) of Act No. 23551). In addition, the National Constitution provides that: “Trade unions are guaranteed the right to enter into collective agreements, the right to have recourse to conciliation and arbitration and the right to strike” (section 14bis, second paragraph). It is clear that, according to the Constitution, the first step is to negotiate, reach agreement, restore balance, correct inequities and ensure bargaining parity between unions and employers through the introduction of legislation negotiated as part of a collective agreement; the next step is to establish dispute prevention mechanisms based on conciliation and voluntary arbitration (although the Constitution does not indicate whether this should be a government activity); and the final step, as a last resort, is to use union power to exercise the right to strike. The complainants indicate that the Constitution does not set any limits or conditions in this regard.
389. The complainants indicate that the right to strike may be invoked and exercised even though there is no regulatory act passed by Congress governing this right, because exercising the right to strike does not require legislative regulation. Section 14bis of the National Constitution is complemented by the recognition of the constitutional status of human rights declarations and treaties provided for under section 75.22. Of the human rights instruments, only the International Covenant on Economic, Social and Cultural Rights explicitly refers to the right to strike (article 8.1(d)). Nevertheless, the American Declaration of the Rights and Duties of Man, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the American Convention on Human Rights encompass the right to freedom of association as part of the right to strike. There are no ILO Conventions or Recommendations specifically governing the right to



strike, but the right is seen as being implicit in the right to freedom of association enshrined in Convention No. 87.

- 390.** The complainants state that education is not an essential service and that the resolutions, decisions and opinions of the ILO Committee on Freedom of Association, as demonstrated in its handling of case No. 1679, have established that education is not an “essential service”.
- 391.** The complainants are of the view that the indiscriminate repression of education workers which led to the murder of Mr Carlos Fuentealba and the abovementioned Decree by the authorities of Neuquén Province declaring a state of “emergency” in the province’s education system and establishing a mechanism that clearly prevents teachers from exercising their right to strike are totally unacceptable. It is manifestly inappropriate and no less than absurd to try to claim that education is an essential service just when a measure of direct action is taken, when a demonstration is organized or when any sort of action is taken in protest against what teachers are experiencing, and what makes matters worse is that the behaviour of the Neuquén authorities is dangerously centred on the infamous “victim blaming” theory in so far as explicit reference is made to the intention to make educators fully responsible for ensuring the provision of the service.
- 392.** The complainants indicate that section 14bis of the National Constitution clearly guarantees the establishment of free and democratic trade union organizations on mere registration in a special register. The section adds that: “Trade unions are guaranteed the right to enter into collective agreements, the right to have recourse to conciliation and arbitration and the right to strike ...” Likewise, under section 5(d) of Act No. 23551, as mentioned above, as well as under section 31 of the same act, all trade unions have the right to formulate their own action plans and the right to represent the collective interests of all workers who are within the scope of union activity, whether or not they are union members. Decree No. 448/07 issued by the authorities of the province in question is directly aimed at preventing the legitimate enjoyment of the right to strike and at the same time involves an absolute refusal to enter into collective negotiations with the representative trade union regarding the working conditions of the education workers.
- 393.** Finally, the complainants state that the absurd police repression that resulted in the murder of teacher Carlos Fuentealba and Decree No. 448 of 20 April 2007 on educational emergency issued by the authorities of Neuquén Province are illegal and violate freedom of association because they undermine the most fundamental of all rights, namely the right to life, and the right to strike of all workers.

## **B. The Government’s reply**

- 394.** In its communication of 19 October 2007, the Government states that the complaint filed by the CTA and the CTERA is related to the dispute that ATEN entered into with the provincial authorities, which resulted in the pointless death of teacher Carlos Fuentealba. According to the Government, the situation warrants a thorough and detailed description of the events, which date from 20 February 2007, when the trade union ATEN sent a note to the provincial authorities – the Ministry of Education in particular – calling for the launch of negotiations. At the outset, the Government firmly denies that any action was taken to restrict the freedom of association of the trade union organizations that staged the dispute in question.
- 395.** According to the Government, the unions used their rights under section 14bis of the National Constitution, which governs union activities and the enjoyment of the right to strike. They exercised, in the following order, the exclusive rights of trade unions, as provided for under article 31 of Act No. 23551: “(a) to defend and represent the individual

and collective interests of workers in dealings with the State and the employers; (b) to participate in the activities of institutions involved in planning and inspection, in accordance with the respective provisions; (c) to participate in collective negotiations and to monitor compliance with labour and social security regulations; (d) to collaborate with the State in examining and resolving workers' problems; (e) to establish earmarked funds which shall enjoy the same rights as cooperatives and mutual funds; and (f) to administer their own social welfare activities and, as appropriate, to participate in the administration of those undertaken pursuant to law or to collective labour agreements". It is the question of the enjoyment of these rights that prompted the series of events described below.

- 396.** On 23 February 2007, the union sent a note to the provincial authorities, in response to which the province's Minister of Education invited the union on 26 February to attend a hearing in order to give fair consideration to the list of issues raised by ATEN. The following issues were discussed: (1) information regarding the municipal infrastructure; (2) wage scale increases, in response to a call for a pay rise to 2,882 pesos; (3) fixed cash bonuses; (4) the complainant trade union ATEN indicated that it supported the strike to be held on 5 March for an unspecified duration if agreement was not reached. From the list of issues raised by ATEN, workers were offered: (1) the standardization of non-remunerative bonus elements in the basic wage; (2) the elimination of performance-based benefits (for ATEN, "presenteeism"), instead making such benefits an element of the basic wage; (3) a further guarantee of a wage increase of no less than 150 pesos for those who already earned the minimum amount; (4) a commitment to instruct the Neuquén Social Security Institute to make the necessary arrangements to increase the variable percentage of the teachers' retirement allowance; (5) the establishment of a working group on granting contract staff regular staff status and on social programming in the education sector (non-teaching staff); (6) with regard to wages, the amount offered reached and exceeded the fixed national levels, the base amount offered being 1,140 pesos.
- 397.** The Government indicates that a wage agreement was effectively not reached. This prevented the provincial Government from pursuing a timely dialogue, without prejudice to the industrial action being taken by ATEN at the time. Nevertheless, another working group was established with finance officials from the Neuquén provincial authorities to find a solution to the wage claims raised during the dispute. While the negotiations were under way, the union took direct action which involved: (1) the non-initiation of the academic year; (2) the blocking of bridges; (3) the setting up of road blocks without warning in various parts of the province to cut off towns far from the provincial capital and to prevent commercial activity in the productive sector; (4) demonstrations in towns; and (5) threats of further action.
- 398.** The Government adds that the situation described above prevented the normal progression of the academic year, which meant that children were prevented from attending school in a normal and regular way. This situation led to numerous complaints from parents, causing unrest among civil society. Subsequently, faced with the impossibility of continuing the negotiations, the provincial Government proceeded to issue a compulsory conciliation order with the aim of restoring the pre-dispute status quo, so that education workers could return to their normal and regular jobs and so that dialogue could be resumed with the trade union in a climate of social peace. Although the application of Act No. 14786 on compulsory conciliation was rejected by the union, the provincial authorities nevertheless agreed to increase the pay of new teachers to 1,240 pesos, with due account to the geographical location concerned. This proposal was also rejected. It should be noted that the conciliation process provides an opportunity for settlement and rapprochement and that, by exercising their autonomy and by making mutual concessions, it is the parties themselves that reach an agreement that should in theory reconcile their underlying differences. In such circumstances, it is unacceptable for the parties involved to be subjected to measures which restrict their freedom of negotiation. The power to request

compulsory conciliation for a limited period is vested exclusively in the State for the purposes of ensuring social peace, and in no way can it be considered to be a violation of the principles of freedom of association because it will always be established for a limited period.

- 399.** According to the Government, it is of paramount importance to stress that schools in the Republic of Argentina not only provide a natural environment for educating children but also play a very important social role, as in many respects they exert a cohesive influence on various sectors of society, in particular in view of the fact that Neuquén Province occupies a vast territory, which means that many children have to travel many miles, often in adverse weather conditions, in order to attend school. Many publicly run schools in the Republic of Argentina therefore provide children with breakfast and lunch, which means that school attendance is of the utmost importance because the State provides additional support to families, taking into account that there are certain pockets of poverty in the region.
- 400.** The Government states that, because the trade unions felt unsatisfied with the proposals by the provincial authorities, they decided to take direct action, leading to the occupation of the bridges linking the cities of Cipolletti and Neuquén. On 3 April 2007, a road block was set up on national road No. 22, at Arroyito, where there is an intersection of the roads leading to the tourist areas of southern Argentina (Bariloche, Villa La Angostura, Caviahue, El Bolsón and San Martín de los Andes, among others). When they heard about this measure, the Neuquén provincial authorities announced that they would not allow such a blockage and the demonstrators were requested to carry out their protest in the area of the Carancho bridge, in order to provide road users with an alternative route. This request was ignored by the protesters, who at that point included not only teachers but members of different trade unions and political associations. The police force was then called in to enter into dialogue with the union authorities to prevent the demonstrators from blocking the abovementioned road and thus to protect the rights of third parties who had nothing to do with the matter in question to the freedom of movement (a freedom which is protected by the Constitution). No agreement was reached. It was at this point that the police proceeded to clear the way to enable the free movement of the vehicles that had been brought to a standstill. Minutes later, teacher Carlos Fuentealba was unfortunately killed when a tear gas canister was fired. The provincial authorities have since identified those responsible and reports have been prepared leading to the dismissal from the Neuquén police of the perpetrators of the unfortunate event, who have subsequently been handed over to justice. With regard to the legal proceedings, the judge responsible for the case has indicated that the citizen José Darío Poblete was detained after questioning on 6 April 2007 and, after a court hearing on 27 April of the same year, on the basis of a final decision.
- 401.** The contested Decree No. 448 declares a state of educational emergency throughout the province. It gives the Neuquén Province Education Council the power to appoint the interim managers and teaching staff needed in the various schools for the purpose of providing and guaranteeing an educational service and provides that such staff will be appointed until the situation returns to normal. This decision by the provincial authorities is in accordance with the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man and the International Covenant on Economic, Social and Cultural Rights. Even though the education system is not considered to be an essential service, a crisis situation began to emerge when the academic year failed to begin, leading to unrest among parents and society as a whole. Thus, section 3 of the Decree in question that is being challenged by trade unions stipulates that “the staff mentioned in section 1 will be appointed until the educational service returns to normal”. Consequently, the claim that the Decree in question restricts freedom of association is categorically rejected, not only because the Decree was prepared in the spirit of the Committee’s

recommendations, but also because the workers hired to provide replacement services for the strikers were recruited on an interim basis, as has been stated unequivocally. Significantly, the right to strike was not violated because the strike took place for the entire period called for by the union (two months) and wages are being paid to date for the days not worked as a result of participation in the strike, in accordance with an order by the board of the Neuquén Province Education Council, which is a tripartite body responsible for the implementation of the abovementioned Decree.

### C. The Committee's conclusions

402. *The Committee observes that, in the present case, the complainants allege that Mr Carlos Fuentealba was killed on 4 April 2007 during a demonstration by education workers in Neuquén Province which was suppressed by the police, and object to Decree No. 448 of 20 April 2007 on educational emergency, issued by the authorities of Neuquén Province, authorizing the appointment of teachers on an interim basis until the end of the strike called by ATEN.*
403. *With regard to the allegation concerning the murder of teacher Mr Carlos Fuentealba, on 4 April 2007, during a demonstration of education workers in Neuquén Province which was suppressed by the police, the Committee notes that, according to the Government: (1) in the context of a dispute between ATEN and the authorities of the province in question, trade unions decided to take direct action which led to the occupation of bridges linking two cities and on 3 April 2007 the establishment of a road block on national road No. 22, where there is an intersection of the roads leading to the tourist areas of southern Argentina; (2) the provincial authorities announced that they would not allow such a blockage and requested the demonstrators to carry out their protest in the area of the Carancho bridge, in order to provide road users with an alternative route; (3) the request was ignored by the protesters and consequently members of the police force were called in to enter into dialogue with the union authorities to prevent the demonstrators from blocking the road; (4) no agreement was reached and the police proceeded to clear the way to enable the free movement of vehicles; minutes later, teacher Carlos Fuentealba was killed when a tear gas canister was fired; (5) the provincial authorities identified those responsible and reports have been prepared leading to the dismissal of the perpetrators from the Neuquén police force, who have been handed over to justice; (6) as part of the legal proceedings, Mr José Darío Poblete was detained and tried.*
404. *The Committee deeply regrets the death of the teacher, Mr Carlos Fuentealba, after a tear gas canister was fired by the police, and requests the Government to keep it informed of the outcome of the legal proceedings against the person accused of causing his death. Likewise, the Committee recalls that it has underlined on numerous occasions that, although “trade union rights include the right to organize public demonstrations, the prohibition of demonstrations on the public highway in the busiest parts of a city, when it is feared that disturbances might occur, does not constitute an infringement of trade union rights, and the authorities should strive to reach agreement with the organizers of the demonstration to enable it to be held in some other place where there would be no fear of disturbances” [see **Digest of decisions and principles of the Freedom of Association Committee**, 2006, fifth edition, para. 139]. The Committee notes in this respect that the Government tried to dissuade the demonstrators from setting up a road block and that only after they had refused did the Government send in the police force to enable the movement of vehicles. Nevertheless, taking into account the tragic consequences in this specific case, the Committee recalls that “the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use*

of excessive violence when controlling demonstrations which might result in a disturbance of the peace.” [see **Digest**, op. cit., para. 140]. At the same time, the Committee emphasizes that trade union organizations should conduct themselves responsibly and respect the peaceful manner in which the right of assembly should be exercised. The Committee requests the Government to ensure that the above principles are respected and to give instructions to its security forces to this effect, so as to ensure proportionality and balance in the use of force and avoid any excesses.

- 405.** *With regard to the contested Decree No. 448 of 20 April 2007 on educational emergency issued by the authorities of Neuquén Province, authorizing the appointment of teachers on an interim basis until the end of the strike called by the Association of Education Workers of Neuquén (ATEN), the Committee notes that, according to the Government: (1) this Decree declared a state of educational emergency throughout the province, gave the Neuquén Province Education Council the power to appoint the management and education workers needed in the various schools for the purpose of providing and guaranteeing an educational service and provided that such staff would be appointed until the situation returned to normal; (2) this decision by the authorities is in accordance with the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man and the International Covenant on Economic, Social and Cultural Rights; (3) even though the education system is not considered to be an essential service, a crisis situation began to emerge when the academic year failed to begin, leading to unrest among parents and society as a whole; the Decree in question does not violate freedom of association, not only because it was drawn up in accordance with the recommendations of the Committee but also because the staff who were going to provide replacement services for the strikers were hired on an interim basis; and (4) the right to strike was not violated because the strike took place for the entire period called for by the union (two months) and wages are being paid to date for the days not worked as a result of participation in the strike, in accordance with an order by the board of the Neuquén Province Education Council, which is a tripartite body responsible for the implementation of the abovementioned Decree.*
- 406.** *The Committee recalls that, on numerous occasions, it has emphasized that the education sector does not constitute an essential service in the strict sense of the term and that “the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association” [see **Digest**, op. cit., paras 587 and 632]. Nevertheless, the Committee recalls that it has also indicated that “minimum services may be established in the education sector, in full consultation with the social partners, in cases of strikes of long duration” [see **Digest**, op. cit., para. 625]. In the present case, the Committee observes that the Government has not supplied information on the number of workers replacing the workers on strike and has not denied that this measure was the result of a decree adopted without consultation with the trade unions concerned. In these circumstances, the Committee expects that, in the future, in the event of a dispute in the education sector in Argentina involving a strike of long duration, priority will be given to the establishment of minimum services, in full consultation with the social partners concerned, and that the appointment by the authorities, without consultations with the trade unions concerned, of staff to replace the striking workers will be avoided.*

## **The Committee’s recommendations**

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

- (a) *The Committee deeply regrets the killing by the police of the teacher, Mr Carlos Fuentealba, and requests the Government to keep it informed of the outcome of the legal proceedings against the person accused of his murder.*
- (b) *The Committee recalls that the authorities should resort to the use of force only in situations where law and order is seriously threatened. The intervention of the forces of order should be in due proportion to the danger to law and order that the authorities are attempting to control and governments should take measures to ensure that the competent authorities receive adequate instructions so as to eliminate the danger entailed by the use of excessive violence when controlling demonstrations which might result in a disturbance of peace. The Committee requests the Government to take measures to ensure that this principle is respected and emphasizes that trade union organizations should conduct themselves responsibly and respect the peaceful manner in which the right of assembly should be exercised. The Committee requests the Government to ensure that the above principles are respected and to give instructions to its security forces to this effect, so as to ensure proportionality and balance in the use of force and avoid any excesses.*
- (c) *The Committee requests the Government to guarantee that the right to strike is respected and expects that, in the future, in the event of a dispute in the education sector in Argentina involving a strike of long duration, priority will be given to the establishment of minimum services, in full consultation with the social partners concerned, and that the appointment by the authorities without consultations with the trade unions concerned of staff to replace the striking workers will be avoided.*

CASE NO. 2552

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

**Complaint against the Government of Bahrain  
presented by  
the General Federation of Bahrain Trade Unions (GFBTU)**

*Allegations: The complainant organization alleges that the newly adopted amendments to the Trade Union Law and a Decision of the Prime Minister as regards essential services are contrary to the principles concerning the right to strike*

408. The complaint is contained in a communication of 22 February 2007. The International Confederation of Arab Trade Unions submitted additional information in support of the complaint in a communication of 28 October 2007.

409. The Government submitted its observations in a communication of 13 August 2007.

410. Bahrain has not ratified either the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. The complainant's allegations**

411. In its communication of 22 February 2007, the complainant states that Legislative Decree No. 33 of 2002 on the Trade Union Law was promulgated following negotiations and consultations between trade union organizations and the Government. Section 21(e) of the said Law set forth the following essential services in which strike action was prohibited: security services, civil defence, airports, ports, hospitals, transport, telecommunications, electricity and water services. The complainant states that it had expressed reservations concerning section 21's blanket prohibition on strikes in these services, as it did not distinguish between sensitive and non-sensitive departments within these sectors.
412. The complainant indicates that Law No. 49 of 2006 amending certain provisions of the Trade Union Law was subsequently adopted. Section 21(d) of the Trade Union Law, as amended by Law No. 49, "prohibits strikes in essential services which may disturb national security or disrupt the daily life of citizens. The Prime Minister shall issue a decision setting out those essential services where strikes are prohibited". The complainant further states that on 20 November 2006 the Prime Minister issued Decision No. 62, which listed the following as essential services where strike action was prohibited: security services, civil defence, airports, ports, hospitals, medical centres and pharmacies, all means of transport of persons or goods, telecommunications, electricity and water services, bakeries, educational institutions, and oil and gas installations.
413. The complainant alleges that, in leaving the naming of sectors where strike action is prohibited to the Prime Minister's discretion, Law No. 49 of 2006 represents a diminution of workers' rights. It further states that Decision No. 62 of the Prime Minister includes as essential services certain establishments that are outside the scope of essential services in which strikes may be banned, as defined by international labour standards. Finally, a copy of Law No. 49 of 2006 is attached to the complaint.
414. In its communication of 28 October 2007, the International Confederation of Arab Trade Unions alleges that the Government restricts the right to strike in 17 sectors, in violation of international labour standards.

#### **B. The Government's reply**

415. In its communication of 13 August 2007, the Government states that the ILO has not adopted any international labour standards regulating the right to strike. The sole Convention referring to this right remains the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, Article 8 of which sets forth the right to strike, provided that it is exercised in conformity with the laws of the particular country. The ICESCR, the Government adds, also reserves for each nation the right to regulate the manner in which the right to strike is exercised.
416. According to the Government, the ILO's Committee on Freedom of Association has indicated on several occasions that each country has the right to regulate the right to strike, as well as to prohibit its exercise in sectors deemed to be essential services, the interruption of which would lead to the disruption of everyday life for all or a certain part of the population. It was precisely on this principle that the Bahraini legislature drafted section 21 of the Trade Union Law, as amended by Law No. 49 of 2006. Section 21 lays down a general definition of essential services, in which strikes are prohibited, while leaving to the

Prime Minister the power to specify those services considered to be essential in order to make modifications, as need be, and so avoid the difficulties and delays associated with amending the law.

417. The Government indicates that the definition of essential services applied in the Prime Minister's Decision No. 62 of 2006 is identical to that contained in the Trade Union Law, regardless of whether the services concerned are Arab or foreign owned. The definition of essential services utilized takes into consideration the imperative of allowing essential services to continue to be provided to the population. Decision No. 62 of 2006 also includes the same essential services as those set out in section 21 of the Trade Union Law before its modification by Law No. 49 of 2006 – which had included educational institutions and the gas and petroleum sectors. In respect of these latter services, the Government contends that it is unreasonable to permit strikes in educational institutions, as the programmes therein are administered within a time-bound framework, thus rendering compensation for those days lost to strikes difficult. Strikes in the petroleum and gas sectors are also not permissible, as these two industries constitute a principal source of national revenue, and are similarly prohibited in the transportation sector, in view of this sector's importance to the functioning of many other sectors of the economy. The Government states that the definition of these services as essential takes into consideration the general interests of the population.
418. The Government states that, although the legislature has prohibited strikes in those services deemed to be essential, in conformity with international labour standards it has provided for recourse to conciliation and arbitration in case of collective disputes arising in essential services. The mechanisms established by the legislature to dispose of collective disputes, such as conciliation and arbitration proceedings, often dissuade workers from resorting to strikes. Finally, the Government indicates that the list of essential services specified in Decision No. 62 of 2006 is not a definitive one, but may be modified should changes in the existing circumstances so permit.

### C. The Committee's conclusions

419. *The Committee notes that the present case concerns legislation and a Ministerial Decision setting out essential services in which the right to strike is prohibited. Noting the Government's contention that no international labour standards provide for the exercise of the right to strike, the Committee wishes to first clarify that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests. The right to strike, furthermore, is an intrinsic corollary to the right to organize protected by Convention No. 87 [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 521 and 523].*
420. *The Committee notes that section 21 of the Trade Union Law promulgated by Legislative Decree No. 33 of 2002, as amended by Law No. 49 of 2006, prohibits strikes in essential services – defined as those services which may disturb national security or disrupt the daily life of citizens – and provides that the Prime Minister shall issue a decision setting out those essential services where strikes are prohibited. The Committee further notes, from the information at its disposal, that the Prime Minister's Decision No. 62 of 2006 lists the following as essential services where strike action is prohibited: security services, civil defence, airports, ports, hospitals, medical centres and pharmacies, all means of transport of persons or goods, telecommunications, electricity and water services, bakeries, educational institutions, and the petroleum and gas sectors.*



421. *In respect of essential services, the Committee first recalls that the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety, or health of the whole or part of the population) [see **Digest**, op. cit., para. 576]. Moreover, to determine situations in which a strike could be prohibited, the criterion that has to be established is the existence of a clear and imminent threat to the life, personal safety, or health of the whole or part of the population [see **Digest**, op. cit., para. 581]. In these circumstances, the Committee, while noting the Government's indication that the definition of essential services provided for in its legislation is based on the consideration of the general interests of the population, nevertheless considers that the definition set out in section 21 is broader than the definition of essential services in the strict sense of the term. Furthermore, where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the workers to compensate them for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services. As regards the nature of appropriate guarantees in cases where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented [see **Digest**, op. cit., paras 595 and 596]. The Committee therefore requests the Government to take the necessary measures to amend section 21 of the Trade Union Law so as to limit the definition of essential services to essential services in the strict sense of the term – that is, services the interruption of which would endanger the life, personal safety, or health of the whole or part of the population – and to ensure that workers in services where the right to strike is restricted or prohibited are afforded sufficient compensatory guarantees. The Committee requests the Government to keep it informed of the steps taken in this regard.*
422. *As concerns the list of essential services set out in Decision No. 62 of 2006, the Committee recalls that the police and armed forces, public or private prison services, air traffic control, the hospital sector, the telephone service and electricity and water supply services may be considered to be essential services [see **Digest**, op. cit., para. 585]. The Committee has also indicated that what is meant by essential services in the strict sense of the term depends to a large extent on the particular circumstances prevailing in a country. Moreover, this concept is not absolute, in the sense that a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population [see **Digest**, op. cit., para. 582]. These conditions do not appear to have been met in this specific case. The Committee therefore considers that the following sectors set out in Decision No. 62 do not constitute essential services in the strict sense of the term: private security services generally (with the exception of public or private prison services), airports (with the exception of air traffic control), ports, general transport, pharmacies, bakeries, educational institutions and the petroleum and gas sectors (see also **Digest**, op. cit., para. 587). In respect of some of these services, however, the Committee wishes to point out that a minimum service may be set up in the event of a strike, the extent and duration of which might be such as to result in an acute national crisis endangering the normal living conditions of the whole or part of the population; in addition, workers' organizations should be able to participate in defining such a service in the same way as employers and the public authorities [see **Digest**, op. cit., para. 610]. In the light of the above principles, the Committee requests the Government to take the necessary measures to modify the list of essential services set out in Decision No. 62 of 2006 so that it includes only essential services in the strict sense of the term.*

**423.** *The Committee further expresses its concern at the overall authority given to the Prime Minister to add to the list of essential services at any time and without any obligation to consult the social partners concerned. The Committee equally requests that measures be taken to ensure that any determination of new essential services be made in full consultation with the representative workers' and employers' organizations and in accordance with principles of freedom of association. The Committee requests the Government to keep it informed of developments in this regard and, should a new decision of the Prime Minister setting out essential services be issued, to provide it with a copy of the same.*

### **The Committee's recommendations**

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

- (a) The Committee reminds the Government that it has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests and as an intrinsic corollary to the right to organize.*
- (b) The Committee requests the Government to take the necessary measures to amend section 21 of the Trade Union Law so as to limit the definition of essential services to essential services in the strict sense of the term – that is, services the interruption of which would endanger the life, personal safety, or health of the whole or part of the population – and to ensure that workers in services where the right to strike is restricted or prohibited are afforded sufficient compensatory guarantees. The Committee requests the Government to keep it informed of the steps taken in this regard.*
- (c) The Committee requests the Government to take the necessary measures to modify the list of essential services set out in the Prime Minister's Decision No. 62 of 2006 so that it includes only essential services in the strict sense of the term. With respect to services that are not essential in the strict sense of the term, but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population, the Committee points out that the Government may consider setting up a minimum service, with the participation of workers' organizations and employers in defining such a service.*
- (d) The Committee requests the Government to take measures to ensure that any determination of new essential services be made in full consultation with the representative workers' and employers' organizations and in accordance with the principles of freedom of association. The Committee also requests the Government to keep it informed of developments in this regard and, should a new decision of the Prime Minister setting out essential services be issued, to provide it with a copy of the same.*

CASE NO. 2529

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

**Complaint against the Government of Belgium  
presented by  
the Professional Association of Maritime Pilots (BvL)**

***Allegations: The complainant organization alleges difficulties in determining its representative trade union status, that it cannot sit on bargaining and consultation bodies to defend the interests of its members or participate in collective bargaining processes, despite its representativity, partly due to the applicable legislation***

425. The complaint is contained in a communication from the Professional Association of Maritime Pilots (BvL) of 16 November 2006.

426. The Government sent its observations in a communication dated 29 August 2007.

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

**A. The complainant's allegations**

**I. Background**

428. The BvL is a non-profit association, founded according to the provisions of the Act of 27 June 1921 on non-profit associations and international non-profit associations and foundations. The Association, whose articles of association were published in the *Moniteur Belge* on 20 July 2000, is the result of the merger of two pilots' associations: the Association of State River Pilots (VSRL) and the Association of Sea and Coastal Pilots (VZKL). Despite its recent legal establishment, the BvL has in practice a long tradition of defending the professional interests of maritime pilots. The BvL maintains that it is the only organization defending the professional interests of Flemish maritime pilots.

429. Under the Special Act of 8 August 1980 on institutional reform, the regions are responsible for pilotage and beaconing to and from their ports, as well as rescue and towing services at sea. The Special Act accordingly transferred the state pilotage service, established in 1839, to the regions. As a result, the Flemish Region has its own public pilotage service. Moreover, maritime pilots have the status of public employees of the Flemish Region since, by virtue of section 5(1) of the Pilotage Decree of 19 April 1995 respecting the organization and provision of pilotage services in the Flemish Region, the piloting of vessels in the waters defined by the Decree can only be carried out by the pilotage service of the Flemish Region.

- 430.** However, the BvL indicates that, despite the responsibility of the Flemish Region for the organization of the pilotage service, which means that it is the employer of the pilots, the issue of consultation and collective bargaining with employees' trade unions remains under the competence of the federal authorities, in accordance with the Federal Act of 19 December 1974 organizing relations between public authorities and the unions of their employees.
- 431.** The Ministry of the Flemish Community covering maritime ports has had a department since 2001 for the autonomous administration of the pilotage service (DAB-L), which is responsible for providing pilotage services and advice to maritime vessels. The DAB-L was established by a decree issued by the Flemish Parliament on 30 June 2000 and has, in the same way as all autonomous departments, a certain independence in its financial and budgetary administration and personnel management, particularly for recruitment and related expenditure. A Flemish Government decision of 15 December 2000 concerning the organization of the DAB-L explicitly acknowledges its competence for personnel management (section 2(2)). However, the BvL adds that the DAB-L is not an independent legal entity and that its employees are therefore public employees of the Flemish Region.
- 432.** The BvL contends that this competence for personnel management necessarily includes the selection of the social partners that are to participate in collective bargaining with the public employer. In the case of bargaining on the conditions of employment of maritime pilots, it would be expected that the BvL, an organization with a membership that includes over 80 per cent of serving Flemish maritime pilots and 60 per cent of DAB-L employees, would be actively involved. The BvL denounces the fact that it has never been able to participate in official collective bargaining, even when the issues specifically relate to maritime pilotage.
- 433.** The BvL affirms that it is a trade union, recognized in accordance with the Act of 19 December 1974 organizing relations between public authorities and the unions of their employees. Under the terms of this Act, to be recognized, a trade union has to submit to the competent authorities a copy of the statutes of the association and a list of its officers. Once the trade union has met these requirements, it obtains official recognition. The public authorities cannot challenge such recognition. By virtue of the Royal Decree of 28 September 1984, issued under the Act of 19 December 1974, once a trade union is recognized it should have the right: to intervene with the public authorities in the interest of the employees whom it represents or in the interest of an individual member; to assist at her or his request an employee required to justify her or his acts to the administrative authority; to post notices in the premises of the public service in question; and to receive general information concerning the management of the personnel that it represents (section 9).
- 434.** However, according to the BvL, its legal recognition and the rights granted to it are insufficient for a union to be able to participate in collective bargaining. It also needs to be recognized as being "representative". Thus, the BvL indicates that, despite its legal status as a trade union, the law does not grant it the right to participate in collective bargaining, even where such bargaining specifically relates to maritime pilotage.
- 435.** The BvL observes that the Act of 19 December 1974 obliges the public authorities to participate in preliminary negotiation or consultation with the trade unions on all measures relating to the terms and conditions of employment of employees. The BvL uses the term "collective bargaining" to describe these negotiations and prior consultations. The Act adds that such collective bargaining and consultation shall take place in committees on which representative trade unions are represented. However, the Act establishes a number of conditions and criteria to define the notion of representative status, which vary according to the committee in question.

- 436.** The bargaining committees, as laid down in the Act of 19 December 1974, may be at the federal, community, regional or sectoral levels. In accordance with section 3 of the Act, general committees are established at the federal, community and regional levels. These committees are: the Combined Public Services Joint Committee (Committee A), the Federal, Regional and Community Public Services Committee (Committee B) and the Provincial and Local Public Services Committee (Committee C). Bargaining in these committees covers general measures relating to the employees represented by the various sectoral committees. The sectoral committees are set up by the authorities and are solely competent in relation to the matters for which they have been established. The BvL cites the case of maritime pilots, who are employees of the Flemish Region and are covered by Sectoral Committee XVIII, which deals with all matters relating to employees of the Flemish Community and the Flemish Region.
- 437.** The Act of 19 December 1974 also provides that the authorities may determine the membership and operation of consultation committees (section 10 of the Act). The Royal Decree of 1984 defines four types of consultation committees: high consultation committees (HCCs), basic consultation committees (BCCs), intermediate consultation committees (ICCs) and specific consultation committees (sections 35, 36 and 40 of the Royal Decree).
- 438.** The BvL indicates that, although the criteria relating to the representative status of trade unions are intended to allow their participation in the bargaining and consultation committees described above, these criteria vary according to whether they are general bargaining committees, sectoral or consultation committees.
- 439.** With regard to general bargaining committees, the Act of 19 December 1974 provides that trade unions that are considered to be representative and are entitled to be represented on the Combined Public Services Joint Committee, the Federal, Regional and Community Public Services Committee, and the Provincial and Local Public Services Committee are those which operate at the national level, defend the interests of all categories of public employees and are affiliated to a trade union represented on the National Labour Council (section 7 of the Act). The BvL also maintains that trade unions that operate at the sectoral level, as the BvL does, and only defend the interests of a single category of employees, are therefore by definition excluded from participation in general bargaining committees. The BvL also notes that, as the National Labour Council only covers the private sector, the requirement to be affiliated to a union organization that sits on the National Labour Council as a prerequisite for participating in a body covering the public sector is not logical.
- 440.** The BvL adds that, in terms of the representation criteria taken into account to authorize participation in sectoral committees, such as Sectoral Committee XVIII covering the Flemish Community and the Flemish Region, the Act of 19 December 1974 requires: (1) official recognition; (2) the defence of the interests of all categories of personnel in a department covered by the committee (which means that only trade unions that defend the interests of all the employees of the Flemish Community and the Flemish Region can be members of Sectoral Committee XVIII); (3) affiliation to a national trade union; and (4) representation of at least 10 per cent of the employees covered by the sectoral committee or the capacity to demonstrate that the organization has the largest membership among those which do not have a seat on the Federal, Regional and Community Public Services Committee (Committee B). Taking into account these representation criteria, the BvL, which promotes the interests of only one category of public employees and does not operate at the national level, is excluded from the meetings of Sectoral Committee XVIII. The BvL adds that, as the representation criteria for consultation committees are the same as for sectoral committees, it is also excluded from those bodies.

441. The BvL concludes that a trade union which furthers the interests of only one category of public employees and does not have national representation cannot meet the criteria imposed by the Act of 19 December 1974 and therefore cannot be represented on any committees. These representation criteria have led to a situation in which only the three “traditional” trade unions are represented on the bodies in which collective bargaining is carried out between public authorities and their employees. The BvL observes that, under Belgian legal doctrine, this situation may be described as a political/trade union cartel, far removed from real trade union representation.

## **II. *The representative status of the BvL***

442. The complainant organization refers to the figures provided by the public authorities in support of its claim that it represents 80 per cent of the pilots who are in active service and 60 per cent of the personnel. Of a list of 450 officials, of whom 340 are maritime pilots, the 2006 figures show that 269 pilots are members of the BvL. The BvL concludes that, based on the objective criterion of the number of members, it is the most representative organization, not only of maritime pilots, but also of all DAB-L personnel. The BvL denounces the fact that certain organizations are considered to be representative by the authorities, but hide behind the lack of transparency of the traditional organizations so as not to divulge the exact numbers of their members. These organizations, such as ACV Transcom, ACOD and VSOA, according to the complainant organization, only represent a marginal fraction of maritime pilots. The BvL considers that ACV Transcom and ACOD only represent 20 per cent of all DAB-L personnel, and that only two pilots are members of VSOA. And yet these organizations enjoy “representative” status as they operate at the national level and in all sectors. The lack of representation of the maritime pilotage service has led to protests by certain pilots, including collective action, against the marginalization of the BvL in the collective bargaining process. The BvL says that pilots feel their interests are not adequately promoted and protected in the various committees.

## **III. *Collective labour relations in the public service***

443. Despite the fact that the Flemish authorities advocate full participation by the social partners in collective bargaining within the DAB-L, the BvL is not represented; and yet collective bargaining should take into account the specific characteristics of maritime pilotage. The participation of the BvL in collective bargaining would contribute to the achievement of a more serene social climate in the DAB-L since up to now, to ensure that its voice is heard, the only effective means at its disposal has been to call strikes. The authorities nevertheless recognize the specific characteristics of the occupation in several respects. This is demonstrated by the very existence of the DAB-L and the establishment by Protocol No. 18.46 of the Mixed Workgroup on Pilots (GWL), on which the BvL is represented. However, the GWL is only a body resulting from an agreement between the authorities and the unions, and does not therefore have a statutory role. Although Protocol No. 18.46 envisages that certain matters may be addressed in the GWL, it clearly establishes that formal collective bargaining is not carried out in the GWL, which therefore fulfils a role of preparatory discussion. In accordance with the collective bargaining procedures established by law, any agreement reached by consensus in the GWL has to be reviewed in more formal bodies on which the complainant organization is not represented. The BvL adds that its participation in the discussions of the GWL does not mean that it is able to participate actively in the collective bargaining process, as it is left out of the formal bargaining and consultation bodies.

444. The BvL adds that it is represented on another informal consultation body, namely the DAB-L/BvL Consultation Forum. However, only the management of the DAB-L and the BvL’s representatives participate in this Consultation Forum, and not the other unions. The

Forum has no statutory basis and cannot therefore directly influence the decisions taken in the context of a formal collective bargaining process. Accordingly, even though the discussions held in the Forum may cover a number of issues relating to maritime pilotage, the BvL emphasizes that the existence of the DAB/BvL Consultation Forum does not constitute an alternative to its full participation in the formal collective bargaining process envisaged by law.

- 445.** The BvL recalls that there are many consultation bodies in the field of maritime pilotage. It refers to Sectoral Committee XVIII, which covers all the employees of the Flemish Community and the Flemish Region and on which representative organizations are represented. Currently, the only organizations to be considered representative are ACV Transcom, ACOD and VSOA. Sectoral Committee XVIII is authorized to initiate bargaining on measures of a general nature. These measures may relate to the conditions of employment of all the employees of the Flemish Community and the Flemish Region, including maritime pilots. Although the Pilotage Workgroup has competence over all consultations relating exclusively to the personnel of the DAB-L, certain matters, and particularly those relating to the work schedules and rotation rolls of pilots, are prepared by the GWL. After discussion in the GWL, proposals on which consensus are reached are submitted for approval to the Pilotage Workgroup. However, according to the BvL, the so-called “representative” organizations refuse to cooperate in a constructive manner in the GWL, which results in its work being sabotaged. By way of illustration, the BvL indicates that the VSOA has always refused to be bound by Protocol No. 18.46 establishing the GWL and refused to sign a declaration dated 1 April 2005 reaffirming the competence of the GWL and calling for constructive cooperation. Similarly, the ACOD indicated that it no longer wished to participate in the work of the GWL (communication of 15 April 2004, provided with the complaint).
- 446.** In parallel with Sectoral Committee XVIII, a High Consultation Committee (HOC) for the Flemish Community and the Flemish Region has been established in accordance with the Act of 19 December 1974 and the Royal Decree of 28 September 1984. Issues relating to maritime pilotage are discussed in these bodies at the level of the Pilotage Workgroup. The Pilotage Workgroup covers all DAB-L personnel. It is composed of delegates representing the public authorities and of unions represented on the Sectoral Committee, and is chaired by the departmental chief of the DAB-L. The BvL says that it is excluded from the work of this body, which is nevertheless entirely competent in the BvL’s field.
- 447.** The BvL finally notes that it is also excluded from Basic Consultation Committee 6.2, which covers issues relating to the administration of waterways and maritime affairs. The BvL regrets that this latter committee, established by decision of the Flemish Government of 28 July 2005, only authorizes the participation of the three traditional unions, ACV Transcom, ACOD and VSOA, even though they do not adequately represent the personnel engaged in the administration of the waterways and maritime affairs.
- 448.** The BvL indicates that, in view of this systematic exclusion, it sometimes deliberately attempts to participate in the meetings of the bargaining and dialogue bodies to which it has not been invited. It cites the example of a meeting on 15 December 2004 of the Pilotage Workgroup, which it sought to attend. However, even before the meeting began, the President of the Pilotage Workgroup ordered the representatives of the BvL to leave the room on the grounds that their presence was in breach of the federal legislation respecting collective bargaining between public authorities and their personnel (the Act of 19 December 1974 and its implementing Decrees of 28 September 1984 and 29 August 1985). Despite recalling that the BvL represented 85 per cent of pilots and two-thirds of the personnel of DAB-L and requesting once again that the BvL be able to participate in the meeting, the BvL’s representative met with a firm refusal. The BvL claims that the

Flemish authorities are taking refuge behind inadequate federal legislation in refusing it access to the meetings of the Pilotage Workgroup.

449. The BvL adds that maritime pilots who become members of the BvL suffer financial disadvantage in relation to employees who are members of one of the three “traditional” unions. The Act of 1 September 1980 allows the authorities to reimburse the trade union dues of certain employees. Under section 2 of the Act, a union has to be considered “representative” to claim reimbursement for its members. The criteria for representative status are those set out in the Act of 19 December 1974. The upshot is that the public authorities grant financial advantages to unions on the basis of arbitrary criteria relating to representative status. The BvL therefore calls for the reimbursement of trade union dues not to be solely confined to the three “traditional” unions, but for the BvL also to be included.

#### **IV. Violation of ILO Conventions**

450. In its communication, the BvL recalls the principles set out in Conventions Nos 87 and 98 and observes that the practice in Belgium is in stark contrast with the obligation contained in these Conventions for the full development of collective bargaining. The BvL further recalls that Belgium has also ratified the Labour Relations (Public Service) Convention, 1978 (No. 151), which is applicable to the personnel responsible for the public maritime pilotage service. It recalls that Convention No. 151 provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organizations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters (Article 7). It adds that Convention No. 151 does not exclude the possibility for public authorities to establish criteria for representative status in determining the organizations that participate in collective bargaining. However, these criteria should be objective and pre-established so as to avoid abuse. The BvL notes that the Committee on Freedom of Association has already had occasion in earlier cases to indicate that the criteria of representativity applied in Belgium do not meet the condition of objectivity. According to the BvL, it would appear that the authorities have sought to ensure the exclusive participation at all levels of the three “traditional” trade union organizations in all collective bargaining processes, while excluding sectoral organizations such as the BvL.
451. With reference to the Collective Bargaining Convention, 1981 (No. 154), the BvL notes that its scope of application includes not only all branches of economic activity, but also the public sector. The principle of the promotion of collective bargaining is also found in Collective Bargaining Recommendation, 1981 (No. 163), which further specifies that, in countries in which the competent authorities apply procedures for recognition with a view to determining the organizations to be granted the right to bargain collectively, such determination should be based on pre-established and objective criteria with regard to the organization’s representative character, established in consultation with representative employers’ and workers’ organizations (Paragraph 3). Moreover, under the terms of Paragraph 4 of the Recommendation, collective bargaining should be promoted at any level. The BvL calls for it to be possible to engage in collective bargaining, for example, at the level of the DAB-L, where it is the most representative organization.
452. In its complaint, the BvL recalls the numerous cases in which the Committee on Freedom of Association has criticized the Government of Belgium on the issue of the representative nature of unions which have been refused certain rights on the grounds that they were not representative under the terms of the national legislation. The BvL notes that the Committee on Freedom of Association has been expressing reservations since 1962 in



relation to the criteria applicable in Belgium, in accordance with which trade union organizations have to operate at the national and interoccupational levels to be considered representative. The conclusions of the Committee on Freedom of Association in these latter cases recalled that the law in Belgium has been the subject of criticism for several years and needs to be amended. Nevertheless, the Belgian authorities have always ignored the recommendations of the Committee on Freedom of Association.

**453.** The BvL adds that the minimalist interpretation given by Belgian law to collective bargaining in the public sector is in breach not only of ILO Conventions, but also of the other international instruments to which Belgium is party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

**454.** In conclusion, the BvL observes that its exclusion from formal collective bargaining bodies is based on flawed criteria of representativity. The conditions envisaged by the law to determine the representative nature of unions result in the de facto exclusion of unions representing specific categories of employees from the collective bargaining process, even where such organizations are the most representative in their category, as is the case of the BvL. In the view of the BvL, its presence in informal dialogue bodies and its absence from the collective bargaining process in the formal bargaining bodies envisaged by the law constitute discrimination.

**455.** The BvL requests the Committee on Freedom of Association to:

- (1) recognize the BvL as the most representative organization in the field of maritime pilotage;
- (2) recognize the BvL's right to be represented on bargaining and consultation committees, and therefore to be treated as a fully fledged partner in the collective bargaining process;
- (3) find that the Act of 19 December 1974 organizing relations between public authorities and the unions representing their employees, and its implementing decrees, are contrary to Belgium's international obligations;
- (4) accordingly request the Government to revise the legal regime that is in force to bring it into conformity with the recommendations of the Committee on Freedom of Association;
- (5) recommend the authorities, pending the amendment of the Act of 19 December 1974, to authorize the BvL to participate in negotiation forthwith in bargaining and consultation bodies, at all levels; and
- (6) order that the trade union bonus system is not reserved for the three "traditional" union organizations and is extended to the BvL.

## **B. The Government's reply**

**456.** In a communication dated 29 August 2007, the Government sets out to show that there has been no breach of trade union rights, as alleged by the BvL. In its introductory remarks, the Government indicates that it does not share the BvL's conclusions regarding the need to amend Belgian legislation, particularly as such an amendment would not be justified by the need to place a union on an equal footing with other unions when the union in question represents between 60 and 80 per cent of the personnel in a service with fewer than

500 employees out of a sector that includes over 44,000 workers. The Government notes that the provisions of laws and regulations challenged by the BvL have been applicable for over 20 years in a sector employing over 500,000 persons.

457. The Government adds that, in the same way as around 30 other unions that are only recognized, the BvL enjoys the capacity to intervene with the public authorities in the collective interest of the workers whom it represents. It observes, however, that up to now no other recognized organization has challenged the legislation respecting the representative nature of unions. The Government considers that the absence of complaints is an indication that almost all recognized unions are of the view that they cannot claim the same prerogatives as trade unions which defend all categories of public sector workers, particularly since the higher-level public sector unions also ensure a certain convergence with the main lines of trade union action in the private sector, with such action being led by the interoccupational trade union federation to which they are affiliated.
458. The Government indicates that it is frequently approached by small organizations which claim trade union representation for a limited category of workers in a particular occupation or sector. However, the claim to representative status often conceals the pretext of obtaining equal advantages. This situation occurs sporadically in the public sector, where competition and factions emerge in certain occupations. The Government notes that the tactic of opposing other workers' organizations and dominance over a particular sector gives rise to conflict within work groups and also to collective disputes. This can seriously disturb social peace, as it can lead to an escalation of conflict with other workers and to the citizens and users of a service or economic sector being held hostage. The Government adds that such a tactic can be defined in pejorative terms as "corporatism". It observes that in the private sector the tendency towards corporatism is very limited. Sectoral federations express interoccupational solidarity through their federation into broader organizations which can provide a basis for coherent social dialogue and trade union action through their interoccupational and national structures, with all the related advantages in terms of trade union expertise and participation in overall socio-economic policy-making.

## ***I. General considerations***

459. The Government observes that in the public sector there are, on the one hand, representative organizations that enjoy full capacity in terms of interoccupational status, numerical representation and fields of expertise. This status is conferred by their durability, the variety of areas in which they are involved, their level of resources and, in quantitative terms, the size of their membership. There are also organizations that defend specific categories which are not by vocation interoccupational and which are recognized for the specific field that interests them. Coordinated consultation therefore takes place at two levels and machinery exists within the various institutions offering a margin of manoeuvre outside the context of the well-defined bargaining process in the various sectors.
460. The Government considers that coherence can be seen between the public and private sectors at the interoccupational level. This allows exchanges between labour law as it applies to the private sector and that of the public sector. Representative organizations at the interoccupational level participate in the work and enjoy the prerogatives of the National Labour Council, where decisions are taken by unanimity, especially for the adoption of collective labour agreements. These relate to major social programmes, such as those based on interoccupational agreements or the application of European social standards. Policies adopted at the level of the National Labour Council may provide orientation for specific negotiations in the public sector. Standards relating to representative status cannot therefore be watered down, which might give rise to obstacles in the functioning of the National Labour Council and destroy the system of social dialogue.

461. The Government is of the view that representative status cannot be limited to quantitative criteria, nor to interoccupational coverage. Qualitative elements are also important and provide the basis for the mutual recognition that is essential between the partners in social dialogue: the stability of the organization, the reality of its presence and action, and also the externalization of the work of its statutory bodies and its outside relations in terms of contacts and information.
462. According to the Government, the Belgian system is recognized for the balance that is sought between the specific interests of a subsector and the overall socio-economic interests of the world of work. Prerogatives therefore differ and organizations with a lower representative status are recognized for a series of functions germane to common categories of trade union action. In contrast, representative organizations are called upon to discharge functions related to the interoccupational status that they have attained and in relation to their responsibilities in numerical terms and the confidence that they have been able to build up and confirm over time. The flexibility in the application of this system, for example, permits the participation of a recognized organization in a workgroup, even if it is excluded from a bargaining committee. Recognized organizations enjoy certain prerogatives, including those of representing and defending their members. Even though the absence of monopoly and the affirmation of pluralism ensure that the debate is enriched, a measured approach to pluralism also means that it is possible to avoid fragmentation and irresponsible anarchic tendencies. In the Government's view, the interests of workers are therefore appropriately safeguarded.

## **II. *Collective labour relations in public services***

463. The Government recalls the multiplicity of authorities in Belgium which have their own public services. A distinction therefore has to be made between the federal public service, the public services of federated entities (communities and regions) and the public services of local entities (provinces, communes and intercommunal authorities). Subject to certain general provisions established at the federal level, federated authorities enjoy autonomy in relation to their public services. Moreover, institutions have been established within these public services which in turn enjoy a certain autonomy, in the same way as autonomous enterprises at the federal level (postal services, railways, telecommunications) and have their own personnel. Certain specific groups of employees at the federal level are covered by specific federal legislation (the police, the army, magistrates). There is therefore a plethora of legal provisions respecting the status of public service personnel.
464. However, in terms of the legal provisions governing relations between authorities and trade unions, the great majority (70 per cent) of employees in national public services are covered by the same legal regime that is established by the federal State. This regime covers over 500,000 employees in most federal, community or regional public services, as well as provincial and local public services. Separate regimes are few in number and cover a total of 219,000 public employees (persons not covered by trade union rules, services covered by collective agreements and joint commissions in the private sector, and services with specific trade union rules).
465. The Government indicates that the Act of 19 December 1974 and its implementing decrees established a new system of collective labour relations as from 1985. In accordance with the trade union legislation, the authority is under the legal obligation to submit the general measures envisaged relating to its employees to a procedure of bargaining or consultation with the representative unions (depending on the objective and significance of the measures). These preliminary bargaining and consultation procedures with the unions are substantive formal requirements, and failure to comply with them impinges upon the legal status of any measure adopted without negotiation or dialogue. A breach of these

procedures may lead to the intervention of the responsible authority, the Council of State or the courts.

- 466.** The outcome of bargaining is adopted in a protocol which has the weight of a political commitment by the authority to set out the agreed measures in laws or regulations. However, such protocols are not legally binding on the authority. The dialogue process results in a reasoned opinion which is intended to enable the authority to understand the favourable or unfavourable opinion of the unions.
- 467.** Bargaining is carried out in bargaining committees, namely the Combined Public Services Joint Committee (Committee A), the Federal, Regional and Community Public Services Committee (Committee B), the Provincial and Local Public Services Committee (Committee C) and sectoral and specific committees. These committees are composed of a delegation representing the authority and delegations of the representative unions. The delegation representing the authority has to be composed of persons who exercise real responsibility over the policy to be followed in the public services concerned and who are empowered to conclude agreements that are politically binding on the authority. Under sections 21(3) and 43 of the Royal Decree of 28 September 1984, each union freely determines the composition of its delegation to bargaining committees. The Government also refers to the report of the King issued prior to the Order, according to which the intention is to leave the broadest possible freedom to unions in the composition of their delegations, which may even be composed of persons from outside a public service or of staff members from any public service. Circular No. 270 of 19 November 1985 also provides that the authority may not intervene in the composition of union delegations, and there is no provision envisaging the prior communication of the names of the delegates designated by the unions as members of committees. The Royal Decree of 1984 only sets one limit, namely that delegations shall be composed of no more than three members for each union.
- 468.** In the consultation committees, the members of the authority's delegation must be empowered to make commitments on behalf of the public authorities concerned. The composition of union delegations is governed by the same texts as in the case of bargaining committees.
- 469.** The Act of 19 December 1974 establishes the principle that only representative organizations may be represented on bargaining and consultation committees. These organizations have to meet a number of conditions and criteria to be considered representative. With regard to Committees A, B and C, section 7 of the Act provides that the organization must operate at the national level, defend the interests of all categories of personnel and be affiliated to a union organization represented on the National Labour Council (the General Federation of Labour of Belgium (FGTB), the Confederation of Christian Trade Unions (CSC) and the General Confederation of Liberal Trade Unions of Belgium (CGSLB)). The Government adds that three union organizations are currently representative in accordance with these provisions and can therefore sit on the three general bargaining committees: the General Confederation of Public Service Personnel (CGSP), the Federation of Christian Public Service Trade Unions (FSCSP) and the Free Public Service Trade Union (SLFP). Organizations that are members of Committees B and C are automatically considered to be representative for the purposes of participation in sectoral committees, specific committees and distinct specific committees.
- 470.** The representative status of organizations is examined every six years by an independent commission – the Commission to Monitor the Representative Status of Public Sector Trade Unions. The Commission is composed of a President and two members appointed by the King from the judiciary at the joint proposal of the Prime Minister, the Minister of Justice and the Minister of the Public Service. The Royal Decree of 28 September 1984 limits to

the strict minimum the rules for the operation of this Commission, which has to make an autonomous and fully independent assessment of the evidence submitted. Public services make their staff lists available to the Commission. The unions provide evidence that a sufficient number of their members have paid their union dues to demonstrate that they meet the minimum membership requirement. The Commission is an administrative authority and its decisions have the status of administrative acts subject to procedural guarantees of a jurisdictional nature. They may be struck down on appeal by the Council of State.

- 471.** The Government adds that, on the basis of the most recent examination of their representative status (2003), and an appeal for a recount (2005), the CGSP, the FSCSP and the SLFP have been determined to be representative for the purposes of membership of all sectoral committees, specific committees and distinct specific committees; the National Federation of Public Service Trade Unions (UNSP) is representative for membership of a sectoral committee and the Interoccupational Federation of Public Service Personnel (FISP) is representative for membership of a specific committee. The Government explains that alongside the representative trade union organizations, there are unions that are merely recognized. The Act of 19 December 1974 establishes a system for the recognition of trade unions which wish to be active in the public services (section 15 of the Act). The Act specifies the prerogatives of recognized trade union organizations and the Royal Decree of 28 September 1984 establishes the manner in which these prerogatives may be exercised (section 7 of the Order). The Government explains that it is extremely easy for a trade union to be recognized, as no requirements are established in terms of minimum membership, prior uninterrupted trade union activity, representation of sufficiently broad categories of staff or operating rules. The Government indicates that, as of 1 July 2007, a total of 34 trade unions were recognized.
- 472.** Under the terms of section 16 of the Act of 19 December 1974, recognized organizations may: (1) intervene with the authorities in the collective interest of the personnel that they represent or in the individual interest of an employee; (2) assist at her or his request an employee called upon to justify her or his acts to the administrative authority; (3) post notices in the premises of public services; and (4) receive documentation of a general nature concerning the management of the personnel that they represent.
- 473.** In accordance with section 17 of the Act of 19 December 1974, representative trade unions may: (1) exercise the same prerogatives as recognized trade unions; (2) collect trade union dues in places of work during hours of work; (3) attend competitions and examinations organized for employers, without prejudice to the prerogatives of juries; (4) hold meetings in administrative premises.
- 474.** The Government emphasizes that alongside social dialogue, which is carried out in bargaining and consultation committees in which only representative trade unions participate, there is a less formal level of social dialogue in which recognized trade unions also take part to intervene with the authorities.
- 475.** The Government adds that the granting of a trade union bonus by the public authorities to the members of representative trade union organizations is a sort of reimbursement of the costs borne and compensation for the services provided in the form of active collaboration in establishing a positive social climate and the development of social productivity in the interests of all employees, whether or not they are unionized, and of the community as a whole. This bonus is therefore granted in accordance with the principle of equality set out in articles 10 and 11 of the Constitution of Belgium in exchange for their contribution to the sound functioning of the public services. The Government specifies that the trade union bonus is set for the reference year 2006 and for each following year at 80 euros (€) a year.

**III. The trade union status of the Professional Association of Maritime Pilots (BvL)**

**476.** The Government makes the following observations:

- (1) the public pilotage service is covered by Sectoral Committee XVIII – Flemish Community and Flemish Region;
- (2) the number of employees in the public service concerned is 450, while the number of personnel covered by Sectoral Committee XVIII as a whole is over 44,000;
- (3) the BvL claims to have a membership of 269 pilots;
- (4) the BvL is not associated with any of the major tendencies of the Belgian trade union movement;
- (5) under the terms of section 8 of the Act of 19 December 1974, the CGSP, the FSCSP and the SLFP are considered to be the representative unions that sit on Sectoral Committee XVIII – Flemish Community and Flemish Region.

**477.** The three trade union organizations to which the complainant organization refers (namely, ACV Transcom, ACOD and VSOA) are affiliated to the European Federation of Public Service Unions (EPSU), which is the most important federation of the European Trade Union Confederation (ETUC). In the view of the Government, this demonstrates recognition at the European level of the effective interoccupational and inter-sectoral representation of these three trade union organizations.

**478.** The Government indicates that the scope of Sectoral Committee XVIII – Flemish Community and Flemish Region has been revised recently to take into account the situation resulting from the administrative reform of the Flemish Community. This revision does not change the total number of employees covered. In accordance with the reform, the Flemish administration is based on 13 homogenous political fields in each of which a Flemish ministry has been created, which is in turn composed of a department and, where appropriate, autonomous internal agencies that are not independent legal entities. It adds that there are 29 such agencies in the Flemish administration. One of these is the Maritime and Coastal Services Agency, established by order of the Flemish Government of 7 October 2005. The Agency is composed of the following five subdivisions: the administrative service; the coastal section; the navigational assistance section; the pilotage service (DAB-L); and the fleet service. The Government emphasizes that the DAB-L service is therefore only a subdivision of an agency, which is itself only a component of one of the ministries of the Flemish administration. Consequently, the BvL can only refer to a single service in this administration to demonstrate its representative status.

**479.** Moreover, a basic consultation committee has been created at the level of the Maritime and Coastal Services Agency. This basic consultation committee covers the five subdivisions of the Agency, including the DAB-L. The scope of the HOC corresponds to that of Sectoral Committee XVIII and includes over 44,000 employees. The Government concludes that the DAB-L service has to be placed at its appropriate level.

**480.** With regard to the trade union status of the BvL, the Government considers that the BvL's allegations that the system established by the Act of 19 December 1974 is intended to ensure the monopoly of the three organizations that it describes as "traditional" are without merit. It recalls in this respect that two other organizations have succeeded in establishing their representative status, one in respect of the most significant committee in the federal sector and the other in relation to the specific committee established by an inter-communal

authority. It adds that the requirement to be representative to participate in regional bargaining committees (Committees A, B and C) set out in section 7 of the Act of 19 December 1974 is not intended to ensure a monopoly of representative status by the trade union organizations described as “traditional”. It explains that this requirement has its origin in the broad scope of the measures submitted to the general bargaining committees and the importance of their budgetary implications; at this level, it is necessary to resolve issues relating to public service employees while at the same time taking into account the policy followed in relation to private enterprises, which come within the purview of the National Labour Council.

- 481.** The Government considers that the requirement relating to representative status and the representation criteria for participation in a sectoral committee that are faced by the BvL are indeed, contrary to the claims of the complainant organization, objective, pre-established and precise. Nor are these requirements and criteria excessive to the extent that it would be difficult for a trade union to meet them.
- 482.** In this respect, the Government observes that if, in the same way as the two former trade unions representing pilots (VSRL and VZKL) from which the BvL emerged, the latter were affiliated to the National Federation of Public Service Trade Unions, which meets two conditions relating to representative status (defending the interests of all categories of personnel in the services covered by the sectoral committee and being affiliated to an organization established as a federation at the national level), it would be sufficient for it to meet the criterion of 10 per cent of the personnel of the services covered by the sectoral committee.
- 483.** With regard to the BvL’s allegations relating to the trade union bonus, the Government recalls that the provisions of the Act granting this bonus have already been examined by the Committee on Freedom of Association, which found that it does not seem to constitute a real means of pressure leading to the conclusion that the public authorities intend, through the advantages granted to certain workers, to influence unduly the choice of workers with regard to the organization that they intend to join. For it to retain this quality, the Committee on Freedom of Association considers that it is important that the amount of the bonus in question does not exceed a symbolic level [see 208th Report, Case No. 981, para. 116].

#### **IV. *Response to the allegations of the violation of ILO Conventions***

- 484.** With regard to the BvL’s allegations of the violation of ILO Conventions, the Government emphasizes its constant concern to comply with the provisions of the ILO Conventions on freedom of association. It also observes, in reply to the BvL’s allegations of the violation of Convention No. 151, that the Committee of Experts on the Application of Conventions and Recommendations has not commented on the application of this Convention since it provided explanations concerning the nature of the prerogatives of recognized trade unions, and the outcome of the examination of representative status carried out in 2003.
- 485.** The Government adds that, while the Labour Relations (Public Service) Recommendation, 1978 (No. 159), provides for the need for objective and pre-established criteria to determine the representative character of trade unions, Paragraph 1(2) of the Recommendation indicates that the procedures for assessing the representative nature of unions should be such as not to encourage the proliferation of organizations covering the same categories of employees. In this respect, the Government also refers to the conclusions of the Committee on Freedom of Association in a previous case in which it indicated that the diversity of the trends in the trade union movement of many countries has indeed prompted their legislators to reserve certain rights for the organizations with the

largest following among the workers, particularly as concerns negotiation with, or consultation by, employers or the public authorities (...). The Committee has accordingly admitted on various occasions that a distinction may be made under one system or another between different unions according to the extent to which they are representative. But it has added that it is nevertheless necessary, in order to prevent abuse, to verify the value of the criteria chosen for determining representative character and to ascertain whether sufficient protection is afforded to minority organizations to enable them to pursue and develop their trade union activities [see 197th Report, Case No. 918, para. 157].

- 486.** The Government notes that the BvL recognizes in its complaint that the competent authority has established informal structures for the purpose of facilitating consultation and accordingly ensuring the effective exercise of its prerogative as a recognized trade union. The Government observes that the operational difficulties of the Mixed Workgroup for Pilots to which the BvL refers stem from a misunderstanding between the BvL and the representative trade union organizations. The competent authority has refrained from any interference to preserve the freedom of association of each organization.
- 487.** With regard to the references to previous cases examined by the Committee on Freedom of Association, and those cited by the BvL, the Government considers that they are intended to portray the DAB-L as a sector so as to claim that the Committee's conclusions relating to representation at the sectoral level also apply to the situation of the BvL. The Government recalls that, as indicated above, the BvL represents pilots (340 overall of which the BvL declares it represents 269 members) in a service that is only a part of a larger entity, namely the sector covered by the Flemish Government.
- 488.** Finally, the Government denies the allegations that the provisions of trade union legislation relating to representative status are not in compliance with the various European and international instruments (the European Social Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations International Covenants).

### **C. The Committee's conclusions**

- 489.** *The Committee notes that this case concerns the difficulties faced by a trade union that is recognized but does not have the representative status required under Belgian law to be represented on bargaining and consultation bodies and therefore to participate fully in collective bargaining in relation to the category of public employees that it covers.*
- 490.** *Before examining the problems raised in this case which, in certain respects, have already been referred to in part in a number of cases examined previously, and particularly in Case No. 1250 (241st and 251st Reports), they need to be placed in the context of the issues that the Committee has examined in the past relating to the representative status of trade unions.*
- 491.** *The Committee has generally conceded that certain advantages might be accorded to trade unions by reason of the extent of their representativeness, but has taken the view that the intervention of the public authorities with regard to advantages should not be of such a nature as to influence unduly the choice of the workers in respect of the organization to which they wish to belong. The Committee has also taken the view that the fact that a trade union organization is debarred from membership of joint committees does not necessarily imply infringement of the trade union rights of that organization. But for there to be no infringement, two conditions must be met: first, the reason for which a union is debarred from participation in a joint committee must lie in its non-representative character, determined by objective criteria; second, in spite of such non-participation, the other rights which it enjoys and the activities it can undertake in other fields must enable it*



*effectively to further and defend the interests of its members within the meaning of Article 10 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) [see 143rd Report, Case No. 655 (Belgium), para. 40].*

- 492.** *With regard to the system established by the legislation that is in force in Belgium, especially the Act of 19 December 1974 and its implementing decrees, the Committee notes in particular the requirement for trade unions to be affiliated to a federation represented on the National Labour Council for them to be considered representative both in the private sector (the Act of 5 December 1968) and in the public sector (the Act of 19 December 1974) for the purpose of being represented on the joint commissions for the private sector and participating in the work of the general bargaining committees for the public sector.*
- 493.** *The complainant organization challenges the refusal of the authority to grant it the status of representative organization in its own branch. The principal disadvantage is that it cannot be represented on bargaining and consultation committees or participate in the collective bargaining process in relation to issues within its competence. The Committee notes the statistical data provided by the BvL concerning its representative status in the pilotage service. It indicates that there are 450 staff in the DAB-L, of whom 340 are pilots, with 269 of the latter being members of the BvL. It accordingly claims the membership of 80 per cent of the pilots and 60 per cent of all the employees of the DAB-L. The Committee also notes the Government's explanation that the Flemish administration is composed of a series of political fields in each of which a Flemish ministry has been established, made up of a department and, where appropriate, autonomous internal agencies that are not independent legal entities. There are currently 29 agencies that are not independent legal entities in the Flemish administration, one of which, the Maritime and Coastal Services Agency, is composed of five subdivisions, including the DAB-L. The Government also emphasizes that the DAB-L is a service with 450 employees in a sector of over 44,000 workers and that the DAB-L service has to be placed at the appropriate level.*
- 494.** *The Committee recalls that it expressed the view in a previous case concerning Belgium that the legislation could prevent a trade union that is the most representative in its branch from participating in collective bargaining in its sector. The Government was accordingly requested to re-examine the provisions of the Act of 1974 and its implementing decrees. However, the Committee is of the view that the present case differs from the case referred to above in that it concerns an organization that only represents a small category in numerical terms (450 persons) of all the employees covered by a sectoral committee. The Committee also notes the Government's indication that if the BvL, in the same way as the two former trade unions representing pilots from which the BvL emerged, were affiliated to a national organization meeting the requirements for representative status (defending the interests of all the categories of employees in the services covered by the sectoral committee and being affiliated to an organization established as a federation at the national level), it would be sufficient for it to demonstrate that it meets the criterion of 10 per cent of the employees of the services covered by the sectoral committee in order to participate in its meetings.*
- 495.** *In general, the Committee notes the various criteria established by the Act of 19 December 1974 respecting the granting of representative status to trade union organizations (sections 7 and 8 of the Act). The Committee also notes the Government's reference in its reply to the qualitative elements that it also considers important and which, in its view, provide the basis for the mutual recognition that is essential between the partners in social dialogue: the stability of the organization, the real nature of its existence and its action, and also the externalization of the work of its statutory bodies and its outside relations in terms of contacts and information. In this respect, the Committee observes that these criteria are not set out in the legislation and considers that they cannot therefore be*

*deemed to be pre-established. The Committee has recalled on several occasions the need for objective and pre-established criteria to be set out in the law and in practice so as to avoid any risk of partiality or abuse.*

- 496.** *The Committee has recalled its view concerning a trade union that is barred from sitting on a bargaining body. This does not necessarily imply that there is an infringement of that organization's trade union rights. However, the Committee recalls that, for there to be no such infringement, two conditions must be met: first, the reason for which a union is debarred must lie in its non-representative character, determined by objective criteria; second, despite such non-participation, the other rights that it enjoys and the activities it can undertake in other fields must enable it effectively to further and defend the interests of its members within the meaning of Article 10 of Convention No. 87. The Committee notes the indications of the BvL, confirmed by the Government, that the competent authority has established informal structures with a view to its consultation and to ensure the effective exercise of its prerogative as a recognized trade union. The Committee notes that, according to the Government, the difficulties in the operation of the Mixed Workgroup on Pilots referred to by the BvL have their origins in the disagreement between the BvL and the representative trade union organizations and that the competent authority has refrained from any intervention in its concern to preserve the freedom of association of each organization. As the Mixed Workgroup on Pilots is the only body in which the BvL can speak on behalf of the category of workers whose interests it defends in a context of consultation with the other partners, the Committee expects that the Government will take all the necessary measures to reinforce dialogue in this body. The Committee requests the Government to keep it informed of the measures taken.*
- 497.** *In relation to the trade union bonus granted under the Act of 1 September 1980 respecting the granting and payment of a trade union bonus to certain employees of the public service and its implementing decrees, the Committee notes the explanation that, in the view of the Government, it consists of compensation to representative trade union organizations for their contribution to the sound functioning of the public services and is not intended to place them under the control of the public authority. It further notes that the trade union bonus is set for the reference year 2006 and for each following year at €80 a year. In this respect, the Committee considers that this amount does not seem to constitute a real means of pressure leading to the conclusion that the public authorities intend, through the advantages granted to certain workers, to influence unduly the choice of workers with regard to the organization that they intend to join. For it to retain its present quality, the Committee recalls that it is important that the amount of the bonus in question does not exceed a symbolic level.*

## **The Committee's recommendations**

- 498.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a)** *The Committee recalls in general terms, with regard to the determination of the representative status of trade unions, that it has been requesting the Government for very many years to set out clearly in law, and in practice, objective and pre-established criteria so as to avoid any risk of partiality or abuse.*
  - (b)** *The Committee expects that, as the Mixed Workgroup on Pilots is the only body in which the BvL can speak on behalf of the category of workers whose interests it defends in a context of consultation with the other partners, the Government will take all the necessary measures to reinforce dialogue within this Workgroup. The Committee requests the Government to keep it informed of the measures taken.*

CASE NO. 2588

INTERIM REPORT

**Complaint against the Government of Brazil  
presented by  
the National Confederation of Metalworkers (CNM)**

*Allegations: The complainant organization alleges favouritism by the company General Motors towards trade unions that are not really representative and were created under the auspices of the employer, as well as obstacles to the free choice of the trade union that workers of the company wish to join and the granting of benefits to the leaders of the trade union associated with the employer*

499. The complaint under this case is contained in a communication from the National Confederation of Metalworkers (CNM) dated 30 May 2007.

500. The Government sent its observations in a communication dated November 2007.

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

**A. The complainant's allegations**

502. In its communication dated 30 May 2007, the CNM, on behalf of the Trade Union of Workers in the Metallurgical, Mechanical and Electrical Equipment Industries of Porto Alegre (STIMMEPA), indicates that General Motors of Brazil, a company with multinational capital established in the city of Gravataí, Rio Grande do Sul since 1997, has been carrying out its activities without respecting the rights of its workers. There have been violations of the basic rights of the workers contained in the labour legislation, as well as abuses of their dignity in their work. The CNM adds that the principles contained in the International Labour Organization Conventions have also been violated. The complainant organization indicates that it is not appropriate in this complaint to discuss which trade union is the most representative for the category of metalworkers in Gravataí, given that this issue should be resolved by the judiciary or trade unions.

503. The establishment of General Motors of Brazil in the city of Gravataí involved the implementation of projects intended to split the trade union representation of the metalworkers in that city. The splits produced in the category constituted a strategic objective when establishing the company in the city. This brought about an alliance between employer sectors and a trade unionism that existed "on paper" and was docile and lacking in commitment. These docile trade unions that were submissive to the employers did not play the necessary and responsible role of defending the rights of workers. In this context, an artificial split of the metallurgical base of the workers in the city of Gravataí was created, which was achieved through the creation of the Trade Union for Workers in the Metallurgical, Mechanical and Electrical Equipment Industries of Gravataí (SINMGRA). The meeting creating this trade union was riddled with flaws. It was held

with no more than 20 people, some of whom did not belong to the metallurgical sector, and was carried out behind closed doors. Hundreds of workers from the sector who turned up to participate in the meeting to vote against the split and who wanted to continue being represented by the STIMMEPA were prevented from entering the meeting. The complainant organization indicates that the SINMGRA trade union later merged with Ex-Association, another entity with low representation. The complainant organization states that, by means of a merely formal analysis and without evaluating the actual wishes of the workers concerned, these trade unions obtained a legal ruling awarding them representation for the sector. This ruling has been appealed before the judicial authority by means of various proceedings which are pending. According to the complainant organization it is important to point out that there are clear signs that these two trade unions and the trade union which resulted from their merger have received and are receiving material and political support from companies in the town concerned, and in particular from General Motors. This support ranges in practice from financial subsidies for the trade unions to explicit acts of coercion, violating the freedom of association, of the workers both individually and collectively, forcing them to join or support the company's preferred trade union under threat of being dismissed or punished.

- 504.** The complainant organization alleges that there is evidence that General Motors is subsidizing the SINMGRA, which is illegal, in that it shows employer intervention in the workers' trade union (the complainant organization refers to various faxes sent between staff of General Motors referring to the support that should be provided to the new trade union). According to the CNM, the company also pays additional sums of money to the leaders of the SINMGRA. The complainant organization alleges that the company favoured the trade union concerned not only through the payment of money or by exerting influence, but also through the recruitment of the leaders of the SINMGRA in order to integrate them into the management of the company, the purpose of which was to ensure that the company's interests could be defended more easily.
- 505.** The complainant organization indicates that, in addition to the financial benefits granted to the new trade union, the company denied access, in a discriminatory manner, to its premises by the STIMMEPA. At the meetings held at the company the workers were urged to join or support the new trade union, under threat of serious consequences if they refused to comply. The workers, after observing the representativeness of the new trade union, rejected it in every possible way, which led to the persecution of these workers by the company. The persecution took the form of moral harassment or unjustified dismissals, in response to which a number of complaints were made about the company's attitudes. In September 2003, the first complaints were lodged with the Public Prosecutor for Labour No. 4, requesting that investigations be conducted into the financial influence of General Motors in the creation of the SINMGRA. The complaints also referred to coercion and moral harassment by the employer with respect to workers who had rejected the new trade union representation and who had condemned the elections of that trade union, which were in their view null and void.
- 506.** As an example, the complainant organization mentions that, in 2005, two employees of General Motors lodged another complaint with the Public Prosecutor for Labour, indicating that on 15 February 2005 a meeting was held in the company's industrial complex for the purpose of approving the clauses of the collective agreement proposed by the SINMGRA, which had not been agreed upon at previous meetings with the workers. It adds that, when the workers arrived at the company, they were prevented from entering and were forced to remain in the car park, which was where the meeting took place, without the option of being present or participating in the meeting. The access gates to the car park were later closed, forcing the workers to be present at the meeting, with the sole objective of ensuring a quorum. The workers were also filmed or photographed in order to record any rejection by the workers at the meeting being held. In this way, the workers'

right to participate freely or not to participate in the event was violated and they were forced to participate in the meeting held by mutual agreement between the SINMGRA and General Motors. Other complaints were lodged with the authorities by several tens of workers concerning acts of harassment and reprisal by the company.

507. The complainant organization alleges that in the context of the violations of the ILO Conventions concerning freedom of association, workers Airton, Taborda and Rogelio Testa were recently dismissed based on a highly questionable just cause. The reason for their dismissal is clear: these workers were carrying out their activities independently, including activities aimed at ensuring greater protection of the work environment, and were questioning the legitimacy of the trade union financed by the enterprise.

## B. The Government's reply

508. In its communication sent in November 2007, the Government of Brazil states that on 5 December 1941 it granted trade union registration to the STIMMEPA to represent the category of workers in the metallurgical, mechanical and electrical equipment industries in the town of Porto Alegre. In 1971 that trade union was granted an extension of its territorial base to the towns of Alborada, Cachoeirinha, Gravataí, Guaíba and Viamao of the state of Rio Grande do Sul. On 30 September 1997, the SINMGRA requested trade union registration and indicated that it was intending to represent the category of metalworkers in mechanical offices for the repair of vehicles and accessories, in the electrical equipment, electronics and electromechanical industry, in the automobile and part and component fitting and manufacturing industry, in the dental, medical and hospital products and equipment industry, in the refrigeration and water treatment industries and in the iron preparation industry in the municipality of Gravataí. On 3 December 1997 the SINMGRA (Ex-Association) requested trade union registration in order to represent the category of workers in the metallurgical, mechanical and electrical equipment industries in the municipality of Gravataí, and it was in these circumstances that discussion started with regard to the representation of the metalworkers in the municipality of Gravataí.

509. The Government states that the request for trade union registration made by SINMGRA was challenged twice; one of the challenges was considered to be legitimate and the other not legitimate. The request for trade union registration made by SINMGRA therefore remained pending until the secretary for labour relations was notified of the relevant decision. On 10 September 1999, based on the ruling of the Court of Justice of the State of Rio Grande do Sul, the registration of the SINMGRA was then published in the *Official Journal* of the Union. The STIMMEPA, in disagreement with the granting of trade union registration to SINMGRA, later lodged an appeal before Chamber 15 of the Judicial Department of the Federal District against the decision of the Executive Secretary of the Ministry of Labour and Employment. In February 2001 the Ministry was notified that the decision had been taken to suspend the administrative act granting trade union registration to the SINMGRA, re-establishing the representation of the professional category concerned in favour of the STIMMEPA, until the controversy had been resolved by the state judicial authority. On 11 March 2002 a ruling was handed down cancelling the trade union registration awarded to the SINMGRA. The SINMGRA then lodged an appeal against that ruling. The Government later refers to various legal proceedings instituted by the sector's trade unions. Finally, the Government states that, taking into account the ruling handed down by Chamber No. 21 of the Judicial Department of the Federal District, Technical Note DIAN/CGRS/SRT/MTE No. 217/2005 was issued proposing the granting of definitive registration to the SINMGRA (Ex-Association) to represent the category of workers in the metallurgical, mechanical and electrical equipment industries based in the municipality of Gravataí.

**C. The Committee's conclusions**

- 510.** *The Committee observes that in this case the complainant organization alleges that the establishment of the company General Motors in the city of Gravataí involved the splitting of the trade union representation of the workers in the metallurgical sector, and that the company has favoured the creation of trade unions (SINMGRA and Ex-Association). The complainant organization alleges that, in addition, these trade unions are receiving political and financial support (supplementary payments to their leaders, recruitment of leaders in order to integrate them into the company's management) from the company, and that the company is threatening and coercing workers into supporting or joining those trade unions (it is alleged that there have been dismissals as a result of questioning the legitimacy of the trade unions financed by the company or for not supporting the activities of these trade unions, as well as pressure exerted on the workers to participate in their meetings). According to the complainant organization complaints have been lodged with the Public Prosecutor for Labour in connection with these events.*
- 511.** *The Committee notes that the Government refers in its reply to numerous administrative and judicial proceedings initiated by the trade unions of the metallurgical sector with the aim of obtaining representation of the workers based in the municipality of Gravataí (which was ultimately granted to the SINMGRA – Ex-Association).*
- 512.** *In this regard, the Committee observes that the Government does not refer in its reply to the allegations made concerning the acts of favouritism by General Motors towards two trade unions and against the STIMMEPA. In these conditions, in order to reach its conclusions on the alleged facts in this case, the Committee urges the Government to take the necessary measures, including consulting with the representative employers' organization, to have an investigation carried out into all the allegations made by the complainant organization and to communicate the findings of that investigation.*

**The Committee's recommendation**

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

*The Committee urges the Government to take the necessary measures, including consulting with the representative employers' organization, to have an investigation carried out into all the allegations made by the complainant organization (alleged acts of favouritism by General Motors towards two trade unions (SINMGRA and Ex-Association), dismissals and harassment of workers for not supporting or joining those unions, etc.) and to communicate the findings of that investigation.*

CASE NO. 2548

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

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

*Allegations: In the context of a collective dispute at the University of Burundi between non-teaching staff and the university administration, the complainant organization alleges harassment and intimidation of strikers, hiring of strike breakers, questioning and imprisonment of striking trade union leaders and refusal by the authorities to negotiate, recognize the dispute or set up an arbitration board*

514. The present complaint is contained in a communication from the Confederation of Trade Unions of Burundi (COSYBU) dated 26 January 2007.
515. The Government sent its observations in a communication received on 11 June 2007.
516. Burundi has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

**A. The complainant's allegations**

517. In its communication of 27 January 2007, the COSYBU denounces the collective dispute between its affiliate, the University of Burundi Workers' Union (STUB), and the university administration. The organization also complains about the negative attitude of the supervisory authorities, which is not helping to resolve the dispute.
518. According to COSYBU, the dispute has been caused by differences in pay awards for teaching staff and non-teaching staff at the University of Burundi. COSYBU states that these two categories of workers have specific areas of responsibility but have always worked together in a harmonious and complementary manner, each being unable to function adequately without the other. Since 2000, both categories of staff have been governed by regulations that are distinct but harmonized, with the exception of a few category-specific provisions.
519. In 2003, a salary increase of between 30 and 70 per cent, depending on status, was awarded to the university teaching staff. Non-teaching staff, who did not benefit from such a measure and considered this omission to be discriminatory treatment, launched a strike to demand a salary increase. This strike, lasting four months, led the Government to grant a 25 per cent increase in the salaries of non-teaching staff at the university. COSYBU alleges that this dispute is responsible for the unhealthy atmosphere within the university community.

- 520.** More recently, in October 2006, a salary increase of 80 per cent for university teaching staff was agreed. Once again, this salary increase did not apply to non-teaching staff, who therefore launched a strike in protest at this treatment which they considered discriminatory. COSYBU alleges a series of violations of the right to strike by the university administration and the supervisory authorities during the action.
- 521.** As regards the issue of coercion, COSYBU alleges that, on 14 December 2006, five members of the STUB executive committee, including the vice-chairperson, were questioned and imprisoned by the police at the request of the university administration. These union members were only released after five days of detention and no explanation was given. On 28 December 2006, three librarians, including the head librarian, were verbally intimidated and harassed by the university rector. These persons were instructed by means of an administrative mail, a copy of which is attached to the complaint, to keep the central library open despite the strike. On 9 January 2007, three members of the support staff were also allegedly intimidated by the university rector in an unsuccessful attempt to persuade them to resume work.
- 522.** In addition, the university administration reportedly recruited ten employees for the central library to replace the staff members on strike.
- 523.** The complainant organization states that the STUB has repeatedly called since the outset for the dispute to be resolved through negotiation. An exchange of views was organized on 29 December 2006 between the STUB and the university rector's office at the request of the Inspector General for Labour and Social Security. At the end of the meeting, the two parties signed a memorandum of non-conciliation which was transmitted to the Ministry of Public Service, Labour and Social Security. The Inspector General for Labour and Social Security attached to the memorandum a recommendation, a copy of which is appended to the complaint, to set up an arbitration board, in accordance with the legislation in force regarding the settlement of collective labour disputes (Labour Code, section 198). However, according to COSYBU, the Ministry has not acted on this recommendation and would only advocate referral of the case to the courts for settlement of the dispute.
- 524.** Furthermore, the complainant organization deplores the rejection by the Ministry of National Education and Culture, which is responsible for the university, of a report submitted by the joint negotiating committee that it had set up in order to settle the dispute. The complainant claims that this rejection constitutes a violation of Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). According to COSYBU, the report could have helped to settle the dispute.
- 525.** COSYBU expresses concern at the situation, since there have been repeated strikes at the university by students, teaching staff and non-teaching staff which prevent it from functioning properly. The complainant organization states that it is aware of the need to combine the socially desirable with the economically possible but notes that the authorities' refusal to engage in dialogue is only exacerbating the situation.

## **B. The Government's reply**

- 526.** In its communication dated 12 March 2007, received on 11 June 2007, the Government indicates its wish to clarify certain aspects of the dispute.
- 527.** Firstly, the Government states that the dispute is not due to discriminatory treatment of non-teaching staff, as defined by section 6 of the Labour Code and by the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). The Government reviewed the salary scale for university teaching staff in order to reverse the outflow of teaching staff to other institutions that were offering higher pay. Non-teaching staff are governed by



different regulations and cannot claim discrimination. Even taking account of the concept of work of equal value, the Government considers that there can be no question of equating the work of a university professor with that of a manager in the university administration.

- 528.** The Government points out that it has encouraged dialogue in order to settle the dispute, as demonstrated by the various meetings held between the complainant organization, STUB representatives and the Ministry of Public Service, Labour and Social Security. The parties also met the Inspector General for Labour, who confirmed to them that there was no issue of discrimination in this case. The Government therefore maintains that it cannot be accused of failing to encourage social dialogue in order to find a peaceful solution to the dispute.
- 529.** As regards the cases of questioning and detention, the Government firstly points out that it does not advocate the use of force or other means of coercion in order to settle a labour dispute, and it asks trade unionists to do likewise. In this respect, it indicates that the trade unionists were detained as a preventive measure, since a number of people involved in the strike were arrested and investigated on suspicion of causing damage to work tools and the university restaurants during the strike.
- 530.** As regards the staff working in the university libraries, kitchens and restaurants, the Government recalls that the law provides in general that, in the case of strike action, a minimum service must be organized by the employer in consultation with union representatives. According to the Government, no interruption could be permitted to the restaurant and library services which were necessary for students continuing with their studies. Since these minimum services were not being provided during the strike, the university administration was obliged to reassign some casual workers for the provision of students' basic needs and to recruit temporary workers to maintain the central library service.
- 531.** The Government adds that some of the staff members who were not on strike were reportedly harassed and held against their will. Recalling that this type of conduct on the part of strikers is punishable by law, the Government indicates its willingness to train its representatives to respect the law so that nobody is subjected to coercion during a collective dispute.
- 532.** The Government states that it does not consider recourse to arbitration to be appropriate since it would be unable in any case to satisfy the salary demands made by staff due to the lack of the necessary financial resources. It adds that the Ministry of Public Service, Labour and Social Security has the right to refuse recourse to arbitration and that the recommendation made to the complainant organization to refer the case to the courts does not violate either national legislation or any international convention ratified by Burundi, given that the Labour Code establishes the two alternative measures of arbitration and legal proceedings for ending strikes.
- 533.** Finally, as regards the joint committee set up by the Ministry of National Education and Culture to make proposals regarding salary and benefit increases for non-teaching university staff, the Government takes the view that the aim of reports prepared by technical committees is to inform decision-makers and that they are not agreements, as claimed by the complainant organization. The Government's refusal to follow the proposals made by this committee cannot therefore constitute a violation of Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

### C. The Committee's conclusions

534. *The Committee observes that this case concerns a collective dispute at the University of Burundi between the non-teaching staff – represented by the STUB, a union affiliated to COSYBU – and the university rector's office; violations of the right to strike by the university administration and the police during the strike action; violation by the Government of the principles of freedom of association and of the right to collective bargaining both through its refusal to act on the recommendations of a joint technical committee set up to settle the dispute and through its refusal to submit the dispute to arbitration as provided for in national law in the event of failure of the preceding conciliation procedure.*
535. *The Committee notes that, according to the complainant organization, members of the STUB executive committee, including its vice-chairperson, were questioned by police on 14 December 2006 during the strike and imprisoned. They were only released after five days of detention and no explanation was given. The Committee notes that the Government merely states in its reply that a number of people involved in the strike were arrested and investigated on suspicion of causing damage to work tools and the university restaurant during the strike. The Government adds that trade unions should not use force or other means of coercion to settle a labour dispute. In this respect the Committee recalls that trade unions should respect legal provisions which are intended to ensure the maintenance of public order; the public authorities should, for their part, refrain from any interference which would restrict the right of trade unions to organize the holding and proceedings of their meetings in full freedom [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 147]. As regards the arrest and detention of union leaders, which the Government does not appear to deny, the Committee wishes to recall that the preventive detention of trade unionists on the ground that breaches of the law may take place in the course of a strike involves a serious danger of infringement of trade union rights. Furthermore, the arrest of trade unionists against whom no charge is brought involves restrictions on freedom of association, and governments should adopt measures for issuing appropriate instructions to prevent the danger involved for trade union activities by such arrests [see **Digest**, op. cit., paras 70 and 77]. Having considered the information provided, the Committee expresses concern at the circumstances surrounding these arrests, particularly since they seem to have been made purely on the basis of assumptions. The Committee requests the Government to launch an independent inquiry into the circumstances surrounding the arrest and detention of the trade unionists and, if their detention proves to have been unjustified, to punish those responsible in order to discourage all harassment and further wrongful detention of trade unionists for legitimate activities. The Committee requests the Government to keep it informed of the results of this inquiry.*
536. *The Committee notes the allegations by COSYBU that a number of workers were intimidated and threatened by the university administration in an attempt to persuade them to return to work. It also notes the assertion that the university administration reportedly recruited ten employees to work in the central library to replace the staff members on strike. The Committee notes the Government's reply that this recruitment was justified by the need to continue to provide normal restaurant and library services for students. The Government adds that, since minimum services were not being provided during the strike, the university administration was obliged to reassign some casual workers for the provision of students' basic needs and to recruit temporary workers to maintain a minimum service at the central library.*
537. *The Committee notes that the Government refers, in relation to this case, to legislative provisions for determining a minimum service in the event of strike action. These provisions stipulate that a minimum service must be provided to ensure the safety and*

*maintenance of equipment and facilities so that work may be resumed as normal once the strike is over (Labour Code, section 217). The provisions also stipulate that the trade union should be consulted when appointing workers to provide this minimum service (Labour Code, section 218).*

- 538.** *The Committee recalls that it has always recognized the right to strike as one of the essential means through which workers and their organizations may promote and defend their economic and social interests. Consequently, the establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance. Furthermore, the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services. Finally, in so far as the strike is legal, the hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association [see **Digest**, op. cit., paras 606, 612 and 632]. In the absence of information on any agreement between the employer and the STUB on the determination of minimum services to be provided in the case of strike action, the Committee takes the view that the recruitment and reassignment of workers by the administration of the University of Burundi in order to continue to provide normal restaurant and library services seriously impede the free exercise of trade union rights by non-teaching staff members, particularly their right to strike. The Committee expects that the Government will in future ensure full respect for the principles relating to the exercise of the right to strike as recalled above.*
- 539.** *The Committee further takes the view that section 218 of the Labour Code, which stipulates that the task of appointing workers to provide the relevant services and activities falls to the employer after consultation with the trade union body or, in its absence, with the works council, contravenes the principles which it has had occasion to recall in the past, namely that, in the determination of minimum services, legislation should provide for the matter to be resolved by an independent body if there is disagreement between the employer and the representative workers' organization [see 292nd Report, Case No. 1679, para. 93]. Consequently, the Committee requests the Government to amend section 218 of the Labour Code in order to ensure full respect for this principle. The Government is requested to keep the Committee informed of all measures taken in this respect.*
- 540.** *The Committee notes the Government's assertion that the university administration reported acts of violence against non-striking workers, some of whom were held against their will. If these reports are confirmed by the independent investigation, the Committee wishes to recall that the exercise of the right to strike should respect the freedom to work of non-strikers, as established by the legislation, as well as the right of the management to enter the premises of the enterprise. Similarly, the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike [see **Digest**, op. cit., paras 652 and 667].*

541. *The Committee notes the allegation that the Ministry of Public Service, Labour and Social Security refuses to set up an arbitration board, recommending legal action instead. From correspondence between the authorities, COSYBU and the STUB, a copy of which is attached to the complaint, it emerges that the STUB requested the Ministry of Public Service, Labour and Social Security to set up an arbitration board in a letter dated 25 October 2006. In a reply dated 2 November 2006, the Ministry refused to grant the request on the ground that there was no dispute between the non-teaching staff at the University of Burundi and their employer. On 4 December 2006, the STUB, after suspending the strike action between 13 November and 3 December to enable negotiations to proceed, resubmitted its request for an arbitration board to be set up. On 19 December 2006, the Inspector General of Labour and Social Security requested the parties to the dispute to participate in an exchange of views. This exchange of views finally took place on 29 December 2006, and ended with the two parties signing a memorandum of non-conciliation. The legislation in force, in particular section 198 of the Labour Code provides that, in the case of total or partial failure, or error in the procedures laid down by section 191, the labour inspector prepares a report on the dispute, specifying in particular the points which are still the subject of disagreement. This report, along with any useful documents and information, is immediately transmitted to the minister responsible for labour, who then establishes an arbitration board. The Inspector General for Labour and Social Security transmitted the memorandum in question, along with a recommendation of recourse to arbitration, to the Ministry of Public Service, Labour and Social Security. Despite another request by the STUB dated 19 January 2007, the Ministry of Public Service, Labour and Social Security has not acted on the recommendations of recourse to arbitration. The Minister, on the basis of section 36 of the Labour Code, which provides that, no party to an agreement can unilaterally impose amendments to the agreement in force and that amendments must be made with the consent of all parties, requested that the matter should be dealt with through collective bargaining in accordance with section 228 of the Labour Code. In this respect, he proposed that an internal technical committee should be set up comprising representatives of the STUB and the employer in order to make specific, realistic and consensual proposals to the Government. However, he made suspension of the strike and resumption of work the prerequisites for negotiation. In a reply dated 23 January 2007, the STUB stated that the salary demands had already been the subject of negotiations within the joint committee that was set up on 18 August 2006 by the Ministry of National Education and Culture, and that the Ministry later rejected the recommendations in the committee's report, giving rise to the dispute. The STUB states that the Ministry's proposal to set up an internal technical committee amounted to a delaying tactic in order not to set up the arbitration board, despite this being required by law. In a communication of 25 January 2007, the Ministry repeated its refusal to set up an arbitration council and recommended that the STUB should refer the dispute to the relevant legal bodies for resolution.*
542. *The Committee observes that, in its reply, the Government refers to section 221 of the Labour Code in specifying the possible legal remedies for ending strike action, namely an arbitration award or a court decision. The Committee notes, however, that section 202 of the Labour Code states that a case may be referred to the labour court by one of the parties to the dispute only after conciliation has failed at the level of the minister responsible for labour, and only after a memorandum of non-conciliation in relation to the ruling issued by the arbitration board has been signed (Labour Code, sections 198 to 201). The Committee therefore expresses deep concern at the Government's recommendation to the STUB that it should refer the matter to the courts even though the arbitration procedure established in the Labour Code has not yet been exhausted, given that the recommendations made by the Inspector General for Labour have not been acted on. Consequently, the Committee requests the Government to set up an arbitration board without delay as required by section 198 of the Labour Code and to keep it informed of measures taken in this respect.*

543. *The Committee notes that, according to the information provided by the complainant organization and confirmed by the Government in its reply, salary negotiations within the joint committee (comprising workers' and employers' representatives) began in August 2006 on the Government's initiative. This committee produced a report including recommendations resulting from the negotiations between the parties. The Committee can only regret that the Government has not acted on the recommendations of this committee, which it set up and whose creation and work may have given rise to expectations among workers and their representatives. The Committee notes that this attitude – which seems to be the cause of the dispute – is not conducive to maintaining a relationship of confidence between the parties or to promoting or developing harmonious industrial relations.*
544. *The Committee recommends the Government to take all measures necessary to encourage the resumption of the negotiation process between non-teaching staff of the University of Burundi or their representatives and the university administration on salaries and other related matters, and to keep it informed in this respect.*

### **The Committee's recommendations**

545. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *The Committee requests the Government to launch an independent inquiry into the circumstances surrounding the arrest and detention of the trade unionists and, if their detention proves to have been unjustified, to punish those responsible in order to discourage all harassment and further wrongful detention of trade unionists for legitimate activities. The Committee requests the Government to keep it informed of the results of this inquiry.*
  - (b) *The Committee expects that the Government will in future ensure full respect for the principles relating to the exercise of the right to strike as recalled above.*
  - (c) *The Committee requests the Government to amend section 218 of the Labour Code in order to ensure full respect for the principle that, if there is disagreement between the employer and the representative workers' organization in the determination of minimum services, the matter should be resolved by an independent body. The Government is requested to keep the Committee informed of all measures taken in this respect.*
  - (d) *The Committee requests the Government to set up an arbitration board without delay as required by section 198 of the Labour Code and to keep it informed of measures taken in this respect.*
  - (e) *The Committee recommends the Government to take all measures necessary to encourage the resumption of the negotiation process between non-teaching staff of the University of Burundi or their representatives and the university administration on salaries and other related matters, and to keep it informed in this respect.*

CASE NO. 2534

DEFINITIVE REPORT

## **Complaint against the Government of Cape Verde**

**presented by**

**— the National Union of Workers of Cape Verde – Trade Union Confederation (UNTC–CS) and**

**— the International Trade Union Confederation**

*Allegations: Unilateral establishment of minimum services by the Government on the occasion of a strike at the National Institute of Meteorology and Geophysics*

**546.** This complaint is contained in a communication dated 14 December 2006 from the National Union of Workers of Cape Verde – Trade Union Confederation (UNTC–CS). The International Trade Union Confederation associated itself with the complaint in a communication dated 19 December 2006.

**547.** The Government sent its observations in a communication dated 9 September 2007.

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

### **A. The complainants' allegations**

**549.** In its communication dated 14 December 2006, the UNTC–CS alleges that the Government had recourse to civil requisition during a 48-hour strike called by the Transport, Communications and Civil Service Workers' Union on 13 December 2006 at the National Institute of Meteorology and Geophysics concerning pay.

**550.** According to the complainant organization, the Government, alleging a lack of agreement between the parties in respect of the minimum services to be performed during the strike, ordered that the strikers be requisitioned (issuing a back-to-work order), thus preventing the strike from being held.

**551.** The complainant organization indicates that the Government systematically requisitions strikers to prevent them from exercising the right to strike, a matter that has been previously examined by the Committee.

### **B. The Government's reply**

**552.** In its communication of 9 September 2007, the Government indicates that Legislative Decree No. 170/91 of 27 November 1991 sets forth the right to freedom of association, and that the right to strike is established in Legislative Decrees Nos 76/90 and 77/90 of 10 September 1990.

**553.** The Government adds that it does not interfere, either directly or indirectly, in negotiations and discussions between employers and workers. However, according to the Government, the National Institute of Meteorology and Geophysics provides the information necessary

for air traffic control. According to the Government, the safety of air traffic depends on the quality, timeliness and quantity of information supplied by the services of the National Institute of Meteorology and Geophysics.

554. The Government indicates that, in the framework of the announced strike, the Government was not given any guarantees of compliance with article 12 of Legislative Decree No. 76/90, which stipulates the need to establish appropriate minimum services where respect for more imperative rights must be ensured: in this particular case, the need to maintain and not to reduce minimum levels of international air safety.

### C. The Committee's conclusions

555. *The Committee observes that the allegations in the present case refer: (1) to the civil requisition, by the Government, of workers who had called a strike at the National Institute of Meteorology and Geophysics, which resulted in the strike being prohibited; and (2) the systematic use by the Government of civil requisition during strike proceedings, which is equivalent to prohibiting them.*

556. *The Committee notes the Government's reply, which states that the strikers were requisitioned because they were not providing the minimum services established in article 12 of Legislative Decree No. 76/90 concerning strikes, such services being necessary as the National Institute of Meteorology and Geophysics is responsible for supplying the information necessary for the safe provision of national and international air traffic control.*

557. *The Committee observes that article 12 provides that: (1) during strikes workers are required to provide the services necessary for the safety and maintenance of teams and systems so that once the strike is over activities can be resumed as usual; (2) in enterprises or establishments set up to meet imperative social needs, during strikes workers are required to provide the minimum services necessary to meet those needs; (3) for the purposes of the previous clause, enterprises or establishments set up to meet imperative social needs are considered to be those in the following sectors: (a) post and telecommunications; (b) health services; (c) funeral services; (d) water supply and sanitation; (e) power and fuel supply; (f) firemen; (g) transportation, ports and airports; (h) loading and unloading of animals and perishable foodstuffs; (i) banking and credit institutions. The article also provides that it is the responsibility of the employing entity to determine the minimum services, following consultations with the workers' representatives, and if this is not done, the Government may have recourse to civil requisition.*

558. *The Committee observes that it has already given recommendations in the past about similar allegations in a case relating to Cape Verde [see 320th Report, Case No. 2044]. In this regard, the Committee reiterates that "the establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance" [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 606]. Given that the services provided by the National Institute of Meteorology and Geophysics are essential for air traffic control to be carried out safely, the Committee considers this to be an institution in which minimum services can be established when workers have decided to call a strike.*

- 559.** *The Committee considers, however, that these minimum services should not be determined solely by the employer, but that the determination of minimum services and the minimum number of workers providing them should involve not only the public authorities, but also the relevant employers' and workers' organizations. This not only allows a careful exchange of viewpoints on what in a given situation can be considered to be the minimum services that are strictly necessary, but also contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organizations that a strike has come to nothing because of over-generous and unilaterally fixed minimum services. Moreover, the Committee considers that any difference of opinion should be settled by an independent body and not by the Government [see **Digest**, op. cit., paras 612 and 613]. The Committee asks that the Government take the necessary measures to amend Legislative Decree No. 76/90 in accordance with these stated principles to ensure that minimum services are determined with the participation of the Government and of the workers and employers concerned, and that any difference of opinion in this respect be settled by an independent body.*
- 560.** *As to the allegations concerning civil requisition being used systematically by the Government to prevent workers taking strike action, the Committee observes that the Government has not responded to these allegations. The Committee requests the Government to guarantee that civil requisition is only used in cases where the minimum services established in accordance with the principles stated in the above paragraphs are not respected.*
- 561.** *The Committee calls the attention of the Committee of Experts to the legislative aspects of this case.*

### **The Committee's recommendations**

- 562.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee asks that the Government take the necessary measures to amend Legislative Decree No. 76/90 so as to ensure that minimum services are determined with the participation of the Government and of the workers and employers concerned, and that any difference of opinion in this respect be settled by an independent body.*
  - (b) The Committee requests the Government to guarantee that civil requisition is only used in cases where the minimum services established in accordance with the stated principles are not respected.*
  - (c) The Committee calls the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.*



CASE NO. 2555

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

**Complaint against the Government of Chile  
presented by  
the National Association of Regional Officials of the National Youth Service  
(SENAME-ANFUR)**

***Allegations: Dismissal of a trade union official  
by the National Youth Service***

- 563.** The complaint is contained in a communication from the National Association of Regional Officials of the National Youth Service (SENAME-ANFUR), dated January 2007. The Government sent its observations in a communication dated 19 September 2007.
- 564.** Chile has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainant's allegations**

- 565.** In its communication of January 2007, SENAME-ANFUR alleges that the trade union official Bernardo Hernández de la Fuente was dismissed by a simple administrative decision, in proceedings which allowed no real possibility of defence for a trade union official whom management wanted to dismiss.
- 566.** According to the complainant organization, the trade union official in question, who was president of SENAME-ANFUR in the city of Talca, had 20 years of service and was always among the most highly rated officials, was accused, disciplined and dismissed from his post for allegedly logging into a computer in order to gain access to confidential information. This was all based on supposition, rather than any concrete evidence, and during the course of the administrative proceedings the authorities responsible for carrying out the investigation requested by SENAME failed to follow the appropriate procedures; evidence in the form of expert reports, interviews and so on was not obtained.
- 567.** The complainant organization explains that on 5 May 2004, through resolution No. 671, the Regional Directorate of SENAME ordered administrative proceedings in order to ascertain the administrative liability of the official in question. This resulted in a "confidential memorandum" by Yessenia Díaz Jorquera to the Regional Director of SENAME, alleging that, on 16 April 2004, she had seen the trade union official in question in the vicinity of a computer used to store information relating to proceedings in which he was involved. In other words, the accusation was based solely on the fact that the trade union leader had been seen near a computer, not because he had been interfering or attempting to review information (for example). Ms Díaz Jorquera was the sole accuser and witness, and admits in her statements that she did not actually see the union official log in to the computer but merely had a feeling that that was the case, since she was the only person with the password for the computer in question. However, no proof of this has been offered.

568. In the view of the complainant organization, the proceedings were such as to obstruct due process and the trade union official was in the end formally dismissed from his post on 6 May 2005 with the approval of the National Director. Even if the alleged offence (attempt by the accused to view information on the computer) took place, the sanction applied by the administrative authority was disproportionate to the offence, which would not appear to justify dismissal, especially given that the official in question acted on occasions as a prosecutor or assistant to the institution's lawyers as well as being president of the regional trade union organization and was required to carry on constant dialogue with the authorities. The offence, if it had actually been committed, would merit an administrative sanction at the most (an adverse comment or a reduction in salary).
569. The complainant organization states that it sought protection from the Appellate Court of Tulca of which SENAME claims to have no competence in the matter. On 15 November 2005, the Appellate Court of Tulca ruled itself to have no competence in the case and referred the case to the Santiago Court of Appeal, as requested. The Santiago Court, on 1 March 2006, rejected the appeal for protection, and SENAME then proceeded with the dismissal of the trade union official Bernardo Hernández de la Fuente.

## B. The Government's reply

570. In its communication dated 19 September 2007, the Government states that under national legislation, comprising a series of standards both legal (Law No. 19296 on associations of public administration officials) and constitutional, the right to form unions in accordance with the criteria established in ILO Conventions Nos 87 and 98 is recognized. The Government adds that the immunity of trade union officials is regulated and protected by laws concerning the employment of workers in the public and private sectors, in accordance with the principles of Conventions Nos 87 and 98. These standards, contained in national law, are also consonant with statements made by the Committee on Freedom of Association. Paragraph 804 of the *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, states that: "The Committee has pointed out that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct." Chilean law guarantees this protection, with the sole exception of cases of serious misconduct by the worker, a situation which is recognized by law and constitutes an exceptional situation in which the authorization of an autonomous body is also required. Law No. 19296 grants due recognition and employment security to trade union officials of public employees' associations. For example, section 25 expressly states in its first paragraph:

Directors of associations of public service employees shall enjoy trade union immunity, that is, shall be protected from dismissal, from the date of their election until six months after leaving union office, provided that termination does not occur as a result of censure by the assembly of the association in question or of the disciplinary measure of formal removal from office, approved by the Office of the Comptroller General of the Republic.

Similarly, immunity shall not apply in the case of dissolution of an association where that is entailed by the application of section 61(c) and (e), or is the result of factors provided for in the internal regulations, provided that, in the latter case, the factors in question imply culpable fault on the part of the directors of the associations.

In this regard, during the period referred to in the previous paragraph, officials shall not be transferred from the place or post they occupy without their written authorization. Similarly, they shall not be subject to annual assessments during the periods referred to in the preceding paragraphs, unless this is expressly requested by the official. If no such request is made, the most recent assessment shall apply for all legal purposes.

- 571.** It follows from the above that only in cases of censure by the assembly of an association, or the latter's dissolution, or formal dismissal proceedings, may an official be removed from his or her post, for which authorization is required by the Office of the Comptroller General of the Republic, "a body independent of all ministries, authorities and offices of the State, whose purpose is among other things to determine the constitutionality and legality of decrees and resolutions of department chiefs which must be carried out by the Office of the Comptroller General, monitor compliance with the administrative regulations, and carry out all the other functions entrusted to it by the Law in question and other provisions that are currently in force or may be adopted in future" (section 1, Organic Constitutional Law No. 10336 regarding the Office of the Comptroller General of the Republic).
- 572.** Trade union officials, both in the public service and in the private sector, enjoy protection from dismissal in order to allow them to carry out their union functions, in such a way that the lifting of immunity and subsequent termination of employment is an exceptional case subject to more stringent criteria, and accordingly also to a restrictive interpretation.
- 573.** As regards the specific case to which the complaint refers, the Government states that in resolution No. 671 of 2004, the Regional Directorate of SENAME in the seventh region ordered administrative proceedings with a view to determining possible administrative liability of the official Bernardo Hernández de la Fuente in connection with the allegations made in the unnumbered internal memorandum from Yessenia Díaz Jorquera to the effect that the principle of administrative fairness had been seriously violated by an attempt to gain access, without the authorization of the investigator concerned, to statements by witnesses and one of the parties in the case held on the investigator's computer. As a result of the investigation, the administrative responsibility of Bernardo Hernández de la Fuente was established, charges against him were formulated and he was notified of the charges in due time and form. The charges alleged non-compliance with the provisions of section 61(g) of DFL No. 29, published on 16 March 2005, which combines, coordinates and streamlines the provisions of Law No. 18834 (Administrative Statutes). The strict observance of the principle of administrative fairness, implies morally unimpeachable conduct on the part of officials and honest and loyal service with a view above all to the public interest, rather than private interest.
- 574.** Through resolution No. 296 of 31 March 2006, the National Director of SENAME approved the administrative proceedings and applied the disciplinary sanction of removal from office of the official in question, as provided for in section 121(d) of DFL No. 29. This was implemented on the basis of the attribution of administrative responsibility to him in disciplinary proceedings, in accordance with the provisions of section 119(2) of DFL No. 29. The proceedings were upheld by the Office of the Comptroller General on 7 April 2006, in accordance with the Political Constitution and the associated Organic Constitutional Law No. 10336. That body enjoys autonomy under the terms of article 98 of the Political Constitution; this is a fundamental attribute which guarantees the greatest possible independence from other state authorities. It follows that it is the exclusive prerogative of the Comptroller General under the terms of the Constitution to decide whether or not a decree or resolution is consistent with the law in force, and this means that any decisions which it may adopt in the exercise of that function cannot be challenged by recourse to protection procedures under law.
- 575.** As regards the status of union official Hernández de la Fuente, it must be noted that section 25 of Law No. 19296 stipulates that executive officers of associations of public officials enjoy immunity, that is to say, protection from dismissal, from the date of their election until six months after the end of their term of office provided that the term of office is not terminated because of censure by the association's assembly, or by application of the disciplinary sanction of removal from office approved by the Office of the

Comptroller General of the Republic. Thus, on 7 April 2006, the Comptroller General, in view of the fact that the National Executive Board approved the removal from office of the official in question, granted its authorization in accordance with the powers attributed to it under section 25 of Law No. 19296 (concerning associations of public administration officials), having examined the legal, formal and substantive aspects of the proceedings and the statements made by the official concerned.

576. In the case of the official who has lodged the appeal, there are administrative proceedings which observe legal standards, and in which an hierarchical superior applies one of a number of disciplinary sanctions provided for by the Administrative Statutes for Public Officials. This gives rise to an administrative *res judicata* which is not subject to any further proceedings unless the original administrative proceedings are declared null and void. The Government adds that the removal from office of the appellant was ordered after the completion of summary proceedings in which he had been charged, and after the evidence had been duly assessed by the investigator, as is required in such proceedings.
577. As regards the application for protection lodged by Mr Hernández de la Fuente against the SENAME regional and national directors, the Santiago Court of Appeal ruled itself competent to hear the case, which was heard in its entirety by the Talca Court of Appeal, and gave the following ruling on 5 December 2005:

Considering that: (1) the appellant has lodged a precautionary application for protection against Doña Marjorie Maldonado Cárdenas, Regional Director of SENAME, and against Carmen Andrade Lara, Deputy National Director of the same service, requesting a ruling to overturn the resolution of 6 September 2005 and the confidential communication of 8 September of the same year, which communicated the disciplinary measure of dismissal from the grade 5 post in the Talca Regional Department of the National Youth Service (SENAME), in violation of the right of property with regard to public office and violating the constitutional guarantee enshrined in article 19(24) of the Political Constitution of the Republic; (2) the sanction applied against the appellant was based on facts dealt with in administrative proceedings which led to dismissal; (3) the request for protection lodged by the appellant claims that the disciplinary measure of dismissal was illegal and arbitrary, despite the fact that it followed administrative proceedings that respected legal standards and allowed the individual in question the benefit of due process of law, and the competent authority's ruling cannot therefore be deemed to be illegal or arbitrary; the constitutional guarantee invoked by the appellant was therefore not violated. For these reasons, and in accordance with article 20 of the Political Constitution of the Republic, and with the agreement of the Supreme Court, the application for protection is hereby rejected.

578. Lastly, Bernardo Hernández de la Fuente initiated proceedings against the Director of SENAME before the 19th Civil Court of Santiago, and sought a ruling overturning all the administrative proceedings against him. The purpose was to quash the decision of the National Director implementing the sanction of dismissal and reinstate him immediately in the post he had held in April 2004. The case is currently pending and no judicial decision has been handed down.

### **C. The Committee's conclusions**

579. *The Committee notes that in the present complaint, the complainant organization alleges that SENAME removed trade union official Bernardo Hernández de la Fuente (president of the complainant union in the city of Talca) from his post on the grounds of his alleged attempt to log into a computer used to store confidential information, and in order to do so used an administrative procedure which contravened the rules of due process and resulted in the imposition of a penalty which, even if the alleged offence had been proved – and the complainant denies this, his accuser having merely claimed to have seen him in the vicinity*

*of a computer containing confidential information – would not justify dismissal, but rather an adverse comment or reduction in salary.*

- 580.** *The Committee takes note of the Government's statements to the effect that: (1) legislation grants trade union officials protection from dismissal except in cases of the disciplinary sanction of removal from office imposed by the administrative authority after the appropriate administrative proceedings and confirmed by the Comptroller General of the Republic, a body independent of other state authorities, following an examination of the legal, formal and substantive aspects of the case and of any statements presented by the party concerned; (2) the administrative proceedings confirmed that the accused had been responsible for serious violation of the principle of administrative fairness by virtue of having sought access to information held on a computer without the authorization of the official responsible for administrative proceedings in another case, in order to review witness statements and those of one of the parties; (3) the Santiago Appeals Court considered that "the request for protection lodged by the appellant claims that the disciplinary measure of dismissal was illegal and arbitrary, despite the fact that it followed administrative proceedings that respected legal standards and allowed the individual in question the benefit of due process of law, and the competent authority's ruling cannot therefore be deemed to be illegal or arbitrary; the constitutional guarantee invoked by the appellant was therefore not violated"; (4) the official in question has applied to the 19th Civil Court of Santiago for a ruling that the administrative proceedings against him are null and void, thus overturning the dismissal order and ordering his reinstatement; the case is still pending and no judicial ruling has been handed down.*
- 581.** *The Committee regrets that neither the complainant organization nor the Government have communicated the administrative decision to dismiss the official, along with its operative part.*
- 582.** *Whatever the case may be, the Committee, noting that the union official in question has lodged a new appeal with the 19th Civil Court of Santiago, seeking a ruling overturning the administrative proceedings against him and ordering his reinstatement, requests the Government to keep it informed in this regard and to communicate any ruling handed down.*

### **The Committee's recommendation**

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

*Noting that the union official Bernardo Hernández de la Fuente has lodged a new appeal with the 19th Civil Court of Santiago, seeking a ruling overturning the administrative proceedings against him and ordering his reinstatement, the Committee requests the Government to keep it informed of developments and communicate to it any ruling handed down.*

CASE NO. 2564

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

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

— **the Trade Union Confederation of West Santiago (CONFESIMA) and**  
— **the Federation of Engineering Trade Unions (FESIN)**

***Allegations: Death of a striker after being shot  
three times by the police in the context of  
repression of collective trade union actions***

**584.** The complaint is contained in a joint communication dated 7 May 2007 from the Trade Union Confederation of West Santiago (CONFESIMA) and the Federation of Engineering Trade Unions (FESIN), both of which sent further information in a communication dated 14 June 2007. The Government sent its observations by a communication dated 20 September 2007.

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

**A. The complainants' allegations**

**586.** In their communications dated 7 May and 14 June 2007, CONFESIMA and FESIN allege that in March 2007 the permanent and subcontracted forestry workers of the Bosques Arauco enterprise, which belongs to a Chilean economic grouping, initiated collective bargaining in order to obtain better wages and improved conditions of work. In view of the show of unity by the workers, the enterprise agreed to set up a negotiating body.

**587.** The complainant organizations state that on 30 April 2007, which was the deadline for reaching an agreement, more than 5,000 workers of the abovementioned enterprise began an indefinite strike since no agreement had been reached on two of the 23 points raised by the workers. The points of disagreement related to pay, with the workers asking for 40 per cent as opposed to the 4.5 per cent offered by the enterprise. The complainant organizations point out that in 2006 the enterprise recorded sales in excess of US\$2,850 million, with profits of US\$619 million, equivalent to nearly US\$2 million profit per day, a 41 per cent increase over 2005. In the first quarter of 2007, it achieved profits of US\$228 million, a 30 per cent increase over 2006.

**588.** The complainant organizations point out that on 3 May 2007 more than 2,000 workers demonstrated in front of the Horcones plant belonging to Bosques Arauco in Arauco province. After demonstrations lasting five hours, the workers decided to block the road in front of the plant which links Arauco with the regional capital Concepción. This action lasted no longer than 15 minutes, as a result of the subsequent repression by the Chilean military police, a permanent presence there by order of the Ministry of the Interior, who subdued the workers with water cannon and tear gas and also used other armoured vehicles and troops armed with anti-riot and combat equipment. The workers were pursued and obliged to flee to a nearby forest.

- 589.** Around 10 p.m. – the complainants continue – the power supply was cut in the sector and, as part of the unrestrained repression of the workers, the military police proceeded to destroy a number of private vehicles in the vicinity which belonged to the workers. As a result, Mr Rodrigo Cisternas Fernández, aged 26 years and the father of a 5-year-old daughter, attempted to clear the police vehicles out of the way with a backhoe excavator used in forestry work. He actually pushed a vehicle equipped with tear gas launchers off the road. A group of police then opened fire on the excavator with submachine guns and pistols. The shots were fired from the side. Three shots killed Rodrigo Cisternas, one hitting him in the head, one in the knee and one in the chest. The worker died on the spot, practically executed before attempting to get out of the excavator.
- 590.** The organizations denounce the violations of trade union rights and consider that the Government committed a criminal act by involving armed state police in the strike, undermining the workers' freedom of action and jeopardizing the exercise of freedom of association.
- 591.** Attached to the additional information sent by the complainant organizations are press cuttings and a draft agreement signed by 14 members of Parliament calling for the resignation of police, political and administrative officials in relation to the alleged occurrences (the draft was rejected by Congress).

## **B. The Government's reply**

- 592.** In its communication dated 20 September 2007, the Government issued a general statement that national legislation recognizes workers' right to organize, in a series of legal standards and constitutional rules. Moreover, national legislation regards collective bargaining machinery as a regulated procedure designed to obtain better conditions of work and pay. Without going into detail, the Government continues, the national law contains the criteria laid down in Conventions Nos 87 and 98 of the International Labour Organization.
- 593.** The rights laid down in ILO Conventions Nos 87 and 98 recognized in national law enjoy effective protection through a system of inspection by the Labour Inspectorate, the National Labour Directorate and the judicial authorities. Protective regulatory standards enable the system to be implemented and enforced by means of administrative and judicial procedures.
- 594.** As regards the negotiating process referred to by the complainant organizations, the Government states that the incident which gave rise to the complaint occurred against the background of a complex process of negotiation, in which the Regional Labour Directorate of the eighth region of Bio Bio had an important mediating role, as described below. The process began on 2 February, the date on which the Forestry Union of Arauco (USINFA) (an umbrella organization of members of the Federation of Forestry Workers of Arauco (FETRAFOR), the Confederation of Forestry Workers of Chile (CTF) and the Forest Transport Coordination Office) presented the Bosques Arauco enterprise with a petition from the forestry workers of Arauco.
- 595.** The document was presented to the enterprise by means of a note to the enterprise manager. On 1 March 2007, the enterprise replied to the workers' petition without agreeing to any of the demands they made and indicated its willingness to set up a working group. Considering this reply to be evasive, the workers notified the enterprise that on 6 March they would hold a workers' meeting at which decisions would be taken on the issues raised.

- 596.** The enterprise replied on 7 March, reiterating its willingness to set up a working group to examine the forestry workers' requests but without replying to the labour-related issues.
- 597.** At the meeting, the workers decided to mobilize the workers. This started on 12 March with a blockade of the Horcones plant of Bosques Arauco in Curanilahue, an action which involved a large group of workers. The Regional Labour Directorate consequently intervened as mediator with the aim of securing an agreement between the enterprise and the workers to enable the blockade of the plant to be lifted.
- 598.** The agreement enabled working groups to be set up involving Bosques Arauco and the workers represented by USINFA. Immediately, on 15 March, the labour authority put forward a proposal establishing an executive body comprising representatives of USINFA, Bosques Arauco and the Labour Directorate, under which four working groups would discuss specific aspects of the set of demands (harvesting, transport, working hours, working environment and safety). As regards the employees of other enterprises in the group (Aserraderos Arauco, Paneles Arauco and Celulosa Arauco), since Bosques Arauco was not in a position to negotiate on their behalf, the Labour Directorate took the necessary steps to obtain a reply from the authorized spokespersons for the industrial workers in order to set up a negotiating body to deal with their demands.
- 599.** The work of the groups went ahead as planned from 22 March to 18 April, with agreements being reached on all issues except pay. On 23 April, Bosques Arauco presented its pay proposal to the executive body. This comprised a guaranteed bonus equivalent to 4.74 monthly minimum wages (682,560 Chilean pesos) payable in 12 monthly instalments, plus minimum bonuses for Christmas and national holidays of 24,000 pesos on each occasion, with a guaranteed increase of 20,000 pesos for workers who were already receiving benefits.
- 600.** USINFA declared that it totally rejected the enterprise's proposal, announcing that it would resume mobilization of the workers with the aim of achieving better results, especially for drivers, whose wage increase was 3.5 per cent, far less than the requested 40 per cent. Accordingly, the workers decided to mobilize on 30 April, with some 3,000 workers blocking the entrance to the Horcones plant.
- 601.** Given the enterprise's refusal to negotiate with the workers, the Regional Labour Directorate asked the Archbishop of the city of Concepción to mediate. Even though the parties agreed to this, Bosques Arauco decided not to continue with negotiations, saying that it was for the service enterprises whose workers were on strike to continue the dialogue.
- 602.** A new offer was presented on 3 May, this time by the service enterprises, which consisted of a wage increase ranging from a minimum of 40,000 to a maximum of 53,000 pesos. The offer was rejected by the workers who were blocking access to the Horcones plant. At 7 p.m. the same day, these workers decided to blockade route No. 160, an action which resulted in the confrontation with the Chilean police force and culminated in the deplorable death of the worker Rodrigo Cisternas Fernández.
- 603.** After this regrettable event, the workers held a press conference to deplore the worker's death, dialogue was resumed and an agreement was finally reached with the service enterprises on 6 May. The agreement consisted of an increase of 65,000 Chilean pesos for all workers, plus bonuses of at least 24,000 pesos for national holidays and Christmas, and the undertaking to initiate negotiations with the industrial workers in order to consider extension of the benefits to that area.



604. Regarding the death of Mr Rodrigo Cisternas Fernández, the Government reiterates that on 3 May 2007 some 3,000 workers were blockading the entrance to the Horcones plant of Bosques Arauco. After rejecting the offer proposed by the service enterprises, the mobilized workers decided to block the road linking Curanilahue with Concepción, the capital of the eighth region.
605. According to the information supplied by the authority responsible for public order, the Chilean police force, in response to the blockade, proceeded to clear the road, which led to clashes between the police and the demonstrators. During the demonstrations, in circumstances that were unclear, Mr Rodrigo Cisternas rammed two police vehicles with a front loader, injuring the police officers inside. The aforementioned worker died when police officers attempted to stop his attack on the police, reporters and cameramen who were present at the scene.
606. The Government points out that these regrettable occurrences are the subject of a judicial investigation by an inspecting judge with special jurisdiction requested by the Chilean Ministry of the Interior, in view of the public outcry caused by an occurrence of this nature in addition to the gravity and harmful consequences of this occurrence, which call for prompt punishment. For the above reasons, the matter is being fully investigated.
607. The Government regrets the death of Mr Rodrigo Cisternas Fernández and, as well as emphasizing that the events are being investigated by the judicial authorities, it stresses its willingness to keep the Committee informed in this respect with regard to progress made on pending court decisions, in accordance with the guidelines laid down in law.
608. Finally, the Government emphasizes that the labour authority was always present in the negotiating process, seeking a beneficial solution for both parties.

### C. The Committee's conclusions

609. *The Committee observes that, in the present case, the complainant organizations allege that, in the context of a strike at the Bosques Arauco enterprise with demonstrations and the blockade of a road by the workers, the military police intervened using water cannon and tear gas, in addition to destroying private vehicles belonging to workers, and the worker Mr Rodrigo Cisternas Fernández attempted to clear the police vehicles out of the way with a backhoe excavator (as used in forestry work), actually pushing a vehicle equipped with tear gas launchers off the road. According to the complainants, a squad of police officers then opened fire with submachine guns and pistols on the excavator driven by Mr Rodrigo Cisternas Fernández, who received several bullet wounds (including one to the head) and died.*
610. *The Committee notes the Government's statements concerning the negotiation process between the parties to the collective dispute and concerning the presence and mediation of the administrative labour authority, as well as the fact that following the death of Mr Cisternas Fernández the parties reached an agreement. As regards the death of the striking worker Mr Rodrigo Cisternas Fernández, the Committee notes the Government's statement to the effect that: (1) the judicial authority is investigating the facts and the ILO will be kept informed of all progress made; (2) on 3 May 2007, some 3,000 workers blocked the entrance to the Horcones plant of the Bosques Arauco enterprise and, after rejecting a new offer from the service enterprises whose workers were on strike, decided to blockade the road; (3) according to the information from the authority responsible for public order, the Chilean police force, in response to the blockade, proceeded to clear the road, which led to clashes between the police and the demonstrators. During the demonstrations, the Government goes on to say, in circumstances that were unclear, Mr Rodrigo Cisternas rammed two police vehicles with a front loader, injuring the police*

officers inside. The aforementioned worker died when police officers attempted to stop his attack on the police, reporters and cameramen present at the scene.

- 611.** *The Committee deplores the death of the striking worker Mr Rodrigo Cisternas Fernández as a result of being shot by the police and also the injuries to a number of police officers. The Committee observes that the respective versions of the alleged events from the complainant organizations and the Government do not tally completely and therefore requests the Government to keep it informed of the outcome of the judicial investigation, while expecting that the respective responsibilities will be clearly defined and, if appropriate, that the penalties provided for by law will be imposed. In more general terms, the Committee underlines the importance of collective disputes being conducted and resolved peacefully within the framework of collective bargaining and also emphasizes that “in cases of strike movements, the authorities should resort to the use of force only in grave situations where law and order is seriously threatened” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 644] and “the intervention of the police should be in proportion to the threat to public order” [see **Digest**, op. cit., para. 647]. On the other hand, the Committee recalls that workers’ organizations should respect legal provisions on public order and abstain from acts of violence in demonstrations.*
- 612.** *Taking into consideration that it has been obliged, in other cases concerning Chile, to examine allegations of violence between strikers and the authorities in connection with collective disputes, the Committee requests the Government to organize tripartite activities to examine this issue, and reminds the Government that ILO technical assistance is at its disposal, if it so wishes.*

### **The Committee’s recommendations**

- 613.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to keep it informed of the outcome of the judicial investigation into the death of the striking worker Mr Rodrigo Cisternas Fernández, while expecting that the respective responsibilities will be clearly defined and, if appropriate, that the penalties provided for by law will be imposed.*
  - (b) Taking into consideration that it has been obliged, in other cases concerning Chile, to examine allegations of violence between strikers and the authorities in connection with collective disputes, the Committee requests the Government to organize tripartite activities to examine this issue and reminds the Government that ILO technical assistance is at its disposal, if it so wishes.*

CASE NO. 2434

INTERIM REPORT

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

- **the World Confederation of Labour (WCL)**
- **the General Confederation of Labour (CGT)**
- **the National Association of Telephone and Communications Engineers (ATELCA)**
- **the National Union of Workers of Interconexión Eléctrica SA (SINTRAIISA)**
- **the National Union of Workers of CHIVOR (SINTRACHIVOR) and**
- **the National Union of Workers of ISAGEN SA ESP (SINTRAISAGEN)**

*Allegations: The National Association of Telephone and Communications Engineers (ATELCA), the National Union of Workers of Interconexión Eléctrica SA (SINTRAIISA), the National Union of Workers of CHIVOR (SINTRACHIVOR) and the National Union of Workers of ISAGEN SA ESP (SINTRAISAGEN) allege that the proposed amendment to article 48 of the National Constitution relating to social security violates the principle of free and voluntary negotiation in that it precludes the possibility of establishing the pension scheme through collective bargaining and decrees that any current collective agreement which regulates pensions other than in accordance with the new scheme shall be invalid as from 31 July 2010. The World Confederation of Labour (WCL) alleges that the National Office of the Attorney-General refuses to negotiate the list of claims submitted to it on 2 April 2002 by the National Union of Workers of the Office of the Attorney-General (SINTRAPROAN)*

- 614.** The Committee last examined this case at its March 2007 meeting and presented an interim report to the Governing Body [see 344th Report, paras 725–801, approved by the Governing Body at its 298th Session].
- 615.** The General Confederation of Labour (CGT) sent new allegations in a communication dated 15 March 2007.
- 616.** The Government sent its observations in communications dated 9 April and 4 July 2007.

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

## **A. Previous examination of the case**

**618.** On its previous examination of the case in March 2007, the Committee made the following recommendations [see 344th Report, para. 801]:

- (a) With regard to the allegations relating to the limitation of the right of collective bargaining by virtue of the recent adoption of Legislative Act No. 1 of 22 July 2005, which amends article 48 of the Constitution on social security, the Committee:
  - (i) recognizes the right of States to regulate pension schemes but underlines the necessity to respect the principle of collective bargaining in so doing;
  - (ii) in relation to collective agreements concluded prior to the entry into force of the legislation, considering that previously negotiated agreements should continue to maintain all their effects, including those relating to pensions clauses, until their date of expiry, even if it is after 31 July 2010, the Committee requests the Government to adopt the relevant corrective measures and to keep it informed of developments in this respect;
  - (iii) with regard to agreements concluded after the entry into force of Legislative Act No. 1, taking into account the outcome of the referendum, the Committee requests the Government, in view of the particular circumstances of this case and in order to ensure harmonious industrial relations in the country, to hold new in-depth consultations on retirement and pensions with the interested parties, in order to find a negotiated solution acceptable to all the parties concerned in accordance with the Conventions on freedom of association and collective bargaining ratified by Colombia.
- (b) In relation to the allegations concerning the refusal of the National Office of the Attorney-General to engage in collective bargaining with SINTRAPROAN, the Committee requests the Government to take the necessary measures to ensure observance of the right of collective bargaining of public servants, in accordance with the provisions of Conventions Nos 98 and 154 ratified by Colombia.
- (c) With regard to the allegations concerning the persecution through successive disciplinary procedures of Mr Franco Cuartas, founder member and leader of SINTRAPROAN, the Committee requests the Government to take the necessary measures for an investigation to be carried out into the allegations and circumstances leading to Mr Franco Cuartas leaving his job, with the investigation being carried out by an independent person who enjoys the confidence of the parties and, if these allegations are found to be true, to take the necessary measures to reinstate Mr Franco Cuartas and to put an end to any disciplinary proceeding against him. The Committee requests the Government to keep it informed in this respect.
- (d) In relation to the alleged dismissal of Luis Carmelo Cataño Cataño, Carlos Romero Aguilar, Francisco Molina and Silvio Elías Murillo, despite enjoying trade union immunity, and in the case of Mr Murillo, despite the Chocó Administrative Court ordering his reinstatement, the Committee notes that the Government has not provided its observations on this subject and requests it to do so without delay.

## **B. New allegations**

**619.** In its communication of 15 March 2007, the CGT alleges that Mr Jhon Jair Silva and Mr Jesse Moisés Gutiérrez Herrera, members of the National Union of Workers of the Office of the Attorney-General (SINTRAPROAN), have been dismissed.

### C. The Government's reply

- 620.** In its communications of 9 April and 4 July 2007, the Government sent the following observations.
- 621.** With regard to section (a) of the recommendation, the Government reiterates what it said previously in respect of Legislative Act No. 01 of 2005, amending article 48 of the Political Constitution, and in particular that this Act is a fundamental element of the package of measures adopted to address the serious problems arising in financing pensions liabilities.
- 622.** The Government considers that various aspects warrant consideration by the Committee on Freedom of Association in this case. In the first place, the regulation of conditions for the award of pensions is not strictly a matter of conditions of work, but rather it is a post-employment issue, that is to say, one relating to the sphere of pensions. Conventions Nos 98 and 154, which are alleged to have been violated, refer to negotiations of terms and conditions of employment. The scope of those instruments is not really to regulate pensions issues, as that issue is covered by other instruments also adopted by the Organization.
- 623.** Secondly, and with regard to the fact that the issue of pensions is regulated by other instruments, it should be considered that the aforementioned Conventions envisage the possibility of States regulating, that is to say legislating, on pensions-related matters, without in so doing violating the right of collective bargaining.
- 624.** Thirdly, collective bargaining relating to pensions, by its very nature, contains elements which are outside the scope of collective bargaining and which depend on the powers granted by constitutions to governments and their legislative bodies. These aspects, as they do not concern a particular population group, which negotiates a particular agreement, but rather concern the entire population of a given country, cannot be regulated by agreement, but through the power of the legislator to regulate general conditions governing the lives of the citizens. This is not a violation of the right of freedom of association but one of the most legitimate expressions of a welfare State governed by the rule of law. Naturally it is for governments and parliaments to determine which of those aspects are regulated by legislative means or through the decisions of the executive power. However, it is clearly and universally accepted that matters such as age, the number of contribution weeks, differences between the sexes when establishing certain requirements, are not fixed by collective bargaining between a certain group of citizens, in this case unionized workers, and the negotiating authority, but by the legislature, since, again, they relate to general matters concerning the living conditions of the population as a whole.
- 625.** The Government indicates that the chief objective is to ensure the financial sustainability of the social security system. In addition, it aims to ensure that the Colombian pensions system is fair to all Colombians, to which end, from 2008, pension requirements and benefits will be those established by the Pensions (General System) Act.
- 626.** Initially the protection of persons against the contingencies of old age and invalidity was structured as a consequence of the employment relationship. That was how it was envisaged in the Labour Code. The 1991 Constitution adopted a different model for social security, establishing in article 48 that “all citizens are guaranteed an inalienable right to social security” and to that end indicating that “social security is a public service of a compulsory character which shall be provided under the direction, coordination and control of the State, subject to the principles of efficiency, universality and solidarity, in such terms as may be established by law”. Accordingly, article 48 of the Constitution envisages the social security system as independent from the labour system. Indeed, the

1991 Constitution excludes the right to the provision of social security from the autonomy of private will and considers it a right of the person simply through their participation in society, with goes beyond the bounds of an employment relationship and is manifested in the provision of a public service of a compulsory nature that is to be directed and coordinated by the State, subject to the principles of efficiency, universality and solidarity.

- 627.** The Government indicates that the adoption of Act No. 100 of 1993 sought to give effect to the constitutional principles and to resolve the structural financial problems that were emerging in the pensions system and which were the result of decisions such as low contributions, or none at all, the dispersion of pension schemes and exaggerated benefits. The measures adopted in Act No. 100 of 1993 were not sufficient to eliminate the large imbalances which were already occurring in the system. In addition, Act No. 100 of 1993 did not cover all sectors, since it did not include members of the police, public servants affiliated to the National Teachers' Social Benefit Fund and ECOPETROL workers. In addition, the Act did not affect legally concluded collective agreements or accords, nor did it prevent them from continuing to be concluded. The general pensions system in Colombia, including the transitional arrangements, and the excepted schemes were therefore experiencing financial difficulties which were reflected in high operating deficits. Indeed, the operating deficit, measured as the difference between pension contributions and benefits in the pensions system, led to the need to use resources from the ISS reserves and the general national budget equivalent to 3.3 per cent of GDP in 2000 (5.1 billion pesos) and 4.6 per cent of GDP in 2004 (8.2 billion pesos). Thus, following the adoption of Act No. 100 of 1993, an unsustainable situation has arisen involving a transfer of liabilities between generations, since current and future contributors through their taxes and contributions would have to finance not only the debt relating to current pensions, but also their own social expenditure and their future pensions.
- 628.** The pensions operating deficit aggravated the difficult economic situation through which the country was passing, which had a negative impact on employment, tax revenues and contributions. To finance the social cost of pensions, in accordance with constitutional obligations, over the past ten years, the nation has used resources which otherwise would have been allocated to other essential purposes and objectives of the State. As a consequence, the nation had to resort to rising internal and external debt to finance the growing social investment in health and education.
- 629.** To make the system sustainable and to some extent reduce the size of the envisaged deficits, the Honourable Congress of the Republic approved a pensions reform through Act No. 797, which envisaged changes to the requirements and benefits of the general pension system, and succeeded in reducing the national pensions deficit to 40 per cent of GDP in 2000 over a horizon of 50 years, moving towards the sustainability of future pension payments and the macroeconomic and fiscal stability of the country. This Act also reformed the transitional arrangements.
- 630.** The Constitutional Court declared the provisions of the Act to reform the transitional arrangements unconstitutional for procedural reasons. The considerable fiscal impact of the transitional arrangements led the Government to insist on reforming the transitional arrangements, since between 2003 and 2004 there would be an increase of 21 per cent in current pension payments borne by the nation, rising from 7.1 billion pesos in 2003 to 9.9 billion pesos in 2004, as a result of the growth in the number of pensioners and, above all, the larger budget inputs required in view of the imminent exhaustion of the financial reserves of the ISS that year. For these reasons, the national Government presented and Congress approved Act No. 860 of 2003, which aimed at changing the transitional arrangements.

- 631.** Acts Nos 797 and 860 sought to reconcile the public interest involved in maintaining the social security system and satisfying the irrefutable right to social security guaranteed in the Constitution with the expectations of those with transitional arrangements.
- 632.** Although the reforms adopted helped to improve the operating balance of the system, they did not succeed in balancing it completely. The country spends more on social security than on other sectors which, in one way or another, also represent constitutional priorities.
- 633.** It emerges from the structure of the national general budget for 2004, without taking into account the public debt servicing, that the category of social protection accounted for 31.7 per cent of the total, at 15.8 billion pesos, a significant proportion of which was for current pension payments, at a total of 9.1 billion pesos, the equivalent of more than 18.2 per cent of the total budget, a figure that includes 0.7 billion pesos that have been set aside for and are required for the ISS to meet its pension obligations that year (it does not include the projected additional approximately 0.9 billion pesos for that). Current pension payments correspond to a proportion of the budget that is greater than each of the other sectors included in the budget. It should be clear that, with these resources, only around half a million pensioners are being served (see table).

#### Number of pensioners by institution in 2004

Institution	Estimated number of pensioners	Average pension (minimum salaries)
CAJANAL	196 935	2.9
National Police Retirement Fund	65 346	2.7
Teaching Social Benefit Fund	63 504	2.7
Armed Forces Retirement Fund	32 588	4.7
Ministry of Defence	27 926	2.1
National Police	20 457	3.0
National Railways Social Fund	16 577	2.4
FONCOLPUERTOS	15 908	6.8
Agricultural, Industrial and Mining Credit Fund	10 649	3.6
SENA	4 203	3.2
National University of Colombia	4 182	5.9
Ministry of Agriculture	3 404	3.0
INCORA	2 079	2.7
Congress Social Provision Fund	1 755	20.7
Other institutions	6 747	
Total	472 260	

Source: Directorate-General of the National Public Budget.

ISS pensioners are not included because there are currently only 0.7 billion pesos set aside in the national budget to finance ISS insurance.

- 634.** Only in the case of the police, taking into account the characteristics of this group of public servants and the risks to which their members are subjected, is it justified to maintain a special scheme, as is the case in many countries around the world.
- 635.** With regard to the relationship between collective bargaining and pension matters, Act No. 100 of 1993 organized the general pension system and clearly required respect for acquired rights “in accordance with previous legislative provisions, accords or collective agreements”, but also made it clear that this should not prejudice the right of denunciation which the parties enjoy and that the arbitration tribunal would settle differences between the parties”. The foregoing shows the clear intention to align collective agreements and accords with the provisions of Act No. 100 of 1993 and that pensions cannot simply be considered a consequence of an employment relationship, but are a benefit derived from the social security system organized by the legislator.
- 636.** However, given that the Constitution guarantees the right to collective bargaining, it has not been possible to fulfil the intention of Act No. 100, as set out in section 11, since there remains the possibility of continuing to establish special rules in pension matters, for which reason, and despite the fact that the Supreme Court of Justice has repeatedly stated that pension benefits should be harmonized with Act No. 100 of 1993, not only have collective agreements not been harmonized with the Act, but agreements continue to be concluded in which entities undertake to assume new pensions obligations directly, giving preference to certain workers and breaching the equality that the Constitution wished to impose on the social security system. In fact, according to the Constitutional Court, the universality of the social security system presupposes a guarantee of protection for all persons without any discrimination, at all stages of their lives, and this guarantee without discrimination can only be provided in a unified system which cannot be varied at the will of one sector of its beneficiaries.
- 637.** Therefore, and in order to achieve the aims outlined in article 48 of the Constitution, the requirements for accessing the pension system and the benefits it guarantees must be clearly established. Furthermore, this is particularly important when taking into consideration not only the principles that should govern the social security system but also the economic consequences of the current situation, and the situation in the medium and long term.
- 638.** The Government indicates that considerable resources are being used to finance special pension schemes while they could be used to increase the coverage of the general social security system and increase social investment or to promote the development of the country. These reasons clearly justify the need to establish that collective bargaining should not include the pension system.
- 639.** The Government indicates that article 55 of the Constitution provides “that the right to collective bargaining to regulate industrial relations shall be guaranteed except as otherwise provided by the law”. From this point of view, it could be argued that a law may determine the scope of the right to collective bargaining and exclude pension schemes from its scope. However, examination of the case law of the Constitutional Court does not yield clear conclusions on this point. Indeed, while the Constitutional Court initially was rather in favour of the possibility of establishing limits to the right of collective bargaining for reasons of public interest, in recent years it has been more restrictive.
- 640.** Firstly, in ruling C-112-93, the Constitutional Court allowed the possibility of establishing limits to collective bargaining, provided that such limits were reasonable and such as to prevent state entities being endangered. In particular, the Court held that agreements could not result in “the destruction, bankruptcy, deterioration or lack of productivity of enterprises, and also that state entities cannot constitutionally grant absurd wages, benefits



or privileges beyond the bounds of social reality”. Later, in ruling C-408 of 1994, the Constitutional Court reiterated that the Constitution allowed reasonable exceptions to collective bargaining.

641. Nevertheless, the broad approach taken by the Constitutional Court in previous cases has been restricted in later rulings. In view of the above, the constitutional rules should be clarified so as to establish that collective agreements or accords cannot be concluded in relation to pensions.
642. The Government adds that, in order to be able to assess the constitutional viability of the proposed Legislative Act, and its perfect compatibility with ILO Conventions, it is necessary to analyse whether those Conventions, which were approved by Colombia and form part of its constitutional provisions, prohibit or prevent the denial of collective bargaining on the statutory compulsory pension scheme. Convention No. 87 establishes special protection which allows citizens to establish trade unions and contains a series of general provisions requiring States to protect this right to organize. None of the provisions examined impede the inclusion in the Colombian Constitution by a legislative act of a limitation on collective bargaining concerning the compulsory pension scheme. Such an act would not violate or breach the right to organize, which could be pursued in the normal ways and with the protection of the State. It should be noted that the provisions of article 39 of the Constitution and the development of constitutional jurisprudence through constitutional reinstatement, as a means to protect the right to organize, through *tutela* (protection of constitutional rights), are appropriate methods for a harmonious development of freedom of association in Colombia.
643. Nor does Convention No. 98 on the right to organize and collective bargaining, which was integrated into ordinary Colombian legislation by Acts Nos 26 and 27 of 1976, contain any provision that might preclude limiting the scope of collective bargaining in the Constitution of the Republic of Colombia in relation to the compulsory pensions scheme established by law. Article 4, which is the Article that specifically refers to collective bargaining, states that measures appropriate to national conditions shall be taken, when necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers’ organizations, on the one hand, and workers’ organizations, on the other, with a view to the regulation of terms and conditions of employment by means of collective agreements. This provision undoubtedly leaves States that have adopted the Convention free to limit the scope of collective bargaining when compulsory schemes such as pensions are affected, and they enable exceptions to be made that significantly affect the national budget and the equality of workers, in an area as important as retirement. In the same way, Convention No. 154 on collective bargaining indicates in Article 5, section 1 that: “Measures adapted to national conditions shall be taken to promote collective bargaining”.
644. In conclusion, it should be noted that none of the Conventions which protect the right to organize and collective bargaining could be an obstacle to establishing in the Constitution, through a legislative act, a restriction on collective bargaining aimed at modifying the general pensions schemes.
645. The Government recalls that in 2003 it held a referendum that contained questions on various issues, such as political organization, fiscal control, budget design, etc. Only question 8 referred to pension matters, which is why it should be made clear that the result of the aforementioned referendum cannot be interpreted as a rejection of the modification of the pensions schemes.

646. The Government notes with regard to section (a)(ii) that, in relation to the agreements containing pensions clauses concluded before Legislative Act No. 01 of 2005 came into force, the Act provides:

...

With regard to pensions all acquired rights will be respected.

**Paragraph Three.** The rules governing pensions on the date of entry into force of this legislative act contained in valid accords, collective agreements, awards or agreements shall remain in force for the term originally agreed. Accords, agreements or awards signed between the entry into force of this legislative act and 31 July 2010, cannot contain more favourable pension conditions than those currently in force. In all cases they will lapse on 31 July 2010.

647. Therefore it can be inferred that pension clauses agreed upon before Legislative Act No. 01 of 2005 will be respected. The Government notes that the adoption of relevant measures, suggested by the Committee on Freedom of Association, is not possible, as that is within the competence of the legislature and not of the executive, which is that of the Government (article 113 of the Constitution).
648. With regard to section (a)(iii) of the recommendations relating to holding consultations, the Government notes that the issue of pensions had been included in the referendum with a view to solving the serious deficit in the pensions system, as said before. Question No. 8 of the referendum was as follows:

8. Limitation of pensions and salaries relying on public resources.

Question: As a measure to reduce social inequalities and control public spending, do you agree with the following article?

Add article 187 to the Constitution to read as follows:

Upon the entry into force of this constitutional reform, persons becoming eligible to retire will not receive from public resources a pension above twenty-five (25) current legal monthly minimum salaries. Exceptions are those who have acquired rights and those who are protected by exempted and special pension schemes.

The validity of pension schemes that are exempted, special or resulting from standards or agreements between nationals, whatever their nature, will lapse on 31 December 2007, with the exception of the pension scheme for Presidents of the Republic that will be effective from the date of entry into force of this constitutional reform.

Transitional arrangements will be regulated by the Pensions (General System) Act.

Pension requirements and benefits for everyone, upon entry into force of this constitutional reform, with the above time exceptions, will be those established in the Pensions (General System) Act. No disposition can be given or agreement invoked, of any kind, between nationals, that would deviate from that established therein.

With the exceptions laid out in the Pensions (General System) Act, from the entry into force of this constitutional reform, old-age or retirement pensions cannot be granted to persons under the age of 55 years.

The Pensions (General System) Act will order the revision of pensions that do not comply with the legal requirements or that abuse the law.

From 1 January 2005 until December 2006, the salaries and pensions of public servants, and persons whose salaries and pensions are paid with public resources, will not be increased, in both cases when they yield more than twenty-five (25) current legal monthly minimum salaries.

The legal system for members of the police is excluded from this provision.

Yes [ ]

No [ ]

Blank paper [ ]

649. According to information from the National Civil Registry Office, the results of the popular vote on that question were as follows:

Yes votes	No votes	Void votes	Total votes (yes + no + void)	Percentage of participants Yes	Percentage of participants	Unanswered questions
5 602 823	493 563	124 926	6 221 312	90.06	24.82	451 738

650. As can be seen, for question No. 8, 90.06 per cent voted in favour. However, the question was not incorporated in the Constitution because a participation of 25 per cent of the voting population was necessary and participation was 24.82 per cent. Approving a referendum requires not only an affirmative majority (for yes) for the questions submitted for consideration but also a minimum total participation of at least 25 per cent of the voting population. In conclusion, question No. 8 was not incorporated because of lack of participation by the voting population rather than because it was not approved. More than 5.5 million voters is a significant number, therefore we consider that carrying out another consultation, as proposed by the Committee on Freedom of Association, is not necessary, and that pertinent explanations have been given with regard to the economic impact of not applying Legislative Act No. 01 of 2005. (The Government includes a copy of the results published by the Registry Office.)
651. With regard to section (b) of the recommendations, the Government notes that the State of Colombia respects the right to collective bargaining of trade unions of public employees. As has been explained on various occasions, they cannot submit claims to resolve labour disputes which arise in their employment relations with the respective public institutions that employ them, based on the exhaustion of the procedures set out in the Labour Code – direct negotiation, collective agreement and, where appropriate, strikes and arbitration – but such unions can submit claims intended to improve their conditions of work, as long as they respect the constitutional competence of the authorities to determine unilaterally the emoluments of public servants. As stated in the Government’s various replies, the Attorney-General has dealt with claims from the trade union appropriately (the Government includes a copy of the reply sent by the Office of the Attorney-General).
652. With regard to section (c) of the recommendations, the Government indicates firstly that the Office of the Attorney-General reported that Mr Franco Cuartas never presented his resignation during his contract.
653. The Government requests the Committee to clarify which body or person could have jurisdiction to carry out an independent investigation, according to the criteria of the Committee on Freedom of Association. The Office of the Attorney-General, in accordance with the provisions of article 3 of Act No. 734 of 2002, is the permanent body responsible for diligently exercising disciplinary authority and as such can begin, continue or remit any investigation or judgement of competence of the internal disciplinary systems of public bodies.
654. With regard to putting an end to any disciplinary proceedings against Mr Franco Cuartas, as the Attorney-General states: “this aspect is impossible to implement, bearing in mind that both the Constitution, in article 6, and Act No. 734 of 2002, oblige me to comply with their rules, that is to say to begin a disciplinary investigation when the potential perpetrator or perpetrators of the offence have been identified, without exception, either in the complaint or through preliminary enquiries”.

- 655.** As for section (d) of the recommendations, the Government indicates, with regard to the dismissal of Mr Luis Carmelo Cataño Cataño, that the Fourth Labour Court of the Bogotá, DC Circuit found in favour of Mr Cataño Cataño, and that this decision was appealed by the Office of the Attorney-General. The Supreme Court of Bogotá, Labour Tribunal, when deciding on the appeal, decided to overturn the ruling rejecting the claim and thereby absolved the Office of the Attorney-General.
- 656.** With regard to the dismissal of Mr Carlos Romero Aguilar, in accordance with ruling No. 101151 of 7 May 2007, the Chief of the Human Resources Division made the Legal Office aware that, according to information sent from the Ministry of Social Protection to the Office of the Attorney-General, Mr Romero Aguilar did not figure on the list of trade union committees or subcommittees and, as such, Mr Romero Aguilar did not have trade union immunity.
- 657.** With regard to Mr Francisco Molina Alvarado, the aforementioned official communication showed that he was registered on the Bogotá sector subcommittee by the Ministry of Social Protection; however the General Secretariat of the Office of the Attorney-General had informed them that Mr Jovanny Quiñónez Díaz had been appointed to the post that Mr Molina Alvarado had provisionally occupied, having earned it through a selection process. In accordance with article 188 of Decree-Law No. 262 of 2000, provisional appointment can be made for a term of up to six (6) months which can be extended for another six (6) during the selection process. In this case, Mr Molina Alvarado was not dismissed, but rather his post was taken on by the person who earned the job through a selection process.
- 658.** With regard to Mr Silvio Elías Murillo, the Government indicates that Mr Murillo's claims for reinstatement were denied by the Second Labour Court in first instance and in second instance by the Supreme Court, Labour Tribunal.

#### **D. The Committee's conclusions**

- 659.** *The Committee notes the new allegations presented by the CGT and the Government's observations on the Committee's recommendations made at its previous examination of the case.*
- 660.** *With regard to section (a) of the recommendations relating to the limitation of the right to collective bargaining by virtue of the recent adoption of Legislative Act No. 01 of 22 July 2005, the Committee notes that the Government refers to the economic conditions that led to the adoption of the legislation that aims to establish an economically and financially viable universal and supportive system. The Committee notes that the Government insists that the power to regulate the pensions policy is granted to the Government by the Constitution, that pension issues do not fall within the scope of Conventions Nos 87 and 98 and that it is not contrary to these Conventions to prevent or limit those issues from being negotiated collectively.*
- 661.** *In that regard, the Committee recalls, firstly, as at its previous examination of the case, that it recognizes the right of States to regulate pension schemes but underlines the necessity to respect the principle of collective bargaining in so doing [see 344th Report, para. 80(a)(i)]. As the Committee observed at its previous examination of the case, the adoption of a legal system for pensions does not generally fall within the jurisdiction of the Committee. However, it can examine to what extent the principles of freedom of association have been respected in adopting that system. Therefore, the Committee observes that until Legislative Act No. 01 was issued, it was legal to establish pensions clauses in collective agreements, in particular clauses that improved on the legal provisions, and so this was done on numerous occasions between private and public*

*enterprises and public bodies with various trade union organizations. On those occasions, the parties regulated the mode and amount of pensions applied to workers in the enterprise or the sector through collective bargaining.*

- 662.** *The issuance of Legislative Act No. 01 changed the governing legal situation by establishing that “with effect from the entry into force of this Legislative Act, pension arrangements other than those set out in the Pensions (General System) Act cannot be established by accords, collective agreements, awards or legal acts of any kind”. Furthermore it establishes that “Without affecting the acquired rights, the system applied for members of the police and the President of the Republic, and what is established in the paragraphs of this article, the validity of special or exempted pension schemes, as well as any other scheme different to that permanently established in the Pensions (General System) Acts, will lapse on 31 July 2010.”*
- 663.** *Indeed, the Committee observes that, following the introduction of Legislative Act No. 01, no pension conditions can be negotiated that are different to those in the general pensions system. With regard to the agreements made before the Legislative Act, while the Act contains a provision to respect acquired rights, it also provides that, in all cases, pre-existing systems that are different to the general pensions system will lapse as of 2010. In some cases this may mean a unilateral modification of the contents of signed collective agreements. In that regard, the Committee has considered on previous occasions that it goes against the principles of collective bargaining and the principle of acquired rights of the parties. Therefore, the Committee once again requests the Government to adopt the necessary measures to ensure that collective agreements containing pensions clauses, which are valid beyond 31 July 2010, remain in effect until their expiry date.*
- 664.** *With regard to agreements concluded after the entry into force of Legislative Act No. 01, specifically in relation to the general prohibition of establishing a pension scheme different to that established in the general pensions system, the Committee recalls that, on its previous examination of the case, it had noted that, according to the allegations, the Legislative Act had been adopted despite the opposition of the social partners, expressed in a referendum, about which neither the Government nor the complainants had provided greater detail. In this regard, the Committee had requested the Government to hold new consultations with the interested parties in order to find a negotiated solution acceptable to all the parties concerned. The Committee notes the information provided by the Government about the referendum, that the legislative authority had decided upon the referendum in order to make some amendments to the Constitution; the referendum was about various issues; question No. 8 was about pensions; during the vote, 90.06 per cent of voters accepted the new scheme; however the provision could not be included in the Constitution because the Constitution stipulated that participation greater than 25 per cent was needed in the referendum, which was not achieved. The Committee notes that the Government emphasizes that in any case more than 5.5 million people participated in the referendum and indicates that independently of the result, the State has jurisdiction to regulate pension issues by legislative means.*
- 665.** *In this regard, the Committee has considered on previous occasions that the process of tripartite consultation on legislation helps to give 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 **Digest of Decisions and Principles of the Freedom of Association Committee**, fifth edition, 2006,*

*para. 1076]. Therefore, the Committee again requests the Government, in view of the particular circumstances of this case and in order to ensure harmonious industrial relations in the country, to hold new in-depth consultations on retirement and pensions with the interested parties, in order to find a solution acceptable to all the parties concerned, in accordance with the Conventions on freedom of association and collective bargaining ratified by Colombia, in particular ensuring that the parties involved in collective bargaining can improve the legal provisions on retirement and pension schemes by mutual agreement.*

- 666.** *With regard to section (b) of the recommendations relating to the refusal of the Office of the Attorney-General to engage in collective bargaining with SINTRAPROAN, the Committee notes that the Government reiterates what it said at the previous examination of the case, that article 416 of the Labour Code establishes that trade unions of public employees cannot submit claims but only respectful petitions. In that regard, the Committee again reiterates that, although certain categories of public servants should already enjoy the right to collective bargaining, in accordance with Convention No. 98, the promotion of that right was generally recognized for all public servants with the ratification of Convention No. 154 on 8 December 2000 and, in consequence, workers in the public sector and the central public administration should enjoy the right to collective bargaining. In these circumstances, recalling that special modalities of application may be fixed for collective bargaining in the public service, but at the same time maintaining that the mere possibility of submitting respectful petitions is not sufficient to consider that there is a true right to free and voluntary collective bargaining, the Committee again requests the Government to take the necessary measures to amend article 416 of the Labour Code so as to ensure observance of the right of public servants to bargain collectively in accordance with the provisions of Conventions Nos 98 and 154, ratified by Colombia.*
- 667.** *With regard to section (c) of the recommendations relating to the alleged persecution through successive disciplinary procedures of Mr Franco Cuartas, founder member and leader of SINTRAPROAN, the Committee recalls that it had requested the Government to carry out an independent investigation that would have the confidence of the parties and, if the allegations were found to be true, to take the necessary measures to reinstate him and put an end to any disciplinary proceeding against him. In this regard, the Committee notes that the Government indicates that the Office of the Attorney-General reports that Mr Franco Cuartas has not resigned from his post. In addition, it indicates that the Office of the Attorney-General is the authority responsible for disciplinary authority and therefore can begin, continue or remit any investigation or judgement of competence of the internal disciplinary systems of public bodies.*
- 668.** *In that regard, the Committee notes that the Office of the Attorney-General is responsible for disciplinary authority and investigation but observes that the recommendations of the Committee have not been followed up with regard to the investigating body in order to ensure complete impartiality. The Committee believes that the independent authority should be the judicial authority or an independent person who enjoys the confidence of the parties. Therefore, the Committee requests the Government to take the necessary measures to carry out without delay an independent investigation into these allegations and, if they are found to be true, to take the necessary measures to cancel the disciplinary measures taken against Mr Franco Cuartas.*
- 669.** *With regard to section (d) of the recommendations relating to the alleged dismissal of Luis Carmelo Cataño Cataño, Carlos Romero Aguilar, Francisco Molina and Silvio Elías Murillo, despite enjoying trade union immunity, and in the case of Mr Murillo, despite the Chocó Administrative Court ordering his reinstatement, the Committee notes the information from the Government that: in the case of Mr Cataño Cataño, the Supreme Court of Bogotá refused his reinstatement by overturning the ruling of the Fourth Labour*

*Court of the Bogotá Circuit; with regard to Mr Carlos Romero Aguilar, he did not have trade union immunity; with regard to Mr Francisco Molina, he was not dismissed but, as he had been appointed provisionally, his post was subject to a selection process and was obtained by another person; and with regard to Mr Murillo, the Government clarifies that the claim for reinstatement was denied in courts of first and second instance. The Committee observes that the Government has not provided additional information relating to the reason for the dismissals, and does not refer to having respected the trade union immunity of the officials, nor does it include copies of the legal rulings showing that there was no anti-union discrimination in the dismissal of the union officials. The Committee recalls the principle that a worker or trade union official should not suffer prejudice because of their trade union activities. In order to be able to formulate conclusions based on all the information, the Committee requests the Government to send a copy of the judicial decisions denying the reinstatement of the dismissed union officials.*

- 670.** *With regard to the new allegations presented by the CGT relating to the dismissal of SINTRAPROAN members Jhon Jair Silva and Jesse Moisés Gutiérrez Herrera, the Committee requests the Government to send its observations without delay on the matter.*

### **The Committee's recommendations**

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

- (a)** *With regard to the allegations relating to the limitation of the right to collective bargaining by virtue of the recent adoption of Legislative Act No. 01 of 22 July 2005, which amends article 48 of the Constitution on social security, the Committee:*
- (i)** *with regard to agreements concluded prior to the entry into force of the legislation, once again requests the Government to adopt the necessary measures to ensure that collective agreements containing pensions clauses, which are valid beyond 31 July 2010, remain in effect until their expiry date;*
  - (ii)** *with regard to agreements concluded after the entry into force of Legislative Act No. 01, again requests the Government, in view of the particular circumstances of this case and in order to ensure harmonious industrial relations in the country, to hold new in-depth consultations on retirement and pensions, exclusively with the social partners, in order to find a solution acceptable to all the parties concerned in accordance with the Conventions on freedom of association and collective bargaining ratified by Colombia, in particular ensuring that the parties involved in collective bargaining can improve the legal provisions on retirement and pension schemes by mutual agreement.*
- (b)** *With regard to the allegations concerning the refusal of the Office of the Attorney-General to engage in collective bargaining with the SINTRAPROAN, the Committee again requests the Government to take the necessary measures to amend article 416 of the Labour Code, so as to ensure observance of the right of public servants to bargain collectively in accordance with the provisions of Conventions Nos 98 and 154, ratified by Colombia.*

- (c) *With regard to the allegations of persecution through successive disciplinary procedures of Mr Franco Cuartas, founder member and leader of SINTRAPROAN, the Committee requests the Government to take the necessary measures to carry out without delay an independent investigation into these allegations and, if they are found to be true, to take the necessary measures to cancel the disciplinary measures taken against Mr Franco Cuartas.*
- (d) *With regard to the alleged dismissal of Luis Carmelo Cataño Cataño, Carlos Romero Aguilar and Silvio Elías Murillo, despite enjoying trade union immunity, in order to be able to formulate conclusions based on all the information, the Committee requests the Government to send a copy of the judicial decisions denying the reinstatement.*
- (e) *The Committee requests the Government to send its observations without delay with regard to the new allegations presented by the CGT relating to the dismissal of SINTRAPROAN members Jhon Jair Silva and Jesse Moisés Gutiérrez Herrera.*

CASE No. 2489

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

**Complaint against the Government of Colombia  
presented by  
the Single Confederation of Workers of Colombia (CUT)**

*Allegations: The Single Confederation of Workers of Colombia (CUT) alleges that: (1) the National Trade Union of University Workers of Colombia (SINTRAUNICOL) was put under pressure and threatened by the Vice-Chancellor of the University of Córdoba and paramilitary commanders of the United Self-Defence Forces of Colombia (AUC) to persuade them to renegotiate the collective agreement; (2) on 17 February 2003, following the appointment of a new Vice-Chancellor, a meeting was held at the university, which was deemed by the authorities to be an illegal work stoppage and resulted in disciplinary proceedings against the SINTRAUNICOL trade union leaders; and (3) in December 2005, despite the opposition of the trade union, agreements Nos 095 and 096 were approved, altering the status of university workers from public officials to public employees, which rendered the collective agreement invalid*



672. The Committee last examined this case at its May–June 2007 meeting and submitted an interim report to the Governing Body [see 346th Report, paras 442–467, approved by the Governing Body at its 299th Session].
673. The Government sent new observations in a communication dated 4 September 2007.
674. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

#### **A. Previous examination of the case**

675. In its previous examination of the case in May–June 2007, the Committee made the following recommendations [see 346th Report, para. 467]:
- (a) With regard to the alleged pressure and threats suffered by SINTRAUNICOL at the hands of the Vice-Chancellor of the University of Córdoba and the paramilitary commanders of the AUC to persuade them to renegotiate the collective agreement, the Committee strongly urges the Government to take measures immediately to guarantee the safety of the threatened trade union officials without delay. The Committee further strongly urges the Government to take immediately the necessary measures to have a truly independent investigation carried out without delay by a person who enjoys the confidence of both parties and, if these allegations are found to be true, to take the necessary measures to punish those responsible. The Committee condemns the existence and actions of paramilitary organizations, which, in violation of human rights and of freedom of association principles, regard trade unionists as targets. The Committee recalls that the responsibility to stop such organizations rests with the Government. The Committee requests the Government to keep it informed on this matter.
  - (b) With regard to the meeting held by SINTRAUNICOL on 17 February 2003 following the appointment of the new Vice-Chancellor, which was deemed by the administrative authorities to be an illegal work stoppage and gave rise to disciplinary proceedings which are still pending against the trade union officials, the Committee requests the Government:
    - (i) to take the necessary measures to amend article 451 of the Substantive Labour Code so that illegality rulings are made by an independent authority which enjoys the confidence of both parties; and
    - (ii) taking into account the fact that decision No. 0002534 of September 2003, issued by the Ministry of Social Protection, which declared the work stoppage illegal (while the trade union denies it took place), was based on legislation that is not in accordance with the principles of freedom of association, to annul the Minister's declaration and the disciplinary proceedings initiated pursuant to it. The Committee requests the Government to keep it informed on the matter.
  - (c) With regard to the allegations stating that agreements Nos 095 and 096, approved in December 2005 despite the opposition of the trade union, led to the invalidation of the collective agreement, the Committee, noting the previous agreement on working conditions, pay, benefits and incentives signed on 29 March 2006 by representatives of the University of Córdoba and SINTRAUNICOL, requests the complainant organization to report on the circumstances in which this agreement was signed, if it was the result of free and voluntary negotiations and if it replaces the collective agreement that was in force when agreements Nos 095 and 096 were approved.

#### **B. The Government's reply**

676. In its communication dated 4 September 2007, the Government sent the following observations.

677. With regard to paragraph (a) of the recommendations, the Government states, with regard to the issue of safety, that this issue is being dealt with under Case No. 1787, and that it is important that the trade union provides the names of those under threat so that the appropriate measures can be taken. The Government includes a copy of a letter sent by the office of the Vice-Chancellor of the University of Córdoba stating that, since the current Vice-Chancellor of the University took office, there have been no killings, abductions, exiles or displacements and that, in the isolated cases of reported threats, the authorities were informed immediately, and responded by providing the necessary protection, ensuring life, freedom of expression and labour rights. The Vice-Chancellor in turn includes a copy of a communication dated 24 April 2004, stating, at the Vice-Chancellor's request, that "an examination of the archives and card index system kept in this Unit from 2002 to the present time has revealed that no information has been recorded about threats made by terrorists outside the law (FARC, ELN, ERP, AUC) against teaching staff, students or administrative staff at the University of Córdoba".
678. With regard to paragraph (b)(i) of the recommendations, the Government indicates that the Ministry of Social Protection takes decisions in accordance with the national legislation and in the spirit of transparency and impartiality.
679. With regard to paragraph (b)(ii) concerning decision No. 0002534 of September 2003, the Government states that the administrative disputes authority checks the legality of the decisions taken by the Ministry of Social Protection. In the communication mentioned above, the Vice-Chancellor of the University refers to the disciplinary proceedings conducted by the National Office of the Attorney-General and states that the latter upheld the lower court ruling which had acquitted the members of SINTRAUNICOL for the actions carried out on 17 and 18 February 2003. Copies of the acquittal decisions of the National Office of the Attorney-General of 29 November 2005 and 9 December 2005 are also enclosed.
680. With regard to paragraph (c) of the recommendations, the Vice-Chancellor of the University states in his letter, sent by the Government, that following the signing of the agreement with SINTRAUNICOL, the Vice-Chancellor was reported to the Office of the Comptroller General of the Republic by the Association of University Teachers (ASPU), another trade union, which considered that the University administration had awarded exorbitant benefits to public employees.

### **C. The Committee's conclusions**

681. *The Committee notes the Government's observations.*
682. *With regard to paragraph (a) of the recommendations concerning the alleged pressure and threats suffered by SINTRAUNICOL at the hands of the Vice-Chancellor of the University of Córdoba and the paramilitary commanders of the AUC to persuade them to renegotiate the collective agreement, the Committee observes that the Government refers to the issue of safety and states merely that this issue is being examined under Case No. 1787 pending before the Committee, and that it is important that the trade union provides the names of those under threat so that the appropriate measures can be taken. The Committee notes the letter from the Vice-Chancellor of the University sent by the Government in which he states that since he took up office there have been no killings and only isolated cases of threats.*
683. *The Committee observes, however, that it emerges from the rulings of the National Office of the Attorney-General, also sent by the Government, that, as contained in the allegations, the members of the executive board of SINTRAUNICOL were obliged to hold a meeting in Santafé de Ralito with members of the AUC and that, on 6 February 2004, the Public*

Ombudsman's Office had already published a risk assessment report concerning the SINTRAUNICOL trade union leaders. In that report, quoted in the ruling of the National Office of the Attorney-General, the Public Ombudsman's Office states that "the University of Córdoba, the Department's main university, has been affected by the political and military operations of this counterinsurgent group. The teachers, workers and retired staff who ... have reported the influence of these self-defence groups in the different processes which define and guide the life of this educational centre today have been regarded by the AUC as allies of the insurgence and as an obstacle to their aim of consolidating their supreme control". In this regard, the Committee must emphasize once again the extremely serious nature of these allegations and is bound to condemn once again the existence and actions of paramilitary organizations, which, in violation of human rights and of freedom of association principles, regard trade unionists as targets.

- 684.** *In this regard, the Committee is bound to deeply regret that, despite the particular risk faced by SINTRAUNICOL trade union leaders and members under these circumstances, the Government has not yet taken measures to provide protection to the leaders of SINTRAUNICOL and an investigation into the events reported, as requested by the Committee, has not been carried out. In these circumstances, the Committee once again urges the Government to take measures to guarantee the safety of the threatened trade union leaders and requests it to consult the trade union without delay to determine who should be afforded such protection. Furthermore, the Committee once again urges the Government to have a truly independent investigation into these allegations carried out without delay by a person who enjoys the confidence of the parties involved, and, if these allegations are found to be true, to take the necessary measures to punish those responsible. The Committee requests the Government to keep it informed on this matter.*
- 685.** *With regard to paragraph (b) of the recommendations concerning the meeting held by SINTRAUNICOL on 17 February 2003, the Committee recalls that the meeting was deemed by the administrative authorities to be an illegal work stoppage under decision No. 0002534 on the grounds that the right to strike is prohibited in the case of essential public services. In this regard, the Committee notes the information provided by the Government that the decisions were taken in accordance with the national legislation and that the disciplinary proceedings initiated under the decision mentioned led to a decision by the National Office of the Attorney-General acquitting the trade union leaders of SINTRAUNICOL.*
- 686.** *With regard to the legislative provisions relating to the declaration that the strikes were illegal (articles 450 and 451 of the Substantive Labour Code), the Committee recalls that, like the Committee of Experts, it has been pointing out for many years that this legislation is not in conformity with the principles of freedom of association for two reasons: firstly, because the Committee has considered on numerous occasions that the education sector does not constitute an essential service in the strict sense of the term, in which the exercise of the right to strike may be prohibited, and secondly, because, as the Committee has also stated, the responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties involved. In these circumstances, the Committee once again requests the Government to take the necessary measures to amend articles 450 and 451 of the Substantive Labour Code in accordance with these principles.*
- 687.** *With regard to decision No. 0002534 itself, which declared the work stoppages illegal, taking into account that it is based on legislation which is not in conformity with the principles of freedom of association, the Committee requests the Government to invalidate this decision. Furthermore, the Committee notes that in the disciplinary proceedings initiated against the trade union leaders of SINTRAUNICOL as a result of this decision, the National Office of the Attorney-General cleared the leaders concerned of responsibility*

in a decision dated 9 December 2005, which was before this complaint was presented and before the Government sent its observations. In these circumstances, the Committee requests the Government to invalidate any other disciplinary proceedings which may have been initiated against the trade union officials of SINTRAUNICOL under decision No. 0002534.

- 688.** *With regard to paragraph (c) of the recommendations concerning the allegations stating that agreements Nos 095 and 096, approved in December 2005 despite the opposition of the trade union, led to the invalidation of the collective agreement, the Committee noted previously the earlier agreement on working conditions, pay, benefits and incentives signed on 29 March 2006 by representatives of the University of Córdoba and SINTRAUNICOL and requested the complainant organization to report on the circumstances in which this agreement was signed and whether it was the result of free and voluntary negotiations. The Committee observes with regret that the complainant organization has not sent its comments on this matter. However, the Committee observes that in the letter from the Vice-Chancellor of the University, sent by the Government, the Vice-Chancellor refers to the conclusion of this agreement. Taking into account this communication and the copy of the agreement of which note was taken in the previous examination of the case, the Committee understands that SINTRAUNICOL and the University authorities actually signed a new collective agreement following agreements Nos 095 and 096, which would confirm the possibility for public employees of the University to bargain collectively. Unless the complainant organization presents new information, the Committee will therefore not continue to examine these allegations.*

### **The Committee's recommendations**

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

- (a) *With regard to the alleged pressure and threats suffered by SINTRAUNICOL at the hands of the Vice-Chancellor of the University of Córdoba and the paramilitary commanders of the AUC to persuade them to renegotiate the collective agreement, the Committee points out the extremely serious nature of these allegations and once again condemns the existence and actions of paramilitary organizations which, in violation of human rights and freedom of association principles, regard trade unionists as targets, and urges the Government to:*
- (i) *take measures to guarantee the safety of the threatened trade union leaders, to which end the Committee requests the Government to consult the trade union without delay to determine who should be afforded such protection; and*
  - (ii) *have a truly independent investigation into these allegations carried out without delay by a person who enjoys the confidence of the parties, and, if these allegations are found to be true, take the necessary measures to punish those responsible. The Committee requests the Government to keep it informed on this matter.*
- (b) *With regard to the allegations concerning the meeting held by SINTRAUNICOL on 17 February 2003 which was deemed to be an illegal work stoppage by the administrative authorities under decision No. 0002534:*

- (i) *the Committee requests the Government to take the necessary measures to amend articles 450 and 451 of the Substantive Labour Code so that the education sector is not regarded as an essential public service in which the exercise of the right to strike may be prohibited and so that illegality rulings concerning strikes are made not by the Government but by an independent body that has the confidence of the parties; and*
- (ii) *with regard to decision No. 0002534 which declared the work stoppages illegal, taking into account that this decision is based on legislation that is not in conformity with the principles of freedom of association, the Committee requests the Government to invalidate this decision as well as any other disciplinary proceedings initiated against the SINTRAUNICOL trade union leaders under this decision (apart from those for which, according to the Government, an acquittal decision was issued on 9 December 2005, i.e. before this complaint was presented).*

CASE NO. 2493

DEFINITIVE REPORT

**Complaint against the Government of Colombia  
presented by  
the National Trade Union of Workers in “La Previsora SA” (SINTRAPREVI)**

*Allegations: Anti-union discrimination against the official workers belonging to the trade union organization; the presentation of counter demands by the enterprise; the preparation of a voluntary benefits plan to undermine the trade union organization; the conclusion of a collective pact with workers not belonging to the trade union and consequent pressure put on union members to leave the trade union; and the abolition of agreed benefits enjoyed by 114 official workers under the terms of a decision by the Council of State*

- 690.** The Committee last examined this case at its March 2007 session and issued an interim report [see 344th Report, approved by the Governing Body at its 298th Session, paras 845–864].
- 691.** The Government sent new observations in a communication dated 4 July 2007.
- 692.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

**A. Previous examination of the case**

**693.** In its previous examination of the case in March 2007, the Committee made the following recommendations [see 344th Report, para. 864]:

- (a) The Committee requests the complainant organization to provide further information concerning its allegations regarding the preparation of a voluntary benefits plan with the aim of encouraging workers to leave the trade union organization en masse.
- (b) The Committee requests the Government to take the necessary measures to ensure that an investigation is carried out with a view to determining whether, when the signing of a non-union collective accord was being promoted, unionized workers were put under pressure, and requests the Government to keep it informed in this respect.
- (c) As to the allegations concerning the abolition of benefits of 114 official workers established under the Statutes governing Executives (*Estatuto del Directivo*) by virtue of the ruling of the Second Section, Subsection A, of the Administrative Disputes Division of the Council of State, the Committee requests the Government to send a copy of the ruling in question.

**B. The Government's reply**

**694.** As regards recommendation (b) above, the Government states that the Regional Directorate of Cundinamarca launched an administrative labour investigation against La Previsora SA for violation of the right of association, but the investigation was closed for want of legal grounds under the terms of section 13 of the Administrative Disputes Code. The Government attaches copies of sections of the administrative labour complaint (No. 29775 of 13 July 2006), lodged by SINTRAPREVI against La Previsora SA for alleged violation of the right of association. In a ruling of 18 August 2006, the parties were summoned to attend administrative labour proceedings. On 25 August 2006, the date arranged for the proceedings, SINTRAPREVI failed to appear before the Third Inspectorate of the Regional Directorate of Cundinamarca. On 26 August, the complainant party was called on to prove the legal grounds as provided in sections 12 and 13 of the Administrative Disputes Code. When the period allowed for this elapsed, in a ruling of 18 October 2006, it was ordered that the labour proceedings regarding the complaint should be closed for want of legal grounds.

**695.** As regards recommendation (c), the Government attaches a copy of the ruling by the Council of State and the reply sent by the Administrative Vice-Chairperson of La Previsora SA.

**696.** The ruling by the Council of State of 16 February 2006 nullified some sections of Agreement No. 7 of 11 April 1996, issued by the executive board of the La Previsora SA insurance company, as well as Agreement No. 8 of 12 July 1996 which amended Agreement No. 7 regarding housing, education and personal loans, and resolution No. 014 of 1996 issuing regulations on the granting of loans for housing, to official employees of the La Previsora SA insurance company, who are covered by the Statutes governing Executives (*Estatuto del Directivo*). According to the Council of State:

... the Agreements in question, when considered in isolation, appear to be unilateral acts by the administration and products of the employer's free and liberal nature, and therefore separate from any activity or will on the part of the company's employees. Nevertheless, in order for the Agreements to achieve their goal, that of enabling workers in managerial posts to benefit from their provisions – that is, in order for them to have an impact on labour relations and to acquire real meaning in the area that they cover – it was stipulated that these employees had to express a wish to accept the Statutes governing Executives contained in the Agreement, which in turn involved accepting all the clauses, including the clause in section 7 that rules out enjoyment of the benefits provided for in the collective labour agreement.

Anyone who took up one of these posts subsequently had to abide by these same conditions if they signed the Statutes governing Executives, which, as the company recognizes and the complainants denounce, contain a series of benefits that are superior to those provided in the collective labour agreement, and which simultaneously prevent employees from enjoying the special benefits established in that agreement.

According to the Council, this situation:

... led these workers not to join the trade union, because there was no point in belonging to it if the benefits provided in the collective labour agreement had been relinquished. Similarly, unionized workers had to relinquish the benefits to which they were entitled because the trade union comprised over a third of the company's workforce.

The ruling states further on that:

... SINTRAPREVI comprised over a third of the La Previsora SA workforce and therefore, in accordance with section 471 of the Substantive Labour Code (CST) – under which when the number of members of the trade union party to a collective labour agreement exceeds a third of the company's total workforce, the terms of the agreement are extended to all workers, regardless of whether they are unionized – the workers were obliged to relinquish the benefits of the collective labour agreement. The provisions of the Statutes governing Executives could not cover them in any case, since section 7 of Agreement No. 07 of 1996 prohibits simultaneous enjoyment of the benefits contained in any collective labour agreement signed by the company and those provided in the Statutes governing Executives.

The Council later states:

... considering the fact that non-unionized workers had no involvement whatsoever in concluding the Agreements, and assuming that the acts are products of the respondent company's free will, it could be accepted that Agreements No. 07 and 08 of 1996 are not non-union collective accords.

However, as soon as the workers of La Previsora SA decide to agree to their provisions, with the aim of having a legal effect on their labour relations with the company, these Agreements do become a non-union collective accord: although not every regulation contained in the Agreements as previously established by the employer has been discussed, the workers are expressing support for the Agreements as soon as they agree to their terms. The Agreements then become a non-union collective accord, even if the worker has been given the choice between accepting the conditions established by the company and relinquishing the benefits and services offered by the respondent company through the Statutes governing Executives ...

These circumstances lead the Court to conclude that despite the fact that these acts appear to be simply liberal, the Agreements in question do in fact constitute a non-union collective accord, not only because in strict legal terms they are aimed at non-unionized staff members – since, in order to enjoy the benefits established in the Statutes governing Executives workers must relinquish those provided in the collective labour agreement which, as a general rule, are enjoyed by members of the relevant trade union only, except when, as in the case of SINTRAPREVI, the union comprises over a third of the company's workforce – but also because the purpose of these Agreements is to regulate labour relations between signatory employees and the company, which means that both parties must comply with their terms since they form part of the respective labour contracts.

...

Having established the true legal nature of the Agreements in question and taking into account that they do in fact constitute a non-union collective accord, the Court finds that they violate the right to equality and the right of association of the respondent company's employees.

In fact, while the employer's freedom to conclude non-union collective accords is recognized, it is unacceptable for the employer to violate the rights of workers and trade unions by creating more favourable working conditions for non-unionized workers than those

provided in the collective labour agreement. This situation leads to infringement of workers' and trade unions' right to equality since, even though the work done is identical, any worker who abides by the Statutes governing Executives is entitled to superior benefits; and either to large numbers of unionized staff members leaving the unions, or – as in this case, when this phenomenon did not occur – to a significant decrease in income for trade unions, caused by workers relinquishing the benefits agreed in the collective labour agreement, and therefore to loss of the unions' right to receive the corresponding contributions from these workers.

Similarly, considering that the abovementioned Agreements do constitute a non-union collective accord, it must be concluded that the act of issuing them violated section 70 of the Substantive Labour Code, which stipulates that when a trade union comprises over a third of a company's workforce, as is the case with SINTRAPREVI, the company is prohibited from signing collective accords. However, such was the case when the managerial workers at La Previsora SA agreed to the Statutes governing Executives contained in Agreements Nos 07 and 08 of 1996, because from then on the Agreements were classed as a collective accord.

...

It is therefore clear that, in addition to infringing section 70 of Act 50 of 1990 – which prohibits the conclusion of non-union collective accords when the trade union of a company comprises over a third of the company's workforce – and violating the workers' right of association – in the sense that in order to be able to enjoy the benefits offered in the Statutes governing Executives, workers are required to relinquish those provided in the collective labour agreement or to leave the trade union – the Agreements in question also violate the right to equality regarding remuneration for work.

This is because although they undertake equal work, workers who agree to the Statutes governing Executives will, at the whim of La Previsora SA, receive a higher salary and better benefits and services than others who work under identical conditions, as the complainants stress and as even the company recognizes.

697. The Government also attaches a copy of a communication from La Previsora SA in which it states that on 15 November 2006 a collective labour agreement with SINTRAPREVI was signed for the period 2007–10.

### C. The Committee's conclusions

698. *The Committee takes note of the Government's response to recommendations (b) and (c).*
699. *As regards recommendation (b), the Committee recalls that it had requested the Government to carry out an investigation with a view to determining whether, when the signing of a non-union collective accord was being promoted early in 2006, unionized workers were put under pressure. In this respect, the Committee takes note of the information provided by the Government, according to which the Regional Directorate of Cundinamarca launched an administrative labour investigation against La Previsora SA for violation of the right of association, but the investigation was closed on 18 October 2006 for lack of legal grounds under article 13 of the Administrative Disputes Code, since SINTRAPREVI failed to attend the hearings to which it had been summoned. However, the Committee observes that this investigation was undertaken before the Committee issued its conclusions and recommendations, which consequently could not have been taken into account. Despite this, taking into account the information provided by the Government regarding the signing of the collective labour agreement with SINTRAPREVI on 15 November 2006 (a copy of which is attached), it appears to the Committee that the dispute between the parties as regards the signing of a non-union collective accord has been settled.*
700. *As regards recommendation (c) concerning the allegations made by SINTRAPREVI concerning the abolition of benefits of 114 official workers established under the Statutes governing Executives by virtue of the ruling of the Second Section, Subsection A, of the*



*Administrative Disputes Division of the Council of State, the Committee takes note of the copy of this ruling sent by the Government. In this respect, the Committee observes that, on 16 February 2006, the Council of State nullified certain clauses of Agreements established by the company in 1996 within the framework of the Statutes governing Executives (Estatuto del Directivo). The reasons for this decision were the following. The Agreements were deemed by the Council of State to be similar to a non-union collective accord, which benefited those who signed the Statutes governing Executives. According to the Statutes' own provisions, signing the Statutes ruled out enjoyment of the benefits established in the collective labour agreement; according to the Council of State, this situation led workers to leave the trade union because there was no point in belonging to it if the benefits of the collective labour agreement had been relinquished. Furthermore, according to the Council of State, the non-union collective accord violated section 70 of Act No. 50 of 1990 which prohibits the conclusion of non-union collective accords when the trade union of a company comprises over a third of the company's workforce. Such was the situation at La Previsora SA with SINTRAPREVI, whose collective labour agreement, according to this act, consequently covered the whole workforce. Lastly, the Council of State stipulated that these Agreements, which resembled a non-union collective accord, provided benefits that were superior to those agreed in the collective labour agreement that was in force at the time, thereby violating the principle of equality. As regards the signing of collective accords, the Committee recalls that, in examining similar allegations presented in other complaints against the Government of Colombia, it underlined "that the principles of collective bargaining must be respected taking into account the provisions of Article 4 of Convention No. 98 and that collective accords should not be used to undermine the position of the trade unions" and requested the Government to take the necessary measures to ensure that workers were not pressured into accepting against their will a collective accord which implied resignation from a trade union [see 336th Report, Case No. 2239 (Colombia), para. 356, and 337th Report, Case No. 2362 (Colombia), para. 761, among others]. In the present case, the Committee welcomes the fact that the grounds on which the Council of State nullified the abovementioned Agreements – which established certain benefits in favour of some workers – were aimed at defending freedom of association, in particular the right of SINTRAPREVI to free and voluntary collective bargaining, without undermining the position of the union, in full compliance with the principles established by this Committee.*

- 701.** *As regards recommendation (a), the Committee recalls that it had requested the complainant organization to provide further information concerning its allegations regarding the preparation of a voluntary benefits plan with the aim of encouraging workers to leave the trade union organization en masse. The Committee regrets that SINTRAPREVI has sent no communications in this respect. In these circumstances, and taking into account the information provided by the Government according to which on 15 November a new collective labour agreement was signed with SINTRAPREVI for 2007–10, to which reference has been made above, the Committee finds that the parties have succeeded in resolving their dispute and will not, therefore, consider these allegations further.*

### **The Committee's recommendation**

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

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

- **the National Union of Workers in Non-Governmental and Social Organizations (SINTRAONG'S)**
- **the Single Confederation of Workers of Colombia (CUT)**
- **the Confederation of Workers of Colombia (CTC)**
- **the General Confederation of Workers (CGT)**
- **the Union of Workers at Santo Tomás University (SINTRAUSTA)**
- **the Union of Employees in the University of Medellín and**
- **the International Trade Union Confederation (ITUC)**

*Allegations: The National Union of Workers in Non-Governmental and Social Organizations (SINTRAONG'S), jointly with the CUT, the CGT, the CTC and the ITUC allege that the labour inspectorate of the Territorial Directorate of Antioquia refused to enter SINTRAONG'S into the union register because it is made up of workers who do not have a labour relationship established exclusively through a contract of work; the Union of Workers at Santo Tomás University (SINTRAUSTA) and the CUT allege that the university refuses to negotiate collectively with the trade union and has requested the judicial authority to dissolve and liquidate the union and to cancel its registration because its members do not have a labour relationship with the university; the Union of Employees in the University of Medellín alleges that the university authorities have, since 2000, committed numerous acts of anti-union discrimination and interference, such as insisting on a list of candidates for the union's steering committee, dismissing workers for their union activities, prohibiting union membership and not complying with the collective agreement signed in 2004*

703. The complaint is contained in a communication dated 14 June 2006 from the National Union of Workers in Non-Governmental and Social Organizations (SINTRAONG'S) jointly with the Single Confederation of Workers of Colombia (CUT), the Confederation of Workers of Colombia (CTC) and the General Confederation of Workers (CGT). On 31 May 2006, the Union of Workers at Santo Tomás University (SINTRAUSTA), supported by the CUT, sent further allegations (received by the Office on 15 June). On 28 June 2006, the Union of Employees in the University of Medellín sent further allegations. SINTRAUSTA and SINTRAONG'S sent additional information in communications dated 27 July, 6 August and 23 August 2006, respectively. The

---

International Trade Union Confederation (ITUC) sent further allegations in a communication dated 21 November 2006.

- 704.** The Government sent its observations in communications dated 25 October and 19 December 2006, and 8 March, 26 April and 29 October 2007.
- 705.** Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. The complainants' allegations**

- 706.** In their communications of 14 June and 23 August 2006, SINTRAONG'S, the CUT, the CGT and the CTC indicated that SINTRAONG'S was established on 12 September 2005. All workers in a labour relationship with non-governmental organizations, with permanent or fixed-term contracts or contracts to provide services, for building works or for specific projects, can join this organization. According to the trade union by-laws, its principle objectives are the improvement and defence of the salaries, benefits, timetables, systems of protection and accidents prevention and the working conditions in general, as well as the celebration of collective agreements. On 13 September, the union requested registration with the Ministry of Social Protection. On 26 September 2005, the labour inspectorate of the Territorial Directorate of Antioquia issued a ruling that workers who do not have a labour relationship established by an employment contract cannot be members of SINTRAONG'S and therefore the statutes must be modified.
- 707.** On 24 October 2005, the assembly of members decided not to modify the statutes in the manner requested by the labour inspectorate and to continue accepting the membership of workers regardless of whether they had a labour relationship established exclusively through an employment contract. The assembly of members, however, agreed to make the other changes indicated by the administrative authority on 25 November 2005.
- 708.** The complainants note that through resolution No. 02741 of 5 December 2005, the labour inspectorate again rejected the request for registration for the same reasons it had used previously. The legal appeals launched against the resolution were rejected.
- 709.** In its communication of 11 November 2006, the ITUC sent a copy of a letter sent to the Constitutional Court signalling that SINTRAONG'S had lodged an appeal for protection with the Labour Tribunal of the High Court of Medellín that had been denied; the same happened with the appeal to the Supreme Court of Justice. Currently, the appeal is in the Constitutional Court for possible review. According to the ITUC the refusal to register the union is based on the fact that first grade and industrial trade unions can only be joined by workers holding employment contracts and not any other means of relationship such as service provision, works contract, etc. The ITUC adds that, since the passing of Law No. 50 of 1990, there has been a process of increasing employment flexibility, which means that currently the majority of workers have a labour relationship other than an employment contract. This means that there is a restriction on the ability to join a trade union.
- 710.** In its communication of 31 May 2006, SINTRAUSTA indicates that it was formed on 27 August 2000 and was duly entered into the union register through resolution No. 002433 of 30 October 2000 issued by the Territorial Directorate of Cundinamarca. This registration was opposed by Santo Tomás University and by the private security firm Guardianes Compañía Líder de Seguridad Ltd, and the objection was admitted by the Ministry of Labour in resolution No. 000031 of 15 January 2001. SINTRAUSTA lodged an appeal to overturn the resolution, during which time SINTRAUSTA remained

registered. Criminal proceedings were also started against the trade union and its leaders, which were rejected.

- 711.** SINTRAUSTA adds that since its formation it has made a list of demands to negotiate collectively but Santo Tomás University has flatly refused. Administrative action was initiated at the Ministry of Social Protection, but it did not intervene.
- 712.** In addition, the union notes that legal action has been taken to reinstate the members of SINTRAUSTA's steering committee who benefited from trade union immunity, which was rejected.
- 713.** Subsequently, the university lodged a request to dissolve, liquidate and cancel the union registration, arguing that the union had members with no link to the university because since 1 July 2000 they worked for the firm Guardianes Compañía Líder de Seguridad Ltd instead. On 17 September 2004, the Ninth Labour Tribunal of the Bogotá Circuit ruled against the trade union with regard to the dissolution and ordered the cancellation of its registration because, among other things, at the time the trade union was formed, its members did not have a labour relationship with Santo Tomás University because there had been a change of employer to the firm Guardianes Compañía Líder de Seguridad Ltd. That decision was upheld by the Supreme Court of the Judicial District of Bogotá.
- 714.** In its communication of 28 June 2006, the Union of Employees in the University of Medellín alleges that since 2000, the union has been subjected to anti-union action by the university authorities, including: attempts at interference on the part of the university authorities by insisting on a list of candidates for the steering committee; the dismissal of Ms Dorelly Salazar for reporting this interference; pressure and threats of dismissal leading to 29 workers leaving the trade union; the dismissal without just cause in March 2001 of Norella Jaramillo, Ulda Mery Castro, Carlos Mario Restrepo and Julieta Ríos; forbidding teaching staff to join a union; the dismissal of four workers (Messrs Wilman Alberto Ospina, Jesús Alberto Munera Betancourt, Amparo del Socorro Graciano and Diana María Londoño Moreno) because of their union membership and after many years working in the establishment (Ms Graciano and Ms Londoño Moreno were reinstated as they had union immunity). Lastly, the complainant alleges that since the latest collective agreement was negotiated in 2004, it has been violated on a number of occasions.

## **B. The Government's reply**

- 715.** In its communications of 25 October, 19 December 2006, 8 March, 26 April and 29 October 2007, the Government indicated the following.
- 716.** With regard to the allegations presented by SINTRAONG'S about the refusal of the Territorial Directorate of Antioquia of the Ministry of Social Protection to enter the trade union into the union register, the Government notes that the right provided for in Article 2 of Convention No. 87, according to which workers and employers have the right to establish organizations "without previous authorisation", does not mean that the founders of an organization are exempt from the formalities required by domestic law. Therefore, in accordance with the domestic legislation of the Territorial Directorate of Antioquia (Decree No. 1194 of 1994), by means of an observation order, the trade union was requested to correct some clauses in its statutes and clarify the procedure for election of its steering committee. The Government notes that the organization refused to comply with the observations contained in the aforementioned order, which is why it was denied entry into the union register.

- 717.** The organization did not correct its statutes, in particular article 1, paragraph 2, which refers to the union's membership and includes "persons who offer their services in various ways ...", which does not comply with the provisions of current labour legislation, which states that persons linked via an employment contract as defined in article 22 of the Labour Code are authorized to organize themselves in unions: "An employment contract is a contract by which a natural person undertakes to provide a personal service to another natural or legal person, under the continued dependency or subordination of the latter and with remuneration".
- 718.** Thus, an employment contract is characterized by the obligation of the worker to provide a service as a subordinate and by the obligation of the employer as a natural or legal person to remunerate him. The difference between an employment contract and a contract to provide services is that the first presupposes subordination. Civil law, rather than labour law, governs the latter type of contract. To conclude, by including provisions relating to the contract to provide services in its statutes, the trade union is going against the provisions of current labour legislation.
- 719.** The Government adds that in its resolution No. 02741 of 5 December 2005, the labour inspectorate of the Territorial Directorate of Antioquia referred to the procedure for electing a steering committee and considered that the trade union did not take account of the legislative provisions in article 17 of its statutes. Therefore, the Constitutional Court in Ruling C-797/00 stated: "It is not admissible to recognize the absolute nature of freedom of association, in that the Constitution itself establishes the limitation, which can be specified by the legislator, that the internal structure of trade union organizations should be subject to the legal order and to the principles of democracy (article 39, indent 2) and that international human rights conventions authorize imposing restrictions on rights by legislative means when they are necessary, minimal, indispensable and proportionate to the desired end ...".
- 720.** The Government does not believe that there has been any violation of Convention No. 87 by the Ministry of Social Protection: it complies with the labour legislation in accordance with the authority given to it by law in force and ensures its application, as demonstrated by resolution No. 02741 of 5 December 2005. This resolution was subject to appeals, which resulted in resolutions Nos 00151 of 15 February 2006 and 000757 of 22 May 2006. These resolutions confirmed the decision contained in resolution No. 02741 of 5 December 2005. The Government adds that the trade union has the right to call upon the administrative dispute body, which has the jurisdiction to determine the legality of the administration's acts.
- 721.** With regard to the communication of the ITUC about the appeal for protection made by SINTRAONG'S against the Ministry of Social Protection for refusing to register the organization, the Government reports that the Constitutional Court decided not to review the appeal for protection. In accordance with the provisions of article 33 of Decree No. 2591 of 1991, magistrates in the Selection Chamber select proceedings that are due to be reviewed by the Constitutional Court at their own discretion and this selection need not have particular motivation.
- 722.** Regarding the allegations made by SINTRAUSTA, the Government states that with regard to the refusal to register the trade union, members of the then Ministry of Labour and Social Security acted in accordance with domestic legislation.
- 723.** With regard to the criminal proceedings, the Government clarifies that they did not affect the union in any way because the Office of the Public Prosecutor considered that "the creation of a trade union does not harm any protected legal object".

724. As to the refusal to discuss the list of demands, the Government notes that the Ministry did not take administrative measures against Santo Tomás University because this dispute can be adjudicated only by a judicial body, in accordance with article 486 of the Labour Code.
725. The Government adds that in clause 7 of the contract to provide security services signed by Santo Tomás University and the firm Guardianes Compañía Líder de Seguridad Ltd, the university transferred the employment contracts of the security staff, who are members of SINTRAUSTA union. That contract was signed on 1 July 2000. The SINTRAUSTA union was created on 27 August 2000, therefore Santo Tomás University was not obliged to negotiate, because, in accordance with the above, there was no labour relationship between the members of SINTRAUSTA and Santo Tomás University.
726. With reference to the allegations regarding the legal decisions denying protection by union immunity, the Government reports that the rulings handed down by the various labour authorities were contrary to the union's claims, because the judiciary considered that the duly established summary of evidence clearly showed that there was no labour relationship between the workers in the SINTRAUSTA union and Santo Tomás University, as the university transferred the employment contracts to the firm Guardianes Compañía Líder de Seguridad Ltd by means of a contract to provide services and this employer substitution was configured before the union was formed on 27 August 2000 and its entry in the union register on 30 October 2000. Therefore, the legal authority did not ignore due process or the rights of those with union immunity, but rather the latter acted wrongly by accusing the university without having any proof of the labour relationship, which is considered to be the ultimate proof when requesting to be reinstated.
727. Regarding the allegations of the dissolution of the trade union and cancellation of its registration, the Government notes that the Ninth Labour Tribunal of the Bogotá Circuit ordered the dissolution and liquidation of SINTRAUSTA and the decision was confirmed by the Labour Chamber of the High Court of the Bogotá Judicial District in a ruling on 31 January 2005, considering: "(...) it is undeniable in light of the relevant legal standards that when dealing with an enterprise trade union, as SINTRAUSTA is without any doubt, an indispensable assumption is that its members must be part of the enterprise in question, that is, that they must hold the condition of workers in the enterprise at the time of its establishment and it is clear in this case that they were not, because by virtue of the aforementioned substitution made on 1 July 2000 they were working for a new employer".
728. With regard to the allegations made by the Union of Employees in the University of Medellín, regarding the anti-union dismissal of unionized workers: Dorelly Salazar, Norela Jaramillo, Ulda Mery Castro, Carlos Mario Restrepo, Julieta Rios, Wilman Alberto Ospina and Jesús Alberto Munera Betancourt, the Government states that the University of Medellín, in accordance with domestic legislation (article 61, point 1, paragraph (h)) has the discretion to remove staff members as long as it compensates them.
729. The Government highlights that the university's intention in dismissing the aforementioned workers was not to compromise the right to organize and freedom of association, because those workers did not have positions of leadership in the trade union, in which case their dismissal might have caused harm to the union. Also, dismissing those workers did not reduce the number of union members in a way that could harm the union, because as indicated in the regulation (article 401 of the Labour Code) one of the reasons for dissolving a union of workers, as in this instance, is when its membership falls to below 25. The Government therefore believes that the allegation has no legal grounds.
730. With regard to the alleged interference by the university in an assembly to elect the steering committee, this allegation has not been proven by the union. The union does not provide proof of the allegation regarding the deunionization of 29 workers either.

731. The Government reports that according to the Territorial Directorate of Antioquia in communication CGPIVC/JMGG/381 of 7 November 2006, having reviewed the ongoing investigations of the Coordination Office for Inspection and Surveillance, there is no investigation into the University of Medellín for alleged violations of the rights to organize and freedom of association. It also reports on three investigations against the University of Medellín for violating the collective agreement for which the decisions handed down absolved the university, declared that the Ministry did not have jurisdiction or left open a legal recourse, and the trade union has not appealed these decisions. The Government adds that according to the information provided by the Territorial Directorate of Antioquia, the trade union has not reported any anti-union acts, a matter which is outside the Government's responsibility.

### C. The Committee's conclusions

732. *The Committee notes that the present case refers to: (1) the allegations presented by SINTRAONG'S jointly with the CUT, the CGT, the CTC and the ITUC that the labour inspectorate of the Territorial Directorate of Antioquia refused to enter SINTRAONG'S into the union register because it is made up of workers who do not have a labour relationship established exclusively through a contract of work; (2) the allegations presented by SINTRAUSTA and the CUT that the university refuses to negotiate collectively with the trade union and has requested the judicial authority to dissolve and liquidate the union and to cancel its registration because its members do not have a labour relationship with the university; (3) the allegations presented by the Union of Employees in the University of Medellín that the university authorities have, since 2000, committed numerous acts of anti-union discrimination and interference, such as insisting on a list of candidates for the union's steering committee, dismissing workers for their union activities, prohibiting union membership and not complying with the collective agreement signed in 2004.*
733. *With regard to the alleged refusal by the labour inspectorate to register SINTRAONG'S, the Committee notes that the trade union was created on 12 September 2005 and its registration was requested on 13 September 2005, the labour inspectorate formulated objections in a ruling on 26 September the same year and the assembly of members decided to correct some aspects of the statutes that had been objected to, but did not modify the clauses regarding the nature of the labour relationship of its members so it could continue accepting the membership of workers even if they did not have an employment contract but were nonetheless linked via other types of labour relationship such as service providers' contracts or building works contracts. The Committee also notes that through resolution No. 02741 of 5 December 2005 the labour inspectorate again rejected the request for registration and that the legal appeals launched against the resolution were also rejected, as there had been an appeal for protection made before the Constitutional Court. The Committee notes that according to the ITUC, since the passing of law No. 50 of 1990 there has been a process of increasing employment flexibility which means that currently the majority of workers have a labour relationship other than an employment contract.*
734. *The Committee notes that the Government indicates that Article 2 of Convention No. 87, which provides for the right of workers to establish trade unions without previous authorization, does not mean that the formalities required by domestic law should not be complied with and that in the present case the trade union did not modify the provisions of the statute allowing membership of "persons who offer their services in various ways" and therefore they are not complying with current labour legislation which requires that members of trade unions have a labour relationship established by an employment contract. The Committee also notes the information from the Government that the appeal for protection was not selected for review by the Constitutional Court.*

- 735.** *The Committee recalls that Article 2 of Convention No. 87 establishes that all workers without distinction should have the right to establish and to join organizations of their own choosing, with the sole exception of members of the armed forces and police. The Committee has considered upon examination of similar cases [see for example 304th Report, Case No. 1796 and 336th Report, Case No. 2347], that the criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship. In these conditions, and in accordance with Article 2 of the Convention, the Committee requests the Government to take the necessary measures to register without delay SINTRAONG'S and to keep it informed in that respect. In addition, since the Government's statements indicate that only workers with an employment contract have the right to form trade unions, the Committee requests the Government, in consultation with the most representative employers' and workers' organizations, to modify the law so that workers who do not have employment contracts can form the organizations of their choosing if they so wish.*
- 736.** *At the same time, the Committee invites the SINTRAONG'S organization to ensure that it respects the legal and statutory provisions with regard to the procedure for electing a steering committee.*
- 737.** *With regard to the allegations presented by SINTRAUSTA and the CUT, the Committee notes that according to the complainants, since the creation of SINTRAUSTA and since its union registration in August and October 2000, respectively, the university has refused to negotiate collectively unless the labour inspectorate has taken measures on the matter in spite of the administrative action that has been taken; legal action has been taken to reinstate the members of the steering committee which was rejected and subsequently the university lodged a request to dissolve, liquidate and cancel the union registration because the organization had members with no labour link with the university. On 1 July 2000 the employment contracts had been transferred to the firm Guardianes Compañía Líder de Seguridad Ltd. These circumstances were noted by the Ninth Labour Tribunal of the Bogotá Circuit which on 17 December 2004 ordered the cancellation of the registration, a decision which was upheld by the Supreme Court of the Judicial District of Bogotá.*
- 738.** *In this regard, the Committee notes that according to the Government, on 1 July 2000, the university signed a contract to provide security services with the firm Guardianes Compañía Líder de Seguridad Ltd, through which it transferred the employment contracts of the security staff and that on 27 August the same year SINTRAUSTA was formed. Therefore, according to the Government, the university was not obliged to negotiate because there was no labour relationship between it and the members of the trade union because of the transfer of contracts that led to an employer substitution which happened before the union was formed. The Committee notes that according to the Government this situation was recognized by the judicial authority when it ordered the dissolution and cancellation of SINTRAUSTA's registration because when dealing with an enterprise trade union, like SINTRAUSTA, it is an indispensable requirement for its members to be workers in the enterprise at the time of its formation, something which was not the case here.*
- 739.** *Taking account of the circumstances listed, the Committee concludes that, at the time of its formation, SINTRAUSTA did not have members who worked for the university but rather members who worked for the firm Guardianes Compañía Líder de Seguridad Ltd. Indeed, the employer substitution took place on 1 July 2000 and the trade union was formed on 27 August, and was registered on 30 October 2000. Therefore, the Committee considers that as the security firm and not Santo Tomás University is the employer, it is not the responsibility of the university to negotiate collectively with the trade union.*



740. *With regard to the request for the dissolution, liquidation and cancellation of the union registration of the enterprise union SINTRAUSTA for the same reasons, the Committee notes that the workers did not have a labour link to the university but with the security firm as has just been examined, and, therefore, it would be logical that the trade union should not use the name of Santo Tomás University. However, in order to not threaten the existence of the organization and taking into account that it had been entered onto the union register and had a sufficient number of members, the trade union should have been invited to change its name to eliminate the reference to Santo Tomás University, without threatening its existence or damaging its rights. In these circumstances, the Committee invites the complainant to modify its name and to request a new entry in the union register. The Committee requests the Government to take the necessary measures to ensure that when the aforementioned entry is requested, it is granted without delay.*
741. *With regard to the allegations regarding legal action to reinstate workers under union protection, the Committee requests the complainants to specify how many workers were dismissed and to provide their names and the circumstances in which this occurred, in order to be able to examine the allegation in full knowledge of the facts.*
742. *With regard to the allegations presented by the Union of Employees in the University of Medellín, regarding anti-union actions by the university authorities since 2000, the Committee notes that according to the trade union this behaviour includes interference by insisting on a list of candidates for the steering committee, the dismissal of Ms Dorelly Salazar for reporting it, pressure and threats of dismissal which led to 29 workers leaving the trade union, forbidding teaching staff to join a union, the dismissal without just cause of Norella Jaramillo, Ulda Mery Castro, Carlos Mario Restrepo and Julieta Ríos in March 2001; as well as the later dismissal of two more workers (Messrs Wilman Alberto Ospina and Jesús Alberto Munera Betancourt) following their union membership. The Committee also notes that according to the allegations, since the collective agreement was signed in 2004, it has been violated on a number of occasions.*
743. *The Committee notes that according to the Government, the alleged dismissals took place within the context of the university's discretion to dismiss staff members as long as it compensates them; that the dismissed workers did not have positions of leadership in the trade union and their dismissal did not lead to the reduction below the legal minimum of 25 members that would result in the dissolution of the union and that, therefore, it cannot be considered that the dismissal of the workers harmed the union. In addition, the Committee notes that according to the Government, the allegations of interference and the deunionization of the 29 workers as a result of pressure and threats were not proven by the union. The Committee also notes that the Government reports that there are no administrative investigations with regard to these allegations. Lastly, the Committee notes that, with regard to the alleged non-compliance with the provisions of the collective agreement signed in 2004, the various administrative investigations undertaken absolved the enterprise in one case, declared that the Ministry did not have jurisdiction or left open a legal recourse in others.*
744. *The Committee believes that these allegations on dismissals, anti-union interference, pressure and threats are very serious and that the Government should send further information. In the meantime, the Committee wishes to highlight the following principles. The Committee recalls that no person should be dismissed or prejudiced in employment by reason of trade union membership or legitimate trade union activities and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 771]. The Committee highlights that all workers, regardless of whether they are a union official or member, should be protected against acts of discrimination. The Committee recalls that Article 2 of Convention No. 98 prohibits*

*acts of interference in the functioning of workers' organizations and that the promotion of collective bargaining means that the clauses of collective agreements should be respected fully. Therefore, the Committee requests the Government to carry out an investigation without delay into all reported acts and, if they are found to be true, to take the necessary measures without delay to reinstate the dismissed workers. The Committee requests the Government to keep it informed in that respect.*

## **The Committee's recommendations**

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

- (a) With regard to the alleged refusal by the labour inspectorate to register SINTRAONG'S, the Committee requests the Government to take the necessary measures to register it without delay and to keep it informed in that respect and invites SINTRAONG'S organization to ensure that it respects the legal and statutory provisions with regard to the procedure for electing a steering committee.**
- (b) The Committee requests the Government, in consultation with the most representative employers' and workers' organizations, to modify the law so that workers who do not have employment contracts can form the organizations of their choosing if they so wish.**
- (c) With regard to the request for the dissolution, liquidation and cancellation of the union registration of SINTRAUSTA, the Committee invites the complainant to modify its name and to request a new entry in the union register and requests the Government to take the necessary measures to ensure that when the aforementioned entry is requested, it is granted without delay.**
- (d) With regard to the allegations presented by SINTRAUSTA regarding legal action to reinstate workers under union protection, the Committee requests the complainants to specify how many workers were dismissed and to provide their names and the circumstances in which this occurred, in order to be able to examine the allegation in full knowledge of the facts.**
- (e) With regard to the allegations presented by the Union of Employees in the University of Medellín regarding anti-union interference by insisting on a list of candidates for the steering committee, the dismissal of Ms Dorelly Salazar for reporting it, pressure and threats of dismissal which led to 29 workers leaving the trade union, forbidding teaching staff to join a union, the dismissal without just cause of Norella Jaramillo, Ulda Mery Castro, Carlos Mario Restrepo and Julieta Ríos in March 2001, as well as the later dismissal of two more workers (Messrs Wilman Alberto Ospina and Jesús Alberto Munera Betancourt) following their membership, and the repeated violation of the collective agreement signed in 2004; taking account of the seriousness of these allegations, the Committee requests the Government to carry out an investigation without delay into all reported acts and, if they are found to be true, to take the necessary measures without delay to reinstate the dismissed workers. The Committee requests the Government to keep it informed in that respect.**

---

CASE NO. 2556

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

**Complaint against the Government of Colombia  
presented by  
the General Confederation of Labour (CGT)**

***Allegations: Refusal of the administrative authority to register the new trade union organization Union of Chemical and Pharmaceutical Industry Workers (UNITRAQUIFA), its statutes and its executive committee***

746. The complaint is contained in a communication of February 2007, presented by the General Confederation of Labour (CGT).
747. The Government sent its observations in a communication dated 1 October 2007.
748. Colombia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

749. In its communication of February 2007, the CGT states that the Union of Chemical and Pharmaceutical Industry Workers (UNITRAQUIFA) was established on 8 June 2006, on which occasion its statutes were approved and its executive committee elected. A request was made, within the time limits prescribed by law, for entry of the organization, its statutes and its executive committee in the trade union register. However, on 10 July 2006, the Ministry of Social Protection requested the organization to provide it with “detailed” information as to which workers belonged to temporary employment agencies, including their names and the company’s name in each case. This requirement does not appear in any regulation as providing grounds for the non-registration of a trade union. In particular, account has to be taken of the fact that the request for registration was accompanied by a list of the organization’s founders, of the participants in the assembly and of those who were elected to hold posts as union officials. The complainant organization alleges that the registration authority also made remarks concerning the first article of the recently approved statutes in regard to the class of workers belonging to the union, despite this having already been explained at the time the request was made. According to the complainant organization, one of the reasons for the registration having been refused is the fact that the new organization accepts workers from temporary agencies serving the sector’s industries.

**B. The Government's reply**

750. In its communication of 1 October 2007, the Government states that the refusal to register the organization in question as a trade union was due to the fact that the workers belonging to it do not work in enterprises from the same industry, as is required under article 356 of the Substantive Labour Code. According to the Government, workers providing their

services in various enterprises of the same industry must be bound by a contract of employment to the industrial enterprise to which the union corresponds. The Government points out that some of the members of UNITRAQUIFA are workers with the temporary agencies “Servimos”, “Temporales” and “TyS” who were assigned to perform their functions with the pharmaceutical companies, Shering Plough SA and Carboquímica; in other words, they are not directly employed by these companies. Furthermore, the companies do not belong to the same industry, while “Servimos”, “Temporales” and “TyS” are companies that provide services, Shering Plough SA and Carboquímica are companies that are engaged in an industrial activity.

751. The Government attaches the report of the Office for the Coordination of Labour, Employment and Social Security, in which the following is stated: “this office notes that the members of UNITRAQUIFA are workers with the companies Shering Plough SA, Carboquímica, Servimos, Temporales and TyS, these last three companies being temporary employment agencies whose purpose is, among other things, to assign workers to its customer enterprises [...]. From this it may be firmly concluded that the workers with the temporary employment agencies do not correspond to the same activity as that pursued by Shering Plough SA and Carboquímica, while the latter are engaged in an activity that is strictly industrial in nature, the former are engaged in an activity that in no way corresponds to any of what are commonly considered the world over as industries; on the contrary, they are engaged in an altogether dissimilar activity that has to do with personal services”.

### C. The Committee’s conclusions

752. *The Committee notes that the allegations presented by the CGT refer to the refusal by the administrative authority to register the Union of Chemical and Pharmaceutical Industry Workers (UNITRAQUIFA), its statutes and its executive committee on the grounds that, among other things, its membership included workers from the temporary employment agencies serving the industries of the sector.*
753. *The Committee notes the Government’s statement that in order for registration to be able to take place the workers have to be providing their services within companies belonging to the same industry and to be bound to those companies through contracts of employment. In the specific case at hand, the Government states that the refusal was due to the fact that the trade union organization was made up of workers from the pharmaceutical industry and of workers from temporary employment agencies who were assigned to carry out their functions with those pharmaceutical companies. The Committee notes in particular the report of the Office for the Coordination of Labour, Employment and Social Security.*
754. *In this regard, the Committee recalls that “the free exercise of the right to establish and join unions implies the free determination of the structure and composition of unions” [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 333]. In the present case, the UNITRAQUIFA workers should have the right to establish an industrial organization as they see fit, inasmuch as all of them are working within pharmaceutical companies, irrespective of the type of relationship they have with those companies. Although the workers from “Servimos”, “Temporales” and “TyS” who have joined UNITRAQUIFA have no direct employment relationship with the pharmaceutical companies, Shering Plough SA and Carboquímica, they have been sent to perform work in the sector and therefore may wish to become part of a trade union organization representing the interests of the workers in that sector at country level. The Committee recalls in this regard that the status under which workers are engaged with the employer should not have any effect on their right to join workers’ organizations and participate in their activities. The Committee likewise recalls that all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term*

or as contract employees, should have the right to establish and join organizations of their own choosing [see *Digest*, op. cit., para. 255]. In these circumstances, the Committee requests the Government to take the necessary measures, without delay, to register UNITRAQUIFA, its statutes and its executive committee, and to keep the Committee informed in this respect.

### The Committee's recommendation

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

*The Committee requests the Government to take the necessary measures, without delay, to register UNITRAQUIFA, its statutes and its executive committee, and to keep the Committee informed in this respect.*

CASE NO. 2557

INTERIM REPORT

### Complaint against the Government of El Salvador presented by

- the Trade Union Confederation of El Salvador Workers (CSTS)
- the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA) and
- the Sweets and Pastries Industrial Trade Union (SIDPA)

*Allegations: Fraudulent dissolution of a trade union with financial offers from the employer and dismissal of a large number of union members*

**756.** The complaint is contained in a joint communication from the Trade Union Confederation of El Salvador Workers (CSTS), the Trade Union Federation of Food, Beverage, Hotel, Restaurant and Agro-Industry Workers of El Salvador (FESTSSABHRA) and the Sweets and Pastries Industrial Trade Union (SIDPA), dated 29 January 2007. SIDPA sent further information in a communication dated 8 May 2007, as did FESTSSABHRA and SIDPA in a joint communication dated 20 September 2007.

**757.** The Government sent its observations in communications dated 31 May and 24 October 2007.

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

### A. The complainants' allegations

**759.** In their communication dated 29 March 2007, CSTS, FESTSSABHRA, (the Salvadoran affiliate of the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)) and SIDPA allege that the freedom of association of the workers of the Productos Alimenticios Diana SA de CV enterprise has

been violated by the irregular dissolution of SIDPA by the Second Labour Court, instigated by three former leaders of the trade union, in agreement with the general manager of the enterprise and the collaboration of the Ministry of Labour and Social Security.

**760.** The complainants claim that this is a serious precedent for El Salvador, since SIDPA has existed for over 40 years and has faced constant anti-union activity and acts of interference by the enterprise in trade union matters since the 1980s.

**761.** Specifically, the complainant organizations indicate that on 12 March 2007 various members of SIDPA at Productos Alimenticios Diana SA de CV were informed by the human resources manager that the trade union no longer existed and hence the enterprise was dismissing them. The dismissals continued over the following three days. This occurrence was merely an indication of a process instigated without the knowledge of the majority of workers but of which the leaders had informed the competent authority – the Ministry of Labour and Social Security – at the proper time.

**762.** The complainant organizations recount the following sequence of events:

- (a) On 24 October 2006, the former General Secretary of SIDPA, Mr Francisco Flores, received a verbal offer from the Chairman of Productos Alimenticios Diana SA de CV, Mr Hugo Barrera (former Minister for Public Safety and for the Environment, and current Director of the autonomous state enterprise CEPA), to dissolve the trade union in exchange for a financial settlement. On 28 October, at a general meeting of union members, Mr Flores conveyed the enterprise Chairman's proposal to his SIDPA colleagues. The majority decided not to accept it. However, Mr Carlos Hernán Méndez Pérez, the SIDPA General Secretary, and Mr Pablo Ernesto Sánchez, the SIDPA secretary responsible for records and agreements, accepted it and initiated a fraudulent process to dissolve the trade union behind the backs of the other union leaders and members, as is now known.
- (b) On 28 November 2006, a first attempt at dissolving the union was rejected by the Fourth Labour Judge.
- (c) On 21 December 2006, the General Secretary of the Productos Alimenticios Diana SA de CV branch of SIDPA and the Secretary in charge of dispute procedures on the SIDPA Executive Committee notified the Ministry of Labour's Department of Social Organizations in writing of the intentions of the two former leaders to dissolve the union in collusion with the enterprise. They also asked the Ministry of Labour not to supply any documentation on behalf of the union to the two abovementioned persons as the latter were involved in proceedings for expulsion by SIDPA on account of their actions. They corroborated this with documentation stating that the former leaders were being expelled for actions endangering the security and smooth operation of the organization and had even been replaced by the general meeting held on 16 December.
- (d) On 8 January 2007, the National Department of Social Organizations of the Ministry of Labour and Social Security supplied various records and documents to the leaders being expelled from SIDPA despite the written request made on 21 December. The Department not only supplied the documentation – vital to the fraudulent dissolution process – but also omitted to notify the legitimate leaders of SIDPA of this fact.
- (e) On 5 February 2007, the leaders who were being expelled initiated proceedings for "voluntary" dissolution in the Second Labour Court of San Salvador. The proceedings were supposedly endorsed by a general meeting held on 13 January 2007, the record

of which contains 28 signatures, ten of them forged, including that of a person resident in the United States since November 2006.

- (f) According to section 73 of the SIDPA statutes, voluntary dissolution requires the votes of two-thirds of the union membership. Even if the ten forged signatures are added to the 18 genuine ones, the number of signatures does not constitute the stated majority required for dissolution, given that SIDPA has 43 members at Productos Alimenticios Diana SA de CV alone.
- (g) The proceedings reveal that the abovementioned general meeting was not convened with eight days' notice or advertised in the newspapers, as prescribed by the SIDPA statutes. Three days' notice are said to have been given by means of a simple note without even the minimum formalities required for due process, given that there was also no agreement from the executive committee to convene such a meeting, this being a further requirement of the statutes.
- (h) On 15 February 2007, the acting Second Labour Judge decided on the voluntary dissolution, despite the process being totally flawed. What is extremely surprising is that an acting judge, aware of the temporary nature of his duties, reached a decision in only ten days, whereas labour cases generally take months or even years in El Salvador. On 16 February, the same judge contacted the Ministry of Labour requesting the registration of SIDPA to be revoked. The remaining legal representatives of SIDPA were never informed; only the two persons who had fraudulently instigated the proceedings and were in the process of being expelled from the union were notified.
- (i) On 12 March 2007, the enterprise dismissed Mr Daniel Ernesto Morales, the SIDPA Disputes Secretary; on 14 March, it dismissed another eight members of SIDPA; and on 15 March, it dismissed one more, the General Secretary of the SIDPA branch at Productos Alimenticios Diana SA de CV, Mr José Antonio Guillén.
- (j) These dismissals and the supposed dissolution of the union were confirmed to the SIDPA leaders by the enterprise representative, after the human resources manager offered minimum financial compensation to avoid any legal proceedings or denunciation of the acts committed.
- (k) On 20 March 2007, Mr Oscar Antonio Roque, a member of SIDPA, filed a criminal complaint at the Attorney-General's Office for falsification of documents by the former leaders, who allegedly submitted a fake record of the general meeting of 13 January 2007 with ten forged signatures, including his own. This is one of the legal steps being taken to quash the dissolution of the union. The proceedings are currently before the Attorney-General as Case No. 208-UDAJ-2007.

**763.** In its communication dated 8 May 2007, the SIDPA trade union alleges that on 7 May 2007 the enterprise dismissed six members of the union: José Alvaro Castillo López, Julio César Martínez Ramírez (former union leader in his additional year of immunity), Josefa del Carmen Samayoa López (affected by occupational disability, which makes dismissal prohibited by law), Santos Osmin García Martínez (former union leader in his additional year of immunity), Oscar Alfredo Ramírez (SIDPA branch press and public relations officer at Productos Alimenticios Diana SA de CV) and Judith Beatriz Evangelista Navarro. This demonstrates that those seeking the fraudulent dissolution of the union shared an interest with Productos Alimenticios Diana SA de CV to be rid of all SIDPA members at the enterprise.

764. By a communication dated 20 September 2007, FESTSSABHRA and SIDPA stated that on 27 August 2007 the El Salvador Human Rights Prosecutor's Office issued a ruling to the effect that it had decided, as part of an investigation into the fraudulent dissolution of SIDPA, to request reports from the Director-General for Labour at the Ministry of Labour, the Second Labour Judge of San Salvador, and the head of the unit at the Attorney-General's Office dealing with offences relating to the administration of justice (the complainants attach the aforementioned ruling issued as a result of a complaint by the General Secretary of the SIDPA branch at the enterprise).

## **B. The Government's reply**

765. In its communication dated 31 May 2007, the Government states that on 16 February 2007 the Department of Social Organizations at the Ministry of Labour and Social Security received Notice No. 0117 from the Second Labour Court of San Salvador requesting the revocation of the registration of SIDPA, on account of its dissolution pursuant to a ruling of this court dated 15 February 2007.

766. On account of the abovementioned request and in view of the court ruling, the Department of Social Organizations decided on 2 March 2007 to: (a) deem SIDPA dissolved; (b) cancel by means of a note in the margin the registration entry in Volume 1 of the register of occupational associations maintained by the Department; and (c) cancel by means of a note in the margin the registration entry in Volume 19 of the register of general trade union executive committees maintained by the Department, in which the current executive committee of the aforementioned union is registered.

767. The Government adds that the Director-General for Labour, in accordance with section 235 of the Labour Code, sent communications to both the Minister for Labour and Social Security and the Minister for Economic Affairs, and also to the latest executive committee of the union, so that each could appoint a delegate to the Liquidation Board.

768. With regard to the alleged violation of the guaranteed immunity of the SIDPA leaders, and also of the members who, according to the complaint, were dismissed in May 2007, the Government states that both the Directorate-General of Labour and the Directorate-General of Labour Inspection checked their registers and did not find any records of requests or complaints concerning dismissal from those concerned with a view to claiming legal protection in connection with breached labour rights.

769. Moreover, the Government states that it is important that the Committee on Freedom of Association is aware of the legal action pursuant to sections 283 and 284 of the Penal Code initiated at the Attorney-General's Office on 20 March 2007 by Mr Oscar Antonio Roque, in his capacity of rank-and-file member of the SIDPA branch at Productos Alimenticios Diana SA de CV, against Mr Carlos Hernán Méndez Pérez, former General Secretary of SIDPA, for alleged falsification of documents and facts (the complainant organizations refer to Mr Méndez Pérez as one of the persons responsible for the allegedly fraudulent process to dissolve the union). According to a communication from the Deputy Director of the Protection of Social Interests Division at the Attorney-General's Office, investigation of the case is at present fully under way, with the following steps pending: (1) interviews to be held with all persons whose signatures were allegedly forged; (2) official records to be provided (order for confiscation) in order to carry out the relevant examination; (3) a report to be requested from the Ministry of Labour and Social Security (Department of Social Organizations) regarding the registered status of the abovementioned union; and (4) interviews to be held with the members of the union who agreed that it should be dissolved.



770. The Government considers that there is no violation of trade union rights in the present case, since the procedures for voluntary dissolution undertaken by the Second Labour Court of San Salvador at the request of Mr Carlos Hernán Méndez Pérez, acting in his capacity of General Secretary of SIDPA at the time, were correctly observed on the basis of documentation submitted by Mr Méndez. For this reason Mr Oscar Antonio Roque initiated criminal proceedings, not against the ruling of the Second Labour Court but against the documentation used as the basis for the proceedings to dissolve the union submitted by Mr Carlos Hernán Méndez Pérez, who faces prosecution if he is found to have committed irregularities.

771. Despite the above, the Government will request information from the employers' organization concerned and will forward its reply, together with the results of the criminal proceedings which have been initiated.

772. In its communication of 24 October 2007, the Government refers to the decision issued by the Human Rights Prosecutor's Office, requesting the Director-General for Labour to indicate what steps were taken with regard to the matter in question (dissolution of SIDPA). In this regard, the Government provides a verbatim transcription of the report submitted by the Director-General of Labour to the Human Rights Ombudsperson in relation to the present case:

- At 11.09 hours on 22 February 2007, the National Department of Social Organizations of the Directorate-General of Labour was notified of Case No. 0017, dated 16 February 2007, whereby the Second Labour Judge of San Salvador, Mr José Guillermo Ramos Chorro, ordered the revocation of the registration of SIDPA, in compliance with the ruling issued at 09.20 hours on 15 February 2007 by the said court, in which the aforementioned trade union was declared judicially dissolved and a communication was sent to the Chief of the National Department of Social Organizations.
- In compliance with the aforementioned ruling, by means of a decision issued at 15.00 hours on 2 March 2007, the National Department of Social Organizations decided: (a) to deem SIDPA dissolved; (b) to cancel by a note in the margin registration entry No. 80 (page 28 verso – page 29 recto) in Volume 1 of the Register of Occupational Associations maintained by the Department, in which the aforementioned trade union was registered; and (c) to cancel by a note in the margin registration entry No. 204 (page 205, Volume 19 of the Register) relating to the executive committee of the aforementioned trade union.
- The abovementioned registration entries were cancelled by a note in the margin on 6 March this year.
- In accordance with section 235 of the Labour Code, the Directorate-General of Labour sent communications to the Minister for Labour and Social Security and the Minister for Economic Affairs, and also to the latest executive committee of the said occupational organization, so that they could appoint a delegate to the Liquidation Board.
- By means of an order dated 2 July this year, the Directorate-General of Labour acknowledged receipt of the appointments of the Liquidation Board delegates from the Ministry of Labour and Social Security and the Ministry of Economic Affairs. This was not the case with the delegate from the latest SIDPA executive committee, which, having been sent a communication on two occasions, neither made an appointment nor adopted a position in this respect. Hence the terms of section 235 of the Labour Code were observed and proceedings were undertaken solely with the presence of the two ministerial delegates, swearing them in and assigning them their duties as members of the Liquidation Board on 9 July of this year. The respective procedures were undertaken and a deadline of 60 days was set for completion of the liquidation process, in accordance with sections 235 and 236 of the Labour Code.

- The procedures for the liquidation of the abovementioned trade union were completed on 25 July of this year, according to the report submitted by the members of the Liquidation Board. On this date, the Liquidation Board handed the file to the Directorate-General of Labour, in accordance with section 244 of the Labour Code.
- By means of a communication issued at 14.00 hours on 7 August this year, this Directorate-General decided: (a) that the procedures completed by the Liquidation Board for SIDPA should be approved; and (b) that the aforementioned should be communicated to the Minister for Labour and Social Security, in accordance with section 247 of the Labour Code.

773. The Government explains that the dissolution of a trade union is subject to a legal procedure laid down in the Labour Code. Section 232(c) states that the dissolution of a trade union proceeds by virtue of a decision of its members in conformity with the corresponding statutory rules, and section 233(2) states that, under section 232, any interested party may initiate the corresponding legal procedure. Therefore the dissolution of a trade union is the subject of court proceedings.

774. However, in view of the fact that the registration and establishment of legal status of a trade union are administrative acts under section 219(5) of the Labour Code, the Ministry of Labour and Social Security, in compliance with a court ruling, revoked the registration of the aforementioned trade union, pursuant to section 234 of the Labour Code.

775. Finally, the Government points out that trade unions have the possibility of appealing against a labour court ruling, and workers may also have recourse to the legal mechanisms established in the country, such as the courts. Moreover, they have been informed that they can also seek legal protection with regard to securing unpaid benefits for which the employer is responsible. The Ministry of Labour will continue to assist workers whenever they request it.

### C. The Committee's conclusions

776. *The Committee observes that, in the present complaint, the complainant organizations allege that three leaders of SIDPA, after a financial offer from the Chairman of the Productos Alimenticios Diana SA de CV enterprise was accepted by two of them, initiated fraudulent proceedings for the "voluntary" dissolution of the trade union without the knowledge of the other union leaders and members. These proceedings, supposedly endorsed by a general meeting held on 13 January 2007, culminated in an official record containing 28 signatures, ten of which were forged and including that of a person resident in the United States. Hence the consent of two-thirds of the membership required by the union statutes to dissolve the union was not obtained (in this respect, the complainants point out that the union has 43 registered members at Productos Alimenticios Diana SA de CV alone). Moreover, contrary to the union statutes, the requisite eight-day notice period prior to the general meeting in question was not given, either by publication in the press or further to agreement by the union's executive committee. The Committee observes that, according to the allegations, on 15 February 2007 the acting Second Labour Judge approved the dissolution (whereas labour proceedings generally take months or even years), and between 12 and 15 March 2007 the enterprise dismissed two union leaders and eight union members, offering them financial compensation in order to avoid any legal proceedings or denunciation of the acts committed. Finally, on 7 May 2007 the enterprise dismissed one union leader, two former leaders and three other members.*

777. *The Committee notes the Government's statements, particularly to the effect that: (1) the judiciary requested the Ministry of Labour and Social Security to revoke the registration of the SIDPA trade union, and on 2 March 2007 this request was complied with by the Ministry, which deemed the union dissolved, revoked the registration of the union and its*

*executive committee and, in accordance with the law, appointed the Liquidation Board, whose proceedings were completed on 25 July 2007 and approved by the Ministry of Labour; (2) the court ruling ordering the dissolution of the union can be appealed against and dismissed workers can have recourse to the courts or – something they did not actually do – request the Directorate-General of Labour Inspection for legal protection of the breached labour rights; (3) a member of the trade union filed a criminal complaint against one of the instigators of the dissolution of the union (its general secretary at the time) for alleged falsification of documents and facts; and (4) as regards the complaint submitted to the Human Rights Ombudsperson by the General Secretary of the Productos Alimenticios Diana SA de CV branch of SIDPA on account of the dissolution of the union and the dismissals, the Ministry of Labour sent a document in which it essentially reiterates points (1) and (2) above, emphasizing that it (the Ministry of Labour) had merely complied with the court ruling.*

- 778.** *The Committee observes that the Government has not replied to the complainant organizations' claims that on 21 December 2006 two SIDPA officials (including the General Secretary of the union's enterprise branch) informed the Ministry of Labour in writing of the violations committed by two former leaders in dissolving the union in collusion with the enterprise and requested that no documentation on behalf of the union should be made available to those persons who had been replaced at the general meeting of 16 December 2006 and were being expelled from the union. Nevertheless, the Ministry supplied various records and documents to those persons.*
- 779.** *The Committee regrets that, even though the present case contains serious allegations of anti-union dismissals of a large number of trade union members (16), as well as allegations of acts of interference in union affairs by the employer in the form of financial offers, the Government has not undertaken an in-depth investigation of these matters. The Committee urges the Government to carry out an investigation without delay, to keep it informed in this regard and – if the allegations are proven – to take the necessary measures to reinstate the trade union members in their posts with back pay, as well as to take the measures and impose the sanctions provided for in the law so as to remedy such acts.*
- 780.** *The Committee also requests the Government to send the report of the Human Rights Ombudsperson on the present case as soon as the Ombudsperson reaches a decision, and also to send any decisions taken as a result of the criminal complaint filed at the Attorney-General's Office by a union member for alleged falsification of documents and facts by the former General Secretary who instigated the allegedly fraudulent dissolution of the union.*

## **The Committee's recommendations**

- 781.** *In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) The Committee emphasizes the seriousness of the allegations made in the present case with regard to the dissolution of a trade union and anti-union dismissals.*
  - (b) The Committee regrets that, even though the present case contains serious allegations of anti-union dismissals of a large number of trade union members (16), as well as allegations of acts of interference in union affairs by the employer in the form of financial offers, the Government has not undertaken an in-depth investigation of these matters. The Committee urges the Government to carry out an investigation without delay, to keep it*

*informed in this regard and – if the allegations are proven – to take the necessary measures to reinstate the trade union members in their posts with back pay, as well as to take the measures and impose the sanctions provided for in the law so as to remedy such acts.*

- (c) *In close connection with the dissolution of the SIDPA trade union, the Committee requests the Government to send the report of the Human Rights Ombudsperson on the present case as soon as the Ombudsperson reaches a decision, and also to send any decisions taken as a result of the criminal complaint filed at the Attorney-General's Office by a union member for alleged falsification of documents and facts by the former General Secretary who instigated the allegedly fraudulent dissolution of the union.*

CASE NO. 2572

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

**Complaint against the Government of El Salvador  
presented by  
the Workers' Trade Union of the Social Fund for Housing (SITRAFOSVI)**

***Allegations: Violations of the terms of the  
collective agreement in force at the Social Fund  
for Housing***

782. The complaint is contained in a communication from the Workers' Trade Union of the Social Fund for Housing (SITRAFOSVI) dated 7 June 2007. The Government sent its observations in a communication dated 10 August 2007.
783. El Salvador has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

784. In its communication dated 7 June 2007, SITRAFOSVI alleges that the management of the Social Fund for Housing, an autonomous institution under the Ministry of Public Works, is violating the terms of the collective labour agreement in force relating to the rights of the trade union (negotiation of salary increases, consultation of the trade union on certain matters) and to internal advancement, job stability, holidays and a fund for the protection of workers to guarantee them a decent retirement and payments for services rendered in cases of resignation or dismissal.

**B. The Government's reply**

785. In its communication dated 10 August 2007, the Government states that, according to the records of the General Labour Directorate of the Ministry of Labour and Social Welfare, SITRAFOSVI requested a conciliation meeting on 28 July 2006 with the legal representative of the Social Fund for Housing in order to address the failure to comply with some of the terms of the collective agreement signed by both parties. The conciliation

meeting took place on 16 August 2006, at which the employer's administrative and legal representative claimed that the trade union's allegations could not be aired at that meeting because, as well as being untrue, they were characteristic of a collective dispute of a legal nature which, in accordance with article 469 of the Labour Code, should come under the jurisdiction of a labour judge.

786. The Government adds that SITRAFOSVI representatives stated that they did not intend to go to court, and were rather requesting a hearing with the president of the Social Fund for Housing in order to maintain a direct dialogue with the employer, a request that did not receive any response from the employer's representative at that moment.
787. The Government stresses that the trade union did not request the intervention of the labour inspectorate, which monitors compliance with labour legislation, nor did it assert its rights using the legal protection mechanism available through the courts.
788. The Government also states that, on 27 June 2007, the Minister of Labour and Social Welfare held a meeting with the trade union and, after listening to its concerns, exercised his good offices to convince the president of the Social Fund for Housing to receive the trade union members and give them an opportunity to directly address the labour issues in question. The president of the Social Fund for Housing therefore agreed to meet them the following day, with the aim of listening to and initiating a direct dialogue with the workers in order to seek solutions or mutually satisfactory agreements.
789. The Government indicates that to date, the trade union has not repeated its request for the Ministry to intervene, and therefore it presumes that the issues raised in this communication are being addressed through direct negotiation.

### C. The Committee's conclusions

790. *The Committee observes that in the present complaint the complainant trade union alleges the violation of various terms of the collective agreement in force at the Social Fund for Housing since it was concluded in 1995.*
791. *The Committee takes note of the statements of the Government, according to which: (1) on 16 August 2006, a conciliation meeting took place, at which the employer claimed that the conflict in question came within the competence of the judicial authorities and the trade union requested a direct dialogue with the employer; and (2) the trade union did not request the intervention of the labour inspectorate, nor did it initiate legal proceedings. The Committee notes with interest that the Minister of Labour exercised, on 27 June 2007, his good offices to encourage the parties to address their issues directly, to which the president of the Social Fund for Housing agreed.*
792. *The Committee concludes that the parties are endeavouring to resolve the problems concerning the implementation of the terms of the collective agreement. However, since the allegations suggest that these violations are serious and given that the first conciliation meeting with the management was held in 2006, the Committee encourages the parties to resolve their differences in the very near future and reach a mutually satisfactory agreement and it requests the Government to keep it informed in this respect. The Committee emphasizes the principle that (collective) agreements should be binding on the parties [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 939] and that mutual respect for the commitment undertaken is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground [see **Digest**, op. cit., para. 940]. The Committee hopes that the parties will take full account of these principles in the future.*

## The Committee's recommendations

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

- (a) The Committee notes that the complainant trade union and the Social Fund for Housing are endeavouring to resolve the problems relating to implementation of the terms of the collective agreement in force, requests the Government to keep it informed in this respect, and encourages the parties to resolve their differences in the very near future.*
- (b) The Committee hopes that the parties will take full account of the principles formulated in the conclusions regarding the importance of mutual respect for commitments undertaken in collective agreements.*

CASE NO. 2524

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

**Complaint against the Government of the United States  
presented by  
the American Federation of Labor and Congress of Industrial Organizations  
(AFL–CIO)**

*Allegations: The complainants allege that in three recent decisions the National Labor Relations Board (NLRB) set out a new expanded interpretation of the definition of “supervisor” so as to exclude large categories of workers from the protection of the right to organize and bargain collectively under the National Labor Relations Act (NLRA), with severe repercussions on tens of thousands of workers who had previously been covered by the NLRA*

**794.** The complaint is contained in communications from the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), dated 20 and 23 October 2006.

**795.** The Government transmitted its reply in a communication dated 25 September 2007.

**796.** The United States has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## A. The complainant's allegations

797. In communications dated 20 and 23 October 2006, the AFL–CIO alleges that the decisions of the United States National Labor Relations Board (NLRB) in *Oakwood Healthcare Inc.* (348 NLRB No. 37), *Croft Metal Inc.* (348 NLRB No. 38), and *Golden Crest Healthcare Center* (348 NLRB No. 33, 2 October 2006), known as the “*Oakwood trilogy*” violate Conventions Nos 87 and 98 by setting out a new, expanded interpretation of the definition of “supervisor” under section 2(3) of the National Labor Relations Act (NLRA); this section excludes supervisors from the NLRA’s protection of the right to organize and bargain collectively. Section 2(11) of the NLRA defines “supervisor” as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement”.
798. The complainant explains that the original NLRA, commonly known as the Wagner Act, granted organizing and bargaining rights to supervisors in bargaining units separate from those of supervised employees. According to the complainant, if those rights had survived, the Act would be consistent with the principle, established by the Committee on Freedom of Association, that managerial or supervisory employees have the right to form their own associations to defend their interests though a country’s law may require them to form bargaining units separate from those of supervised employees.
799. According to the complainant, tens of thousands of supervisors formed and joined trade unions under the protection of the Wagner Act. But in 1947 a reactionary Congress stripped supervisors of these rights, meeting employers’ demands that supervisors should be under management’s strict hierarchical control and discipline with no independent form of association. The supervisor exclusion was one of several amendments, in what was called the Taft-Hartley Act, that to this day violate workers’ freedom of association.
800. According to the complainant, section 2(3) of the NLRA, as amended, on its face violates the principles of freedom of association. However, the blanket exclusion of supervisors is not the focus of this complaint. The focus is on a change in United States law expanding the interpretation of “supervisor” under the NLRA, and thus depriving workers who are *not* supervisors, of protection of their organizing and bargaining rights. Under the new definition, employers can classify or reclassify as “supervisors” employees with minor or sporadic oversight over co-workers even when such oversight is far short of genuine managerial or supervisory authority.
801. This exclusion from coverage by the NLRA is not a mere technical change, but has enormous repercussions for those workers who have now become “supervisors” under the Act. It means that employers can fire such “supervisors” for trade union activity. They can fire “supervisors” for resisting participation in employers’ anti-union activity. And employers can refuse to bargain with unions of “supervisors” – all this with complete immunity, since supervisors are not “employees under the Act” – that is, workers protected by the NLRA against discrimination for union activity and workers who, with majority status in a bargaining unit, can compel employers to bargain in good faith with their union.
802. The decision is especially ominous in light of the claim of many employers, whether or not they operate within the health-care industry, to be “pushing authority down” through new forms of work organization in “job enrichment” programmes purporting to “empower” employees. As declared in one major business journal, “the accelerated pace and complexity of business will continue to force corporations to push authority down through increasingly horizontal management structures. The ILO has itself noted a widespread

pattern of “changes in the organization of work toward flatter hierarchies and project-based teams (*World Employment Report 2001*, Geneva, 2001)” (*Business Week*, 28 August 2000).

- 803.** According to the complainant, although empowering employees to have more say in workplace decisions may well be a laudable goal, the *Oakwood trilogy* sets the stage for misusing such practices to destroy workers’ collective power by denying their right to form and join trade unions and to bargain collectively, in violation of the principles of freedom of association. Stripping all protection of these fundamental rights from employees mislabelled as supervisors violates international human rights standards and ILO Conventions.
- 804.** The complainant further explains that the NLRB’s new decision in the *Oakwood trilogy* follows an earlier Supreme Court decision. In its 2001 *Kentucky River* decision, the court nullified the results of a 1997 NLRB election where a majority of the Kentucky River hospital’s 110 employees voted in favour of union representation. The employer refused to bargain with the union, arguing that six “charge nurses” (defined below) in the voting group were supervisors, but the NLRB held that the nurses were properly included in the unit. The Supreme Court agreed with the employer, and held that the NLRB’s rationale for deciding that charge nurses who oversaw the work of lower ranking nurses and nurses’ aides, but who lacked disciplinary authority over them, were not supervisors, was inconsistent with the NLRA’s definition of “supervisor”. Health-care employers crowed that the decision gave them new ammunition to break workers’ organizing efforts, calling it “welcome news” that “could give you an edge in union organizing campaigns”.
- 805.** The NLRB is the federal agency with primary responsibility for interpreting and enforcing the NLRA, although the United States Supreme Court has final authority to decide over the meaning of statutory terms. The United States labour law community has long waited to see how the NLRB would change its analysis of who is a “supervisor” after the *Kentucky River* decision in new cases arising before the Board. New cases present new fact situations requiring new analysis of evidence of employees’ duties. The opportunity came in the *Oakwood trilogy*. In each of these cases, an NLRB regional director considered an election petition by employees seeking to form a union and to bargain collectively and ordered an election. The NLRB granted discretionary review of the regional director’s decision in each case upon request of the employers involved and used the occasion to set forth an expanded definition of “supervisor”.
- 806.** The lead *Oakwood trilogy* case involves 12 registered nurses (RNs) who act as permanent “charge nurses” in a hospital, and many more RNs who work as rotating charge nurses. However, the ramifications of the decision extend potentially to millions of workers with minor or sporadic oversight tasks unrelated to hiring, firing, discipline or other markers of true supervision. “Charge nurse” is the term commonly used for a RN who leads the work of other RNs on a hospital floor or unit. The NLRB’s regional director heard the evidence in the *Oakwood* case. He found that charge nurses are *not* supervisors, a decision that prompted the employers’ appeal to the NLRB. The regional director’s decision went into lengthy details about the role of charge nurses. The decision begins with the regional director’s discussion of *genuine* managers and supervisors. These are RNs who hold the position of clinical manager and assistant clinical manager:

Clinical managers are responsible for several units in distinct geographical areas within the hospital. Clinical managers are all RNs ... They are not regularly engaged in actual clinical work/nursing functions. ... There are eight assistant clinical managers (also referred to as assistant nurse managers or ACMs) who report to the nurse managers. ... The parties stipulated, and I find that ACMs are supervisors as defined in section 2(11) of the Act based on their discipline and independently direct other employees.



**807.** The regional director then described the work of charge nurses:

On every shift in each unit, except the pain clinic, there is one RN assigned to work as a charge nurse. ... Rotating charges are individuals who occasionally take charge nurse responsibilities in a unit. ... A permanent charge is a person who has requested to and agreed to be in permanent charge; each time they work, they work as a charge nurse. The duties of a charge nurse, where rotating or permanent, are the same. RNs are paid hourly. They earn \$1.50 more per hour when they are working as a charge nurse. ...

Charge nurses are responsible for overseeing the unit for the shift that they are working, with the staff who are working the unit that day. They do the assignments of all the staff that are working on that shift. They monitor in general all the patients that are in the unit that day, and meet with physicians if a physician has an issue with a nurse or with a patient. They also meet the patients or family members who have a complaint. ...

The charge nurse does not assign employees to shifts; that is done by a staffing office. When the charge nurse comes in, she is handed a list (prepared by the supervisor on the previous shift) of the nurses who are supposed to be working that day on her shift. If nurses on the list do not show up, the charge nurse calls the staffing office to find out where that person is. ...

In making assignments, the charge nurse must determine the acuity of the patient and determine the level of skill required to care for the patient – i.e. RNs can perform certain tasks that cannot be performed by LPNs, etc. ...

The charge nurse also assigns nursing assistants or mental health workers either to particular patients or to work alongside specific RNs. After receiving their general assignment, the RN and/or the charge nurse may assign them more specific tasks such as giving a patient a bath, etc.

Charge nurses are also responsible for assigning breaks and lunches to other employees. However, they do this by asking the other nurses when they would like to take their break, and their main goal in assigning breaks is to make sure the unit is covered at all times. ...

The assignment of work is generally rotated, or based on where a person worked the previous day. When making assignments as a charge nurse, reference is made to a staffing sheet showing where everyone worked the day before. It usually takes only a few minutes to do the assignments ...

**808.** The regional director concluded that these limited duties did not qualify charge nurses as supervisors:

Generally, it is the clinical manager who hires, fires and handles conflicts within the unit. They also handle performance evaluations, finalize schedules, and handle staffing issues and patient complaints. The assistant manager also does these things. Charge nurses do not make the decision to hold someone past the end of their shift if they are short staffed, nor do they authorize overtime. Charge nurses can be, and have been, disciplined by clinical managers.

[There is] no evidence that the [charge nurses] have independent authority with respect to the hire, promotion, demotion, lay-off, recall, reward or discharge of employees. They do not make staffing decisions, and they do not authorize overtime ... There is no evidence that the charge nurses are empowered to adjust any formal employee grievances ... The limited authority exercised by charge nurses to resolve interpersonal conflicts among employees does not confer supervisory status ... [M]anagers are present or on call 24 hours a day to handle any problems that may arise. Consequently, I find that the RN staff nurses/charge nurses are not statutory supervisors.

**809.** In its 3–2 ruling in *Oakwood*, the NLRB stretched the meaning of the term “assign” and “responsibly to direct” in section 2(11) of the NLRA to find that charge nurses are supervisors. As is evident from the Board’s analysis, discussed below, this new definition has significant consequences not only in the health-care industry, but in many other industries as well.

**810.** The Board in *Oakwood* created a sweeping definition of “assign” that is not confined to making non-transitory assignments having a significant impact on employees’ terms of employment (for example, assignment to a shift or assignment to a particular job). Instead, the Board held that the term “assign” “refer[s] to the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee”. In the health-care context, according to the Board, this includes such transitory acts as “assign[ing] nurses and aides to particular patients”, even if such an assignment is only for a single shift.

**811.** Similarly, the Board broadly construed the term “direct” to include direction to perform a single, discrete task. The Board held that direction means deciding “what job shall be undertaken next or who shall do it”. In a nursing home, the Board found authority to direct based on the following responsibilities of charge nurses with respect to certified nursing aides (CNAs):

Charge nurses oversee the CNA’s performance and act to the CNAs when they are not providing adequate care. For instance, a charge nurse will correct a CNA if she perceives that the CNA is not using proper procedures in giving a resident a bath ... [and] will direct the CNAs to perform certain tasks, “for example, clip[ping] residents’ toenails and fingernails ... empty[ing] catheters, or ... chang[ing] an incontinent resident”. In a factory, the Board found lead persons had authority to direct because they instruct employees how to perform jobs properly, and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filled and production completed in a timely manner.

**812.** In addition, the Board held that an employee need not possess even these minor forms of authority on a full-time basis in order to be classified as a supervisor, so long as they have this authority on a “regular and substantial” basis. The Board defined “regular” to mean according to a set schedule or pattern and “substantial” to mean at least 10–15 per cent of the employee’s work time. Thus, a group of ten nurses in a department, each of whom rotates into a charge nurse position once every ten days, can all be excluded from the protections of the Act as supervisors.

**813.** The complainant adds that a powerful, compelling dissent by Board members Wilma B. Liebman and Dennis P. Walsh shows how the Board’s 3–2 majority reached beyond the facts to fashion an ideologically driven management agenda to weaken trade unions and collective bargaining. They said:

Today’s decision threatens to create a new class of workers ... who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees ... If the National Labor Relations Act required this result – if Congress intended to define supervisors in a way that swept in large numbers of professionals and other workers without true managerial prerogatives – then the Board would be duty bound to apply the statute that way. But that is not the case ...

The result could come as a rude shock to nurses and other workers who for decades have been effectively protected by the National Labor Relations Act, but who now may find themselves treated, for labor law purposes, as members of management, with no right to pursue collective bargaining or engage in other concerted activity at the workplace. Indeed, supervisors may be conscripted into employers’ anti-union campaigns, while their pro-union activity is now strictly limited. The majority’s decision thus denies the protection of the Act to yet another group of workers, while strengthening the ability of employers to resist the unionization of other employees.

**814.** According to the complainant, anti-union elements in the management community are already demonstrating their delight at the prospect of union-busting under the new Board ruling. A leading management law firm that routinely assists employers in defeating employee attempts to achieve union representation stated, in an analysis for corporate

clients published the week before the NLRB issued its decision, that the decision “would remove thousands of workers from the NLRA’s protection, prevent them from unionizing, and even result in the termination of bargaining obligations for some existing nurse units”.

- 815.** The complainant goes on to explain that, although it has not ratified them, the United States is obligated by virtue of ILO membership to respect Conventions Nos 87 and 98. Moreover, its obligations in this respect arise under the ILO Declaration on Fundamental Principles and Rights at Work, and human rights instruments like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
- 816.** The United States has also affirmed the importance of international norms and obligations regarding workers’ freedom of association in its own trade statutes and trade agreements. In these statutes governing trade relationships with other countries, Congress has defined freedom of association and the right to organize and bargain collectively as internationally recognized workers’ rights and has relied on ILO guidance in formulating the labour rights clauses in these instruments. And, in its report on legislation governing United States participation in international financial institutions, Congress pointed to “the relevant Conventions of the International Labour Organization, which had set forth, among other things, the rights of association [and] the right to organize and bargain collectively”. Congress has added labour rights amendments to statutes governing the Generalized System of Preferences (GSP) in 1984, the Overseas Private Investment Corporation in 1985, the Caribbean Basin Initiative in 1986, section 301 of the Trade Act of 1988, Agency for International Development (AID) funding for economic development grants overseas, and United States participation in the World Bank, International Monetary Fund and other international lending agencies. Labour rights clauses are included, at the insistence of the United States, in trade agreements with Chile, Jordan, Singapore, Australia, Central America and other trading partners. In every case, freedom of association and the right to organize and bargain collectively are the first rights listed. The North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico brought with it a labour side agreement, the North American Agreement on Labor Cooperation (NAALC). Freedom of association and protection of the right to organize is the first “labor principle” of the NAALC, characterized as “the right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests”. With its North American trading partners, the United States has committed itself to promote the NAALC labour principles and to “effectively enforce its labor law” to achieve their realization. These ILO, United Nations and regional human rights instruments have forged an international human rights consensus that the United States has joined on the importance of workers’ freedom of association. The consensus is strengthened by the international engagement of the United States at the ILO and in regional and multilateral trade arrangements, where it actively supports the promotion and enforcement of internationally recognized workers’ rights. To fulfil both the obligations it has assumed and the objectives that it promotes in the international community, the United States must live up in its own labour law and practice to international labour rights norms on workers’ freedom of association and the rights to organize and bargain collectively.
- 817.** The complainant considers, moreover, that, in violation of Article 2 of Convention No. 87, the NLRB’s *Oakwood trilogy* creates a new distinction in United States labour law denying freedom of association to employees deemed “supervisors” under the new test for supervisory status. Moreover, in violation of Article 1 of Convention No. 98, the NLRB’s *Oakwood trilogy* strips employees in the new “supervisor” status of any and all protection. Employers may fire them with impunity if they do not relinquish union membership or if they participate in union activities. Employers can even force these employees, under pain of dismissal, to participate in management’s anti-union campaigns. In further violation of

Article 2 of Convention No. 98, the NLRB's *Oakwood trilogy* opens the door for management to interfere with trade unions by challenging the status of union-represented workers deemed "supervisors" under the ruling. In many cases, employees caught in the new definition are elected trade union leaders and activists. Employers' moves to remove them from bargaining units will interfere with union members' choice of their leaders and with the functioning of those leaders.

- 818.** Finally, in violation of Article 4 of Convention No. 98, the *Oakwood trilogy* allows employers to challenge unions' representative status by claiming that the bargaining unit contains "supervisors". Instead of using members' resources to engage in collective bargaining, unions will face years of protracted, expensive litigation before the NLRB and the courts, examining in minute detail all the duties and tasks of each employee management seeks to exclude from the union. The nurses at Oakwood Healthcare Inc. began their organizing efforts in 1999; the regional director ordered an election in early 2002, and the NLRB decided the case in late 2006. The same pattern will most likely repeat itself in new cases involving questionably supervisory tasks, since employers will use the distinctive facts of each new organizing drive to challenge – first at the Board and then in the courts – the right of employees to belong to a union on the grounds that they are "supervisors". Thus, rather than encouraging and promoting collective bargaining, the *Oakwood trilogy* discourages and retards bargaining. The *Oakwood trilogy* severely undermines the efforts of workers seeking to form trade unions in hitherto unorganized workplaces because it eliminates a critically important group of employees whose support for the union might otherwise help create majority support for collective bargaining. Not only that, but the decision also allows management to create a cadre of the same supposed supervisors who can be "conscripted", as the dissenting opinion says, even against their will and under pain of dismissal, into an anti-union force in the midst of co-workers seeking to organize. This can have devastating negative effects on workers' organizing rights.
- 819.** The complainant then makes reference to previous complaints brought before the Committee on similar issues (in particular, Cases Nos 1534 (Pakistan), 1751 (Dominican Republic), 1771 (Pakistan), 1878 (Peru), 1351 (Canada), 1959 (United Kingdom)). According to the complainant, the Committee's cases set out these key principles:
- the expression "supervisors" should be limited to cover only those persons who genuinely represent the interests of employers;
  - legal definitions of "supervisors" or other excluded categories of workers should not give rise to an expansive interpretation excluding large numbers of workers from the negotiating scope of a certified bargaining agent;
  - "excluded" employees should not be defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present and potential membership;
  - changing employees' status to undermine the membership of workers' trade unions is contrary to the principle of freedom of association;
  - even true supervisors have the right to form and join trade unions and to bargain collectively, though the law may require that their bargaining units be separate from those of supervised employees. According to the complainant, on all these points, the NLRB's *Oakwood trilogy* runs afoul of the Committee's criteria.
- 820.** The complainant adds that the NLRB's *Oakwood trilogy* has provoked the broadest public concern about United States labour law in many decades. Although earlier decisions by this labour board, excluding university teaching assistants, temporary workers, disabled

workers and other categories of employees from coverage of the NLRA were mainly known to labour law “insiders”, the *Oakwood trilogy* prompted intense media coverage and interest. Major newspapers not known for their sympathy to trade unions, and which rarely comment on labour law issues, sounded editorial alarms over the decision. The complainant cites in this regard articles from the *Washington Post* and the *New York Times*.

**821.** According to the complainant, the widespread public revulsion at the NLRB’s supervisor ruling in *Oakwood* creates an opportunity to correct this violation of workers’ rights through legislative amendments to the NLRA. An amendment can restore the traditional, more balanced test for supervisory status. Recognizing that the ILO Committee on Freedom of Association does not accuse governments, nor does it “enforce” its decisions, the complainant requested the Committee to lend its authoritative voice and its moral standing to support workers’ freedom of association in the United States. To this end, it requested that the Committee urge Congress and the administration to amend the NLRA to ensure that:

- “supervisors” under the NLRA are limited to only those persons who genuinely represent the interests of employers;
- legal definitions of “supervisors” or other excluded categories of workers do not give rise to an expansive interpretation excluding large numbers of workers from protection of the right to organize and bargain collectively;
- employers may not change employees’ status to undermine trade union organization in unorganized workplaces or to undermine the membership and effectiveness of workers’ trade unions in union-represented workplaces.

**822.** The complainant wished to leave for future consideration, the question of whether the NLRA should be amended to permit genuine supervisors who are not part of senior management to organize and bargain in separate supervisors’ bargaining units. Finally, it asked the Committee to send a direct contacts mission to the United States to examine the effects of the NLRB’s *Oakwood trilogy*. Such direct contact with workers, union representatives, employers and their representatives, and labour law authorities would, in the complainant’s view, provide the Committee with “on the ground” understanding of the issues.

## **B. The Government’s reply**

**823.** In a communication dated 25 September 2007, the Government indicates in the first place that the United States has not ratified ILO Conventions Nos 87 and 98, and therefore has no international law obligations pursuant to these instruments and thus no obligation to accord their provisions domestic effect in US law. Nonetheless, the US Government has on numerous occasions demonstrated that its labour law and practice are in general conformance with Conventions Nos 87 and 98, and the ILO supervisory bodies have generally upheld this view. Likewise, the ILO Declaration is a non-binding statement of principles, is not a treaty and gives rise to no legal obligations. However, the US Government has submitted annual reports under the follow-up procedures established by the ILO Declaration that demonstrate that it respects, promotes and realizes the fundamental principles and rights at work embodied in the ILO Constitution.

**824.** In the second place, the Government indicates that the NLRB’s *Oakwood* cases do not conflict with ILO principles of freedom of association, the right to organize, or collective bargaining. Rather, the *Oakwood* cases illustrate reasonable interpretations of statutory language as applied to particular facts by an administrative body. Furthermore, these

decisions have not, as asserted by the AFL–CIO, resulted in workers with only “minor or sporadic oversight tasks” being improperly classified as supervisors. Nor have they led to large numbers of workers losing their right to organize or bargain collectively, as predicted by the complainant.

- 825.** The Government recalls that the NLRA which is the principal statute for the extension of freedom of association rights to private sector employees, defines “supervisor” in section 2(11) as

... any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

- 826.** In the *Kentucky River* decision, the US Supreme Court interpreted the Act as providing a three-part test for determining supervisory status. Employees are deemed “supervisors” under the NLRA if “(1) they hold the authority to engage in any one of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement’, and (3) their authority is held ‘in the interest of the employer.’” *NLRB v. Kentucky River Community Care, Inc.*, 532 US 706, 712–713 (2001) (quoting *NLRB v. Health Care & Retirement Corp. of America*, 511 US 571, 573–574 (1994)).

- 827.** It should be emphasized that for supervisory status to be obtained it must be established that any of the 12 supervisory functions listed in the NLRA definition of “supervisor” is accompanied by the exercise of independent judgement. The burden of proving supervisory status is on the party asserting that such status exists. The NLRB has held that an individual engaged as a supervisor for part of that person’s work time, and the rest of the time as a unit employee, must spend a regular and substantial portion of work time performing supervisory functions in order to satisfy the legal standard for a supervisor. Under the Board’s standard, “regular” means according to a pattern or schedule, as opposed to sporadic substitution. The NLRB has stated that the dividing line between supervisors and non-supervisors is whether the individual exercises “genuine management prerogatives” and that, as a general principle, the Board exercises caution “not to construe supervisory status too broadly”. Consistent with this approach, the NLRB noted in *Oakwood* that the main purpose of the section 2(11) definition of “supervisor” is to exclude from coverage of the Act “individuals whose fundamental alignment is with management.”

- 828.** In response to the US Supreme Court’s decision in *Kentucky River*, in June 2003 the NLRB issued a notice and invitation to the parties in the *Oakwood* cases to address the issue of supervisory status of individuals who exercise judgement in assigning and directing employees. The NLRB considered the cases together since all three cases involved two of the 12 indicia of supervisory status under section 2(11): “to assign” and “responsibly to direct”.

- 829.** On September 29, 2006, the Board issued decisions in the *Oakwood* cases. *Oakwood* was decided first, and the other two cases followed the standards enunciated in *Oakwood*. The Board initially refined the definition of the common relevant terms: “assign”, “responsibly to direct”, and “independent judgement”, consistent with *Kentucky River*, and then applied these terms in each of the three cases to determine which individuals were supervisors.

- 830.** Oakwood Healthcare Inc. operates the Oakwood Heritage Hospital in Taylor, Michigan, and at the time the case was under consideration employed approximately 181 staff registered nurses (RNs). Twelve RNs were permanent charge nurses; 112 other RNs acted as charge nurses on a rotating basis.
- 831.** The NLRB applied the definitions of “assign”, “responsibly to direct”, and “independent judgement” to the facts in *Oakwood* and determined that the 112 RNs who were non-permanent, rotating charge nurses were not supervisors and, therefore, were within the representational unit. The 12 permanent charge nurses were found to assign work and exert independent judgement and, therefore, were found to be supervisors outside the representational unit. Thus, of the approximately 181 RNs at the facility, only 12 – those determined by the NLRB to regularly perform significant supervisory functions – were found to meet the NLRA’s definition of supervisor.
- 832.** The NLRB then applied these definitions to the facts in the other *Oakwood* cases. In *Croft Metals* and *Golden Crest*, the Board found that none of the individuals whose non-supervisory status was challenged (lead persons in *Croft Metals* and/or charge nurses in *Golden Crest*) was a supervisor as defined in section 2(11). Consequently, in three cases where the supervisory status of approximately 173 individuals was challenged, the Board concluded that only 12 individuals met the Act’s definition of supervisor.
- 833.** The results in the *Oakwood* cases are consistent with the Board’s general principle, as stated in *Oakwood*, to exercise caution not to construe supervisory status broadly. This principle has been reaffirmed in a number of subsequent cases where supervisory status was at issue [*Avante at Wilson, Inc.*, 348 NLRB No. 71 (31 October 2006) (reversal of a Regional Director’s finding that RNs and licensed practical nurses (LPNs) were supervisors); *East Buffet and Restaurant, Inc.*, 2007 WL 1035161 (NLRB Div. of Judges) (3 April 2007) (finding restaurant captains not to be supervisors under the Act); *Paramus Ford, Inc.*, 2007 WL 313430 (NLRB Div. of Judges) (31 January 2007) (finding that evidence was insufficient to establish that an assistant parts department manager was a supervisor under the Act)].
- 834.** Examination of the Board’s definitions, and the application of those definitions in the Board’s factual analysis to discern the status of the relevant employees in the *Oakwood* cases, confirms that the *Oakwood* cases designate as supervisors only individuals who represent genuine management interests, and do not create an overly broad definition of “supervisor” or exclude a large number of individuals from NLRA coverage. A discussion of each definition relevant to each of the *Oakwood* cases follows.

### Assignment

- 835.** Examining whether the individuals “assigned” work for the purposes of section 2(11), the Board defined the term, consistent with the ordinary meaning of the statutory word, as the designation of an employee to a place (e.g. location or wing), time (e.g. shift or overtime), or task (which must involve “significant overall duties” not ad hoc instruction that the employee perform a discrete task). The Board applied this definition in the *Oakwood* cases, and determined that only 12 individuals – the permanent charge nurses at *Oakwood* – assigned work, for the following reasons:
- In *Oakwood*, 12 permanent charge nurses were found to “assign.” In each nursing unit, at the beginning of each shift and as new patients were admitted, these charge nurses assigned staff working in their unit to the patients that they would care for during the shift. The charge nurses were assigning “significant overall duties”. The charge nurses’ assignments determined what would be the required work for an

employee during the shift, thereby having a material effect on the employee's terms and conditions of employment.

- In *Croft Metals*, none of the lead persons were found to “assign”. Lead persons did not: prepare posted work schedules; appoint employees to production lines, departments, shifts or overtime; or give significant overall duties to employees.
- In *Golden Crest*, none of the charge nurses were found to “assign”. Charge nurses did not exercise supervisory authority in assigning certified nurse assistants (CNAs) as they did not have authority to require CNAs to go home early or stay past the end of a shift; assign location of CNAs' work; call CNAs in to work; alter CNAs' section assignments to compensate for absent employees or to balance workloads. The fact that the charge nurses verified time cards was found to be routine and clerical and not indicative of supervisory authority. Similarly, the fact that the charge nurses were the highest ranking employees on site during the night shift and every other weekend was insufficient to confer supervisory status.

### *Responsible direction*

**836.** While the Supreme Court in *Kentucky River* rejected a Board limitation on the type of “independent judgement” required to establish the supervisory criteria of “responsibly to direct”, it did not define either term. In *Oakwood*, the NLRB adopted the standard established by the US Circuit Court of Appeals for the Fifth Circuit in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (fifth Cir. 1986), in defining “responsibly to direct” under section 2(11) to include accountability. Therefore, for purposes of “responsible direction”, it must be shown that the employer delegated to the employee the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the employee if the work is performed poorly or no corrective action is taken. The Board applied this definition in the *Oakwood* cases, and only 25–30 individuals – the lead persons in *Croft Metals* – were found to responsibly direct, for the following reasons:

- In *Oakwood*, the Board determined that the employer failed to establish that the charge nurses who direct others were accountable if the tasks were not completed. Although the charge nurses had the discretion to direct other nursing staff to check the crash carts, take an inventory of narcotics, and provide statistical information to administrators, there was no evidence that the charge nurses were required to take corrective action if the nursing staff failed to adequately perform such duties, or that charge nurses were subject to discipline or lower evaluations if other nursing staff failed to adequately perform such duties.
- In *Croft Metals*, lead persons were found to responsibly direct. Lead persons were required to manage their assigned teams, correct improper performance, move employees to do different tasks, and decide the order of work to be performed, all to achieve management-targeted goals. They were held accountable for the job performance of the employees.
- In *Golden Crest*, charge nurses were found not to responsibly direct. While these nurses directed the work of CNAs, they were not accountable for their actions in directing the CNAs. The charge nurses were evaluated on their direction of the CNAs, but this fact alone did not establish that any adverse consequences could or would befall the charge nurses as a result of such rating.



---

*Independent judgement*

**837.** Under the NLRA, a finding of one of the 12 supervisory indicia of section 2(11), alone, is not sufficient to determine supervisory status: independent judgement is also required. Consequently, in the *Oakwood* cases, where one of the supervisory indicia under section 2(11) was found, the Board was required to examine whether the assignment or direction required “independent judgement”. Defining the term in light of the Supreme Court’s views in *Kentucky River*, the Board held that using “independent judgement” is to act free of the control of others and form an opinion or evaluation by discerning and comparing data, provided that the act is “not of a merely routine or clerical nature”. The NLRB stated that “a judgement is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement”. The Board applied this definition in the *Oakwood* cases, and determined that the 12 charge nurses who assigned work in *Oakwood* exercised independent judgement, but the lead persons in *Croft Metals* did not, for the following reasons:

- In *Oakwood*, the Board concluded that the employer adduced evidence sufficient to establish that certain of its permanent charge nurses were supervisors based on their delegated authority to assign employees using independent judgement. The Board focused on the substantial degree of professional discretion that the 12 permanent charge nurses exercised in making assignments in life or death situations. The Board found that where the charge nurse made an assignment based upon the skill, experience, and temperament of other nursing personnel and on the condition of the patients, that charge nurse had exercised the requisite discretion to make the assignment a supervisory function requiring independent judgement. The NLRB’s decision did not extend to permanent charge nurses employed in the emergency room, as it was found that they did not exert sufficient independent judgement to be deemed supervisors under the Act. The facts revealed that those charge nurses were not required to take into account patient conditions or staff nursing skills in making patient care assignments. The Board also found that the employer failed to establish that its 112 rotating charge nurses, as opposed to the 12 permanent charge nurses found to be supervisors, regularly performed supervisory functions.
- In contrast, in *Croft Metals*, lead persons were found not to exercise independent judgement. Although lead persons were found to responsibly direct the work of other employees, the Board determined that the direction (e.g. in directing production and maintenance employees and in directing the loading of trucks) did not require a degree of discretion that rose above the routine or clerical. As a specific example, evidence indicated that lead persons followed pre-established delivery schedules and generally employed a standard loading pattern that dictated the placement of different products in the trucks.
- In *Golden Crest*, even though the employer failed to establish one of the 12 indicia of supervisory functions, which precluded the establishment of supervisory status under the NLRA, the Board nonetheless discussed whether charge nurses exercised independent judgement. The Board found that charge nurses’ ability to call CNAs to work was merely ministerial as the nurses needed to be approved and that reassignment authority was without regard to individualized assignments of CNAs’ skills and patient needs. Accordingly, the Board held that it was not established that the charge nurses used independent judgement.

**838.** The *Oakwood* cases represent a small refinement in the application of the NLRA’s definition of “supervisor”. The tests developed in these cases to determine supervisory status are reasonably conceived and judiciously applied to appropriately limit the NLRA’s definition of “supervisor” to individuals who exercise independent judgement in carrying

out the genuine interests of employers. As illustrated above, as applied, the tests employed in the *Oakwood* cases do not, despite the assertions by the AFL–CIO, represent an expansive definition of supervisor that “extend[s] potentially to millions of workers with minor or sporadic oversight tasks...”. The cases do illustrate the scope of evidence, both testimonial and documentary, that the Board considers and the degree of scrutiny that the Board exercises in applying the legal standard to the facts of a case. This process of determining supervisory status is, as it should be, “heavily fact-dependent”, *Jochims v. NLRB*, 480 F.3d 1161, 1168 (DC Cir. 2007) (quoting *Brusco Tug & Barge v. NLRB*, 247 F.3d. 273, 276 (DC Cir. 2001)), in order to correctly distinguish which individuals are, or are not, supervisors as defined in section 2(11) of the NLRA.

- 839.** A review of all of the post-*Oakwood* decisions addressing the issue of supervisory status under the NLRA that employed the definitions adopted in the *Oakwood* cases reveals virtually no cases where workers were found to be outside a bargaining unit based on those definitions. This result does not reflect the tumultuous outcome predicted in the complaint. In fact, a review of cases applying the *Oakwood* standard decided over the 60 days following the decision, during some of which time the AFL–CIO’s complaint was being drafted, reveals none in which the Board, including its administrative law judges, determined that an employer established supervisory functions under section 2(11). See, e.g. *Rite Aid Corp.*, Case 31-RC-8587 (11 October 2006) (employer failed to establish that leads are supervisors); *Biosource Landscaping Services, Inc.*, Case 9 RC 18101 (23 October 2006) (employer failed to establish that foremen are supervisors); *Healthlink Holdings at Bear Creek*, Case 18 RC 17111 (15 November 2006) (employer failed to establish that LPNs are supervisors); *Haven Health Center of Windham*, Case 34 RC 2134 (16 November 2006) (employer failed to establish that charge nurses are supervisors); *North Coast Opportunities, Inc.*, Case 20 RC 18104 (20 November 2006) (employer failed to establish that lead teachers are supervisors); *Sara Lee Bakery Group*, Case 9 RC 18109 (20 November 2006) (employer failed to establish that lead persons and lead retail clerks are supervisors); *Walker Methodist Health Center*, Case 18 RC 17157 (22 November 2006) (employer failed to establish that LPNs are supervisors); *St. Mary Home*, Case 34 RC 2119 (27 November 2006) (employer failed to establish that licensed practical nurses LPN or RN charge nurses are supervisors); *Eby Brown Co.*, Case 9 RC 18105 (27 November 2006) (employer failed to establish that “supervisors” satisfy the *Oakwood* indicia); *Flint Hill Resources, LP*, Case 18 RC 17418 (1 December 2006) (employer failed to establish that firefighter captains are supervisors).
- 840.** Furthermore, the Government indicates that US law and practice are consistent with freedom of association principles and the NLRB’s decisions in the *Oakwood* cases have not altered this. With regard to the principle that supervisors should be limited to those who “genuinely represent the interests of employers”, the Government indicates that the NLRB recognizes that the main purpose of the section 2(11) definition of “supervisor” is to exclude from coverage of the Act “individuals whose fundamental alignment is with management”, and the discussion of the *Oakwood* cases above demonstrates that these cases respect this principle. With regard to the need to avoid an expansive interpretation of “supervisor” in order not to exclude “large numbers of workers” from the bargaining unit, the Government indicates that there is no evidence that the decisions in the *Oakwood* cases have changed the law so that workers are improperly labelled as “supervisors” under the NLRA. There is no evidence that the decisions have caused “large numbers of workers” to lose their right to organize or bargain collectively.
- 841.** Similarly, there is no evidence to support the allegations that the Board’s pronouncement in the *Oakwood* cases is so broad as to exclude a “substantial proportion” of a union’s membership and that the decisions have led to wholesale changes in worker status aimed at undermining union organizing efforts. Once again, in *Oakwood*, 12 charge nurses were deemed supervisors out of 181 RNs employed at the facility. No employees were deemed

outside the bargaining unit or the scope of the NLRA in *Croft Metals* or *Golden Crest Healthcare*.

- 842.** With regard to the principle relating to the right of supervisors to form and join trade unions and to bargain collectively, which is outside the scope of the complaint as defined by the complainant, the Government indicates nonetheless that the US Constitution guarantees workers, regardless of supervisory status, freedom of association and the right to organize. The NLRA similarly endorses the notion that supervisors enjoy the freedom of association. See 29 USC 164(a) (stating that “[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization”). The US Supreme Court has recognized that supervisors can form unions and engage in collective bargaining. See *NLRB v. News Syndicate Company*, 365 US 695 (1961).
- 843.** In conclusion, the Government states that the complainant has failed to support its assertions. The Board’s *Oakwood* decisions do not conflict with ILO principles of freedom of association, the right to organize, or collective bargaining. The *Oakwood* cases illustrate reasonable application of the law based on the specific facts of each case. These decisions, and the relevant cases that have followed, have not resulted in the alleged dramatic loss for workers of their right to organize or bargain collectively or in workers being improperly classified as supervisors. The complainant’s predictions of dire limitations on the rights of individual workers as a result of the Board’s *Oakwood* decisions, based to some extent on views expressed before the decisions were issued, have simply not come to pass. Nor do the remaining assertions withstand a fair review of the application of the law. While it is unclear how the ever-changing workplace will affect the evolution of the NLRA’s interpretation, it is clear that the *Oakwood* definitions provide for reasonable consideration of fact-dependent situations while providing appropriate protections of worker rights.
- 844.** In fact, in response to the *Oakwood* cases, in an April 2007 memorandum, the NLRB General Counsel reminded the NLRB regional offices that:

... [t]he Board reiterated in the *Oakwood* cases that the burden of proving supervisory status rests on the party asserting that such status exists, and that the assertion must be established by a preponderance of the evidence. That evidentiary burden, the Board made clear, is significant and substantial. “Purely conclusory” evidence is not sufficient to establish supervisory status; a party must present evidence that the employee “actually possesses” the section 2(11) authority at issue. A “paper showing” alone – job titles, descriptions, or evaluation forms – is insufficient. Similarly, testimony merely asserting as a general matter that individuals exercised particular supervisory duties is insufficient; rather, to meet the burden of proof, testimony must include specific details or circumstances making clear that the claimed supervisory authority exists. Further, asserted supervisors will not be found to have such authority if they were not told that they possess it and if they exercised it only sporadically.

These explications of the type and quantum of evidence that satisfies the burden of proof underscore the importance of fully investigating all factors relevant in determining supervisory status, and evaluating whether the evidence is sufficiently specific to demonstrate that the claimed indicia have been shown. Accordingly, as the assertions underlying the complaint are unsupported and in many cases inaccurate, the remedies requested by the complainant are not appropriate or necessary.

- 845.** The Government attaches certain observations made by the United States Council for International Business and the United States Chamber of Commerce independently of the US Government and on their own initiative – as indicated by the Government. The observations aim to demonstrate that the complaint is unfounded for the following reasons:

- The Committee lacks jurisdiction under the principles of international law to apply the elements of Conventions Nos 87 and 98 to the United States which has not ratified either Convention.
- The United States honours the principle of freedom of association and the NLRB decisions that are subject to the complaint do nothing to restrict that freedom.
- Even under the existing freedom of association principles, as elaborated by the Committee, the NLRB decisions further the principle of freedom of association in that they serve to define when an employee’s interests genuinely represent the interests of an employer. Through the NLRB’s dissection of the authority to assign, responsibly direct and its analysis of the use of independent judgement in each of the three *Oakwood* cases, the NLRB was looking for only those situations in which employees genuinely represented the interests of employers in conformity with freedom of association principles; for example, the NLRB found evidence of supervisory authority to assign only where the assignment was made within the supervisor’s sole discretion, and was based upon the needs of the employer and the qualifications of the employees assigned; in other words, the individual is deemed to be acting in the interests of the employer because he/she was creating the criteria for assignment. The decision furthers sound labour relations policy as well, because it addresses and correctly resolves the inherent conflict of interest created when workers and those who legitimately supervise them are part of the same union.
- The complainant lacks any empirical evidence to support its arguments that the NLRB decisions have had the effect of denying numerous employees the right to organize a union, and in fact there is no evidence that any non-supervisory employee has been denied their representational rights as a result of the decisions. The complainant relies upon anecdotal evidence and supposition to substantiate its case to the Committee. It cites a report of the Economic Policy Institute and a law firm publication which had been produced before the NLRB decision in *Oakwood* was issued and therefore were based on conjecture about the expected outcome of this decision and not on the actual analysis of the case; moreover, marketing material by law firms is hardly evidence of an adverse impact of a decision on the rights of employees. Indeed, in an informal survey of management law firms conducted by the US Chamber of Commerce about the extent to which any law firm clients had reclassified workers as supervisors in light of the NLRB’s decision in *Oakwood*, not a single firm reported such a case. Moreover, reference to news articles and newspaper editorials is not evidence of the actual impact of a law on the rights of workers. The fact is that in the year since the *Oakwood* trilogy, there has not been any significant change in the United States in terms of whether workers are classified as supervisory. Thus, the complainant has failed to present a credible argument that the principle of freedom of association is not honoured in the United States.

### C. The Committee’s conclusions

- 846.** *The Committee notes that the present case concerns allegations that, in three recent decisions, the NLRB sets out a new expanded interpretation of the definition of “supervisor” so as to exclude large categories of workers from the protection of the right to organize and bargain collectively under the NLRA, with severe repercussions on tens of thousands of workers who had previously been covered by the NLRA.*
- 847.** *In the first place, noting that the Government reiterates its views on the obligations pertaining to it with regard to freedom of association, the Committee recalls as it had done when examining Cases Nos 2227 and 2460 [332nd Report, para. 600 and 344th Report, para. 985], that since its creation in 1951, it has been given the task to examine complaints*

alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions. Its mandate is not linked to the 1998 ILO Declaration – which has its own built-in follow-up mechanisms – but rather stems directly from the fundamental aims and purposes set out in the ILO Constitution. The Committee also recalls in this respect that when a State decides to become a Member of the Organization, it accepts the fundamental principles embodied in the Constitution and the Declaration of Philadelphia, including the principles of freedom of association. The ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government [*Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, paras 15 and 17].

848. Turning to the case at hand, the Committee notes by way of background, that under the NLRA, employees are deemed to be “supervisors” and thereby excluded from protection under the Act if they have “authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement” (section 2(11) of the NLRA). In the process of applying this definition to specific cases over the years, the NLRB, which is the federal agency with primary responsibility for interpreting and enforcing the NLRA has, in principle, exercised caution “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect” (*Chevron Shipping Co.*, 317, NLRB, 379, 381). However, on two occasions involving the health-care industry, the Supreme Court found that the NLRB had adopted an overly narrow construction of section 2(11) which was inconsistent with the letter and spirit of the NLRA. As noted by the complainant, one of these occasions was the *Kentucky River* decision in which the Supreme Court reversed the NLRB’s decision that charge nurses who oversaw the work of lower-ranking nurses and nurses’ aides but who lacked disciplinary authority over them, were not supervisors. This decision largely set the stage for the three NLRB decisions which are the subject of the present complaint.
849. The Committee notes from the complainant’s allegations that in the leading decision, which is the subject of this complaint (*Oakwood Healthcare Inc.*), the NLRB reversed a decision by a regional NLRB director in order to expand the definition of “supervisor” and therefore exclude certain categories of workers like “charge nurses” from the NLRA provisions which guarantee freedom of association rights. The Committee notes in particular from the complainant’s allegations that, according to the initial decision of the NLRB regional director, there is “no evidence” that charge nurses “have independent authority with respect to the hire, promotion, demotion, lay-off, recall, reward or discharge of employees” and therefore they do not qualify as “statutory supervisors”. However, according to the final decision of the NLRB, charge nurses fall under the definition of supervisor found in section 2(11) of the NLRA because the terms “assign” and “responsibly to direct” apply to them; the term assign is not confined to non-transitory assignments, e.g. assignment to a particular job, which would have a significant impact on an employee’s terms of employment, but rather refers “to the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee” (*Oakwood Healthcare Inc.*, op. cit., page 4). According to the complainant, in the health-care context, this would include “assign[ing] nurses and aides to particular patients” even if such assignment is only for a single shift. The NLRB also found that the term “responsibly to direct” means that “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ ... and carried out with independent judgement” (*Oakwood Healthcare Inc.*, op. cit., page 6).

*The NLRB recalled that the inclusion of this term in section 2(11) of the NLRA was designed to ensure that the statutory exemption of section 2(11) encompassed those individuals who exercise basic supervision but lack the authority or opportunity to carry out any of the other statutory supervisory functions, e.g. where promotional, disciplinary and similar functions are handled by a centralized human resources department.*

- 850.** *The Committee further notes that in the Golden Crest Healthcare Center and Croft Metal Inc., the NLRB – while finding that in the specific circumstances of the case and the evidence presented, the workers in question did not qualify as “supervisors” – further elaborated on the nature of tasks that might be considered as responsibly directing by referring to such acts as correcting a nursing aide if the latter is not using proper procedures in giving a resident a bath and directing aides in performing certain tasks like clipping residents’ toenails, and fingernails, emptying catheters or changing an incontinent resident, or for workers in a factory, tasks like telling employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filled and production completed in a timely manner.*
- 851.** *Moreover, the Committee notes that, according to the complainant, an employee need not possess these minor forms of authority on a full-time basis but rather on a “regular and substantial” basis, that is to say, for 10–15 per cent of the employee’s work time. Thus, according to the complainant, a group of ten nurses each of whom rotates into a charge nurse position once every ten days, can all be excluded from the protection of the NLRA as supervisors.*
- 852.** *The Committee further notes from the complaint’s allegations, that, under the newly interpreted definition of supervisor, employers can classify or reclassify as “supervisors” employees with minor or sporadic oversight over co-workers even when such oversight is far short of genuine managerial or supervisory authority. According to the complainant, this exclusion has enormous repercussions for those workers who have now become “supervisors” under the NLRA. The decision is especially ominous in light of job enrichment programmes purporting to empower employees by pushing authority down – an otherwise laudable goal. According to the dissenting opinion of two of the five board members in Oakwood Healthcare Inc., the decision created a new class of workers who have neither the genuine prerogatives of management nor the statutory rights of ordinary employees. According to the complainant, the decision is likely to remove thousands of workers from the NLRA’s protection, thus preventing them from unionizing, running for trade union office, engaging in collective bargaining and enjoying protection against acts of discrimination and employer interference, all this in violation of Articles 2 and 3 of Convention No. 87 and Articles 1, 2 and 4 of Convention No. 98. Finally, the Committee notes that, according to the complainant the Oakwood trilogy allows employers to engage unions in years of protracted, expensive litigation before the NLRB and the courts, examining in minute detail all the duties and tasks of each employee that the employer seeks to exclude from the bargaining unit as a “supervisor”, thus preventing unions from effectively engaging in collective bargaining.*
- 853.** *The Committee notes that the thrust of the reply, provided by the Government and the observations made independently of the Government by the Council for International Business and the Chamber of Commerce, is that the complainant has exaggerated the impact of the Oakwood trilogy and has failed to provide an appropriate picture of case law with regard to supervisory employees. For supervisory status to be obtained, any of the 12 supervisory functions listed in the NLRA definition of “supervisor” must be accompanied by the exercise of “independent judgement” and the burden of proving that such status is applicable falls on the employer. Thus, even though employees may be found to qualify as supervisors under one of the 12 criteria set out in section 2(11) of the NLRA, in particular, under the terms “assign” and “responsibly direct”, the employer must also*

prove that they act with “independent judgement” to obtain their exclusion from the bargaining unit, and more generally from the freedom of association rights guaranteed under the NLRA. The need to fulfil a combination of criteria operates as an adequate safeguard to ensure that large categories of workers are not unnecessarily excluded. Indeed, the Government emphasises that only 12 out of 181 registered nurses were found to qualify as supervisors in Oakwood Inc. while no employee was found to qualify in Golden Crest Healthcare Center and Croft Metal Inc. Moreover, a review of all the post-Oakwood decisions addressing the issue of supervisory status under the NLRA reveals virtually no cases where workers were found to be outside a bargaining unit based on the definitions elaborated in Oakwood. An informal survey of management law firms conducted by the US Chamber of Commerce about the extent to which any law firm clients had reclassified workers as supervisors in light of the NLRB’s decision in Oakwood, did not reveal any such cases. Finally, a memorandum of the NLRB General Counsel, issued in response to the Oakwood cases in April 2007, makes it clear that the evidentiary burden on the employer is “significant and substantial”. The cases themselves illustrate the scope of evidence, both testimonial and documentary, that the NLRB considers and the degree of scrutiny that the NLRB exercises in applying the legal standard to the facts of a case, a process which is “heavily fact-dependent”.

- 854.** *The Committee recalls that all workers without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing, engage through these organizations in collective bargaining and enjoy effective protection against acts of anti-union discrimination and employer interference [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 216, 770, 855 and 881]. As regards provisions which prohibit supervisory employees from joining workers’ organizations, the Committee has taken the view that the expression “supervisors” should be limited to cover only those persons who genuinely represent the interests of employers [see **Digest**, op. cit., para. 248]. The Committee has previously recognized that limiting the definition of managerial staff to persons who have the authority to appoint or dismiss is sufficiently restrictive to meet the condition that these categories of staff are not defined too broadly, and that a reference in the definition of managerial staff to the exercise of disciplinary control over workers could give rise to an expansive interpretation which would exclude large numbers of workers from workers’ rights [see **Digest**, op. cit., paras 249 and 250]. While taking due note of the Government’s indication that for supervisory status to be obtained, any of the 12 supervisory functions listed in the NLRA definition of “supervisor” must be accompanied by the exercise of “independent judgement”, the Committee also notes that certain situations found by the NLRB interpretation in the Oakwood trilogy to involve authority to “assign” or “responsibly direct” appear to give rise to an overly wide definition of supervisory staff that would go beyond freedom of association principles.*
- 855.** *Observing that the impact of the definition of “supervisor” in the Oakwood trilogy is still unclear, the Committee also notes the serious concerns raised by the complainant to the effect that this definition might lead to the exclusion of wide categories of workers from protection of their freedom of association rights, and to a clogging of the representation and collective bargaining process through an increase in appeals filed by employers with a view to challenging the status of employees in bargaining units.*
- 856.** *In light of the above, the Committee requests the Government to take all necessary steps, in consultation with the social partners, to ensure that the exclusion that may be made of supervisory staff under the NLRA is limited to those workers genuinely representing the interests of employers. The Committee requests to be kept informed of progress made in this respect.*

**857.** *The Committee also requests the Government to keep it informed of the impact of the Oakwood trilogy, on the one hand with regard to future decisions applying the Oakwood interpretation as to what constitutes authority to “assign” or “responsibly direct”, and on the other hand, with regard to the concerns raised by the complainant on possible clogging of the representation and collective bargaining process through an increase in appeals filed by employers with a view to challenging the status of employees in bargaining units.*

### **The Committee’s recommendations**

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

- (a) The Committee requests the Government to take all necessary steps, in consultation with the social partners, to ensure that the exclusion that may be made of supervisory staff under the NLRA is limited to those workers genuinely representing the interests of employers. The Committee requests to be kept informed of progress made in this respect.*
- (b) The Committee requests the Government to keep it informed of the impact of the Oakwood trilogy on the one hand, with regard to future decisions applying the Oakwood interpretation as to what constitutes authority to “assign” or “responsibly direct”, and on the other hand, with regard to the concerns raised by the complainant on the possible clogging of the representation and collective bargaining process through an increase in appeals filed by employers with a view to challenging the status of employees in bargaining units.*

CASE NO. 2580

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

### **Complaint against the Government of Guatemala presented by the Trade Union of Workers of Guatemala (UNSITRAGUA)**

*Allegations: The Trade Union of Workers of Guatemala (UNSITRAGUA) alleges acts of intimidation and pressure against members of the Union of Workers of the Criminal Investigation Department of the Attorney-General’s Office (SITRADICMP) and that recently appointed members of the union’s Executive Committee were transferred against their wishes*

**859.** The present complaint is contained in a communication from the Trade Union of Workers of Guatemala (UNSITRAGUA) dated 11 July 2007.



- 860.** The Government sent its observations in communications dated 14 September and 4 October 2007.
- 861.** Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

#### **A. The complainant's allegations**

- 862.** In its communication of 11 July 2007, the UNSITRAGUA indicates that, on 29 March 2007, workers of the Criminal Investigation Department of the Attorney-General's Office (DICRI) initiated proceedings to establish a trade union, the Union of Workers of the Criminal Investigation Department of the Attorney-General's Office (SITRADICMP), which was registered on 24 May 2007. On 6 July 2007, the union's Executive Committee and Advisory Committee were established for a period of two years.
- 863.** According to UNSITRAGUA, as soon as proceedings were initiated to establish the union and after the Attorney-General had been sent a list of grievances aimed at improving the working conditions of investigators, members of the organization were subjected to acts of pressure and intimidation by the Attorney-General's Office.
- 864.** The complainant adds that, on 9 July 2007, Messrs José Alejandro Reyes Canales (General Secretary), Javier Adolfo de León Salazar (Labour and Dispute Secretary), Axel Vinicio Lemus Figueroa (Finance Secretary) and Erick Daniel Santos Barrera (member of the Advisory Committee) were informed that, through Agreement No. 0376-2007 of 6 July 2007 issued by the Attorney-General, they had been transferred to workplaces far from the capital, where they were required to report in for duty the following day. According to the complainant, the transfers were made against the wishes of the workers concerned and are tantamount to an act of anti-union discrimination given that the people transferred are members of the union's Executive Committee and Advisory Committee. The workers lodged an appeal before the Council of the Attorney-General's Office, which, in accordance with the Organizational Act of the Attorney-General's Office, should suspend the transfer. Nevertheless, the workers have been threatened with disciplinary action for dereliction of duties if they fail to report in at work.

#### **B. The Government's reply**

- 865.** In its communications of 14 September and 4 October 2007, the Government indicates that the Attorney-General of the Republic stated that Messrs Jorge Gary García Herrera, Maynor Giovanni Garrido Véliz, Javier Adolfo de León Salazar, José Alejandro Reyes Canales, Carlos Roberto Sandoval López and Erick Daniel Santos Barrera described themselves as the "ad hoc committee" of united workers and as officials of the new trade union that they later established. According to the Attorney-General, on 11 June 2007, before the Executive Committee had been appointed, they submitted a list of grievances, which was rejected because it had not been submitted by the Executive Committee, as required by law and the by-laws of the trade union. The Attorney-General points out that there is a collective agreement in force between the Attorney-General's Office and a pre-existing trade union.
- 866.** With specific reference to the transfer of workers, the Attorney-General indicates that, in accordance with sections 67 and 71 of the Organizational Act of the Attorney-General's Office, he is authorized to transfer and rotate staff according to their availability and the needs of the service, which does not contravene the principle of immunity of union

officials, according to which they cannot be dismissed without the corresponding judicial authorization.

### **C. The Committee's conclusions**

- 867.** *The Committee notes that, in this case, the UNSITRAGUA alleges acts of intimidation and pressure against members of the SITRADICMP and that recently appointed members of the union's Executive Committee were transferred against their wishes.*
- 868.** *The Committee notes that, according to the allegations, soon after the SITRADICMP was established, the Attorney-General issued Agreement No. 0376-2007, through which some members of the Executive Committee who had been appointed a few days earlier, namely Messrs José Alejandro Reyes Canales (General Secretary of the union), Javier Adolfo de León Salazar (Labour and Dispute Secretary), Axel Vinicio Lemus Figueroa (Finance Secretary) and Erick Daniel Santos Barrera (member of the Advisory Committee), were transferred to workplaces far from the capital, with effect from the following day. The Committee notes that the officials affected lodged an appeal against this decision, which suspends the transfers. Nevertheless, the head of the personnel department of the Attorney-General's Office threatened them with disciplinary action for dereliction of duties if they failed to report in at work.*
- 869.** *The Committee notes that, according to the Government, the Attorney-General is authorized to transfer and rotate investigators according to their availability and the needs of the service and that this does not contravene the right to immunity enjoyed by union officials, given that this establishes that they cannot be dismissed without the corresponding judicial authorization.*
- 870.** *In this regard, while recognizing the Attorney-General's authority to transfer and rotate staff, the Committee observes that, in this case, the transfer of union officials with immediate effect was announced, according to the information provided by the Government, soon after the trade union had been established and a few days after they had been appointed as members of the union's Executive Committee. Furthermore, the transfer affected only the aforementioned members and, according to the allegations, occurred in an environment of intimidation and pressure targeting members of the trade union. The Committee cannot therefore rule out the possibility that these transfers may have occurred for anti-union reasons. The Committee recalls that protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 781]. Under these circumstances, bearing in mind that the untimely transfer of union officials immediately after their appointment could seriously affect the proper operation of the union, the Committee requests the Government, in the absence of any information to the contrary, to take the necessary measures to cancel the transfer of the Executive Committee members and to ensure that the union and its members can exercise their legitimate activities without being subjected to intimidation and persecution. The Committee requests the Government to keep it informed in this regard.*

### **The Committee's recommendation**

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

*The Committee requests the Government, in the absence of any information to the contrary, to adopt the necessary measures to cancel the transfer of the Executive Committee members and to ensure that the union and its members can exercise their legitimate activities without being subjected to intimidation and persecution. The Committee requests the Government to keep it informed in this regard.*

CASE No. 2585

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

**Complaint against the Government of Indonesia  
presented by  
the Federation of Construction, Informal and General Workers (FKUI)**

*Allegations: The complainant alleges violations of fundamental human rights during the arrest and detention of trade union leader Sarta bin Sarim (arrest without judicial warrant for normal trade union activities, prolonged preventive detention by the police in degrading conditions, physical abuse during custody, refusal to inform him of the charges, obstacles in communicating with his lawyer and family, denial of conditional release by the police and not a court of law) and the possibility of him facing further adverse consequences (dismissal) in case he is found guilty of the charges placed upon him (“instigation” and “unpleasant acts” under sections 160 and 335 of the Criminal Code respectively)*

872. The complaint is contained in communication of the Federation of Construction, Informal and General Workers (FKUI) dated 18 July 2007.
873. The Government sent its observations in communications dated 21 September 2007 and 31 January 2008.
874. Indonesia has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant’s allegations**

875. In a communication dated 18 July 2007, the FKUI – an affiliate of the Confederation of Indonesian Prosperity Trade Union (KSBSI) and the Building and Wood Workers International (BWI) – provides the following chronology of events. On 1 May 2007, around 9.30 a.m., Sarta bin Sarim, trade union leader in the Tambun Kusuma company,

joined eight persons who passed in front of his company, in order to hold a peaceful rally to celebrate International Labour Day in Tangerang City. The complainant explains that in Indonesia, since the political reform of 1998, and the ratification of Convention No. 87, all trade unions demand the recognition of May Day as National Labour Day and a national holiday. Rallies were not only held in Tangerang City on that day, but in all provinces of Indonesia, followed by thousands of workers.

- 876.** At 10 a.m., the group passed in front of the Sinar Makmu Integra (SMI) company. Sarta bin Sarim parked his motorcycle outside the company and went inside the open gate alone, asking security whether the workers had permission to leave work on Labour Day. After enquiring on this issue with the head of the warehouse and the chief of human resources of the company, permission was given to workers to stop work on that day. At 10.30 a.m., all workers of SMI stopped work and at least ten of them joined the rally. Sarta bin Sarim left the rally and went back to his company for around ten minutes and then back home. Meanwhile, the group continued their peaceful rally around Tangerang. After some time, the police intervened to disperse the rally, arresting five workers of the SMI company, namely Didit Fulmarizai, Arsudin bin Anwar, Rahmadi Tugimo and two others.
- 877.** At 5 p.m. on the same day, Sarta bin Sarim was arrested at his house by the police of Kabupaten Tangerang without any arrest warrant. The police brought him to the Tiga Raksa police prison at Kabupaten Tangerang. In this prison, Sarta bin Sarim was beaten to the point of vomiting blood.
- 878.** On 2 May at 11 a.m., the police arrested five other workers of the SMI company who had joined the rally at their houses, namely Messrs Parsono bin Seto Yuwono, Suwarno bin Sunarso, Asep Saefudin bin Masturodin, Sandi Gibran bin Martana and Heri Puranto bin Dwijo Santoso. These five workers gave witness statements to the police. They were released a few days later and are not going back to the SMI company to work.
- 879.** On 4 May, Sarta bin Sarim was moved from Tiga Raksa prison to the resort police of Tangerang prison. On 7 May, Sarta bin Sarim's family sent a letter requesting his conditional release. The resort police of Tangerang rejected the request. On Friday, 11 May 2007, the Federation for Construction, Informal and General Workers of the Indonesia Prosperous Labour Union (FKUI-SBSI) came to the resort police of Tangerang to try to obtain clarifications from the chief on the reasons for Sarta bin Sarim's detention and asking for his conditional release. The chief of resort police of Tangerang refused to explain the exact reasons for Sarta bin Sarim's detention and only informed the union that he faced six years' imprisonment under section 160 of the Criminal Law on "instigation" against the authority and one year imprisonment under section 335 of the Criminal Law on "unpleasant acts". The complainant adds that section 160 on "instigation" was adopted in the nineteenth century during colonial times to arrest Indonesian independence fighters including Indonesia's founding father and first President, Mr Soekarno, in 1945 and Muchtar Pakpahan, the first Chairperson of SBSI in 1996. The section has been used many times to imprison human rights and trade union activists. Section 335 on "unpleasant acts", known as a "flexible" section, has been recently used by the Government to put human rights and trade union activists in prison for a short time, so as to intimidate them. If a trade union leader is convicted under these sections, the employer may dismiss him/her without severance pay or the normal procedure to be followed, based on sections 158 and 160 of the Manpower Act No. 13 of 2003. Thus, according to the complainant, the Government frequently uses these provisions to ensure that trade union leaders have difficulties finding another job and are effectively excluded from employment and society. The complainant adds that the resort police of Tangerang did not give the police investigation report to Sarta bin Sarim or his lawyer, as is the right of any person in custody.

- 880.** On Monday, 14 May 2007, around 200 members of FKUI–SBSI organized a demonstration in front of the resort police of Tangerang. Without notice, the police sent Sarta bin Sarim on Monday afternoon to the youth prison of Tangerang for security reasons. In that prison, Sarta bin Sarim suffered once again physical abuse and mistreatment. The chief of this prison has admitted that, despite a capacity of 800 prisoners, the prison has been filled with 3,700 prisoners. Sarta bin Sarim was detained in a room with 300 prisoners, without enough room even to lay down for sleep. His head was shaved and he had to pay money to guards and other prisoners every time he received a visit – he had to pass six gates and pay around 2 to 3 euros at each gate. Each person who wished to visit him had to give him at least 14 euros, or otherwise he would be beaten at each gate on his way back to his room. On 16 May 2007, around 800 persons from FKUI and KSBSI joined a demonstration at the resort police of Tangerang, demanding Sarta bin Sarim’s release.
- 881.** On 21 May 2007, the resort police of Tangerang asked the court to extend the detention of Sarta bin Sarim from 22 May to 30 June 2007. This meant, according to the complainants, that the police did not yet have enough evidence to bring Sarta bin Sarim’s case to the court. Meanwhile, on 23 May 2007, the FKUI board met with the Indonesia National Commission of Human Rights which explained that it would warn the resort police of Tangerang and the youth prison of Tangerang with regard to the physical abuse of Sarta bin Sarim. On Thursday, 24 May 2007, about 800 members of FKUI–SBSI from Jakarta and Tangerang participated in a demonstration in front of the regional police of Jakarta.
- 882.** On 11 June 2007, the first court hearing was held on Sarta bin Sarim’s case at the Tangerang Court. Sarta bin Sarim obtained a copy of the police investigation report from the prosecutor, only in the morning of 10 June 2007 and, still, the document was only part of the police investigation report relevant to the charges brought under section 335 only, and not section 160. The rest of the document was given after the end of the court hearing at the insistence of Sarta bin Sarim’s side.
- 883.** According to the complainant, the Government has done nothing to solve this problem, despite protest letters and the urgent intervention of the ILO on this matter.

## **B. The Government’s reply**

- 884.** In a communication dated 21 September 2007, the Government indicates that Mr Sarta bin Sarim was released on 1 August 2007 based on the decision taken by the District Public Court. However, the KSBSI appealed to the High Court at the provincial level of Banten. The Government adds that it will transmit the documents concerning his release in due course.
- 885.** In its communication dated 31 January 2008, the Government indicates that Mr Sarta bin Sarim is a worker at Tambun Kusuma Company (PT Tambun Kusuma) as a security officer. The company is located in the Jatake Industrial Area, Tangerang City, Indonesia. He is also the leader of the FKUI–SBSI.
- 886.** The Government adds that on 1 May 2007, around 10.30 a.m., Mr Sarta bin Sarim riding a motorcycle together with his group (around 50 persons), came to Sinar Makmur Integra Company (PT SMI), located at the Jatake Industrial Area of Tangerang City. He intended to persuade the workers to discontinue working and join May Day celebration, in compliance with the fifth resolution of the KSBSI and the instructions of the Executive Board of the Indonesia Prosperous Labour Union (DPP DEN–KSBSI). Meanwhile, some of the group members which were outside of the PT SMI fences made noise continuously with their motorcycles. After instructing the PT SMI workers to stop working, Mr Sarta

bin Sarim followed by PT SMI workers (Sugito bin Kawi Harjo, Parsono, Suwarno, Asep Saefudin and Sandi Gibran), left the PT SMI premise.

- 887.** The Government indicates that due to his acts that created disturbance in the working environment, and caused the company great loss, the police office of Curug Sector, City of Tangerang, detained Mr Sarta bin Sarim and his group. After the examination proceeding, this case was delivered to the police office of Tangerang on 3 May 2007. Because of his acts, Mr Sarta bin Sarim has been subject to punishment of a maximum of one year imprisonment under section 335(1) of the Criminal Code. He was arrested by the police on 2 May 2007. On 10 May 2007, an officer of DPP DEN–KSBSI, Muchtar Pakpahan came and asked the release of Mr Sarta bin Sarim. On 24 May 2007, Rekson Silabin and members of the KSBSI led a demonstration to release Mr Sarta bin Sarim. During the court hearing, Mr Sarta bin Sarim was accompanied by his lawyer.
- 888.** Finally, the Government indicates that on 30 July 2007, the District Court of Tangerang decided that Mr Sarta bin Sarim was guilty of “unpleasant misconduct” and punished him with three months’ imprisonment. The court ordered that the three-month period in preventive detention be deducted from the sentence. As a result, the defendant was released. The court also ordered that the evidence (a motorcycle) be returned to PT Tambun Kusuma and that the defendant pay a court fee of 1,000 rupees. The Government attaches a copy of decision No. 978/PID.B/2007/PN of the District Court of Tangerang.

### C. The Committee’s conclusions

- 889.** *The Committee recalls that this case concerns serious allegations of violations of fundamental human rights during the arrest and detention of trade union leader, Sarta bin Sarim (arrest without judicial warrant for normal trade union activities, prolonged preventive detention by the police in degrading conditions, physical abuse during custody, refusal to inform him of the charges, obstacles in communicating with his lawyer and family, denial of conditional release by the police and not a court of law) and the possibility of him facing further adverse consequences (dismissal) in case he is found guilty of the charges placed upon him (instigation and “unpleasant acts” under sections 160 and 335 of the Criminal Code respectively).*
- 890.** *The Committee notes that, in its reply, the Government indicates that Mr Sarta bin Sarim was punished with three months’ imprisonment for having committed an “unpleasant act” (or “unpleasant misconduct” according to the Government) because on 1 May 2007 at 10.30 a.m. he visited the PT SMI company with the intention of persuading workers of this company to discontinue working and join May Day celebrations. This act followed up on the fifth resolution of the KSBSI and the instructions of the DPP DEN–KSBSI. The Committee notes that according to the Government, Mr Sarta bin Sarim and approximately 50 other persons made noise outside the company fences with their motorcycles and, after instructing the workers to stop working, left the company premises followed by five workers of the company (Sugito bin Kawi Harjo, Parsono, Suwarno, Asep Saefudin ad Sandi Gibran). Finally, the Government indicates that on 30 July 2007, the District Court of Tangerang decided that Mr Sarta bin Sarim was guilty of “unpleasant acts” (or “unpleasant misconduct”) and punished him with three months’ imprisonment. The court ordered that the three-month period in preventive detention be deducted from the sentence. As a result, the defendant was released on 1 August 2007. The KSBSI appealed the decision to the High Court.*
- 891.** *On the basis of the allegations and the Government’s reply, the Committee notes with regret that Mr Sarta bin Sarim was arrested and held in preventive detention for three months, by reason of his participation in a peaceful May Day rally. In this regard, the Committee recalls that measures designed to deprive trade union leaders and members of*

their freedom entail a serious risk of interference in trade union activities and, when such measures are taken on trade union grounds, they constitute an infringement of the principles of freedom of association [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 65]. The right to organize public meetings and processions, particularly on the occasion of May Day, constitutes an important aspect of trade union rights [**Digest**, op. cit., para. 136]. The Committee observes moreover, with regret, that the Government has not provided any reply to the allegations that Mr Sarta bin Sarim was arrested without judicial warrant. The Committee emphasizes that the arrest and detention of trade unionists without any charges being laid or court warrants being issued constitutes a serious violation of trade union rights [**Digest**, op. cit., para. 69]. Governments should adopt measures for issuing appropriate instructions to prevent the danger involved for trade union activities by such arrests [**Digest**, op. cit., para. 70]. The Committee urges the Government to issue appropriate instructions, to prevent the danger of trade unionists being arrested by the police for normal trade union activities, like, for instance, peaceful May Day processions, and moreover, without judicial warrants having been issued. The Committee requests to be kept informed of developments in this respect.

892. The Committee further notes that the Government has provided no reply to the allegations that Mr Sarta bin Sarim was placed under preventive detention for three months (from 1 May to 1 August 2007) in degrading conditions, was physically abused during custody, was not informed of the charges brought against him for 40 days (from 1 May until 10 June 2007, i.e. one day before the court hearing and, still, was informed of the charges in their entirety only after the court hearing), faced obstacles in communicating with his lawyer and family, and was on two occasions denied conditional release by the police (and not a court of law). The Committee recalls that preventive detention should be limited to very short periods of time intended solely to facilitate the course of a judicial inquiry [**Digest**, op. cit., para. 78]. It should moreover, be accompanied by safeguards and limitations: (1) to ensure, in particular, that it is not extended beyond the time absolutely necessary and that it is not accompanied by measures of intimidation; (2) to prevent it being used for purposes other than those for which it is designed and, in particular, to exclude torture and ill-treatment and give protection against situations where the detention is unsatisfactory from the viewpoint of sanitation, unnecessary hardship or the right to defence [**Digest**, op. cit., para. 80]. The Committee further emphasizes the importance of the principles according to which anyone who is arrested should be informed, at the time of the arrest, of the reasons for the arrest and should be promptly notified of any charges brought against her or him [**Digest**, op. cit., para. 99]. Detained trade unionists, like anyone else, should benefit from normal judicial proceedings and have the right to due process, in particular, the right to be informed of the charges brought against them, the right to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing, and the right to a prompt trial by an impartial and independent judicial authority [**Digest**, op. cit., para. 102].
893. While welcoming Mr Sarta bin Sarim's release, the Committee considers that this decision in no way addresses the damages he may have suffered nor the reasons behind the preventive detention, which should be clarified in order to avoid recourse to such measures in the future. The Committee requests the Government to carry out an independent investigation into the allegations of grave human rights violations against Mr Sarta bin Sarim (arrest without judicial warrant for normal trade union activities, prolonged preventive detention by the police in degrading conditions, physical abuse during custody, refusal to inform him of the charges, obstacles in communicating with his lawyer and family, denial of conditional release by the police and not a court of law) and, if the allegations are found to be true, to take the necessary measures to compensate Mr Sarta bin Sarim for any damage suffered and to punish those responsible so as to

prevent the repetition of such acts. The Committee requests to be kept informed of developments in this respect.

- 894.** *The Committee further notes from the allegations, that Mr Sarta bin Sarim faced six years' imprisonment under section 160 of the Criminal Law on "instigation" and one year imprisonment under section 335 of the Criminal Law on "unpleasant acts" (the Government only refers to the latter). The Committee notes with deep regret that the Government does not provide a reply to the complainant's allegations according to which, these "flexible" provisions, especially that of section 335, have been used many times in the recent past to imprison human rights and trade union activists; upon conviction, trade union leaders face adverse consequences and, in particular, the prospect of losing their jobs, based on sections 158 and 160 of the Manpower Act No. 13 of 2003. According to the complainant, these provisions are used to ensure that trade union leaders face marginalization and social exclusion which, in addition to the harsh treatment faced during custody, may intimidate them into abandoning their trade union activities.*
- 895.** *In this respect, the Committee recalls that while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists [**Digest**, op. cit., para. 72]. Moreover, one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment. The Committee requests the Government to take all necessary measures to repeal or amend sections 160 and 335 of the Criminal Code on "instigation" and "unpleasant acts" so as to ensure that these provisions cannot be used abusively as a pretext for the arbitrary arrest and detention of trade unionists. The Committee requests to be kept informed of developments in this respect.*
- 896.** *Finally, the Committee notes that Mr Sarta bin Sarim's release was due to his having served the sentence imposed by the District Court of Tangerang, having found him guilty of the charge of committing "unpleasant acts". This has given rise to the appeal undertaken by the KSBSI. The Committee requests the Government to keep it informed of the outcome of the appeal lodged by the KSBSI against this decision and to communicate the text of the ruling handed down on appeal.*
- 897.** *The Committee also requests the Government to provide information on the current employment condition and trade union status of Mr Sarta bin Sarim.*
- 898.** *The Committee reminds the Government that ILO technical assistance is at its disposal if it so wishes.*

## **The Committee's recommendations**

- 899.** *In the light of its foregoing conclusions, the Committee requests the Governing Body to approve the following recommendations:*
- (a) The Committee requests the Government to carry out an independent investigation into the allegations of grave human rights violations against Mr Sarta bin Sarim (arrest without judicial warrant for normal trade union activities, prolonged preventive detention by the police in degrading conditions, physical abuse during custody, refusal to inform him of the charges, obstacles in communicating with his lawyer and family, denial of conditional release by the police and not a court of law) and, if the allegations are found to be true, to take the necessary measures to*



---

*compensate Mr Sarta bin Sarim for any damage suffered and to punish those responsible so as to prevent the repetition of such acts. The Committee requests to be kept informed of developments in this respect.*

- (b) Recalling that while persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists, the Committee urges the Government to:*
- (i) issue appropriate instructions to prevent the danger of trade unionists being arrested by the police for normal trade union activities, like, for instance, peaceful May Day processions and, moreover, without judicial warrants having been issued;*
  - (ii) repeal or amend sections 160 and 335 of the Criminal Code on “instigation” and “unpleasant acts” so as to ensure that these provisions cannot be used abusively as a pretext for the arbitrary arrest and detention of trade unionists;*
  - (iii) take all the necessary measures to educate the police in relation to its action in industrial relations contexts.*

*The Committee requests to be kept informed of developments in this respect.*

- (c) The Committee requests the Government to keep it informed of the outcome of the appeal lodged by the KSBSI against the decision of the District Court of Tangerang having found Mr Sarta bin Sarim guilty of committing “unpleasant acts”, and to communicate the text of the ruling handed down on appeal.*
- (d) The Committee requests the Government to provide information on the current employment condition and trade union status of Mr Sarta bin Sarim.*
- (e) The Committee reminds the Government that ILO technical assistance is at its disposal if it so wishes.*

CASE NO. 2575

REPORT IN WHICH THE COMMITTEE REQUESTS  
TO BE KEPT INFORMED OF DEVELOPMENTS**Complaint against the Government of Mauritius  
presented by  
the General Workers' Federation (GWF)**

*Allegations: The complainant alleges that the process leading to the setting up of a new bargaining structure, called the National Pay Council/Committee (NPC) by the Government, as well as this body's composition, mode of designation of representatives and objectives, violate Conventions Nos 87 and 98*

- 900.** The complaint is contained in a communication from the General Workers' Federation (GWF) dated 21 June 2007.
- 901.** The Government sent its observations in a communication dated 3 August 2007.
- 902.** Mauritius has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 903.** In its communication dated 21 June 2007, the General Workers' Federation (GWF) alleges that the Government of Mauritius decided to set up a National Pay Council/Committee (NPC) on 9 April 2007, thus abolishing the National Tripartite Committee on Salary Compensation (the National Tripartite Committee), a tripartite bargaining structure which had existed for more than 30 years, and was entrusted with determining the salary compensation granted to workers on the basis of the annual rise in the rate of inflation as indicated in the consumer price index. In sum, according to the complainant, the setting up of the NPC is contrary to Conventions Nos 87 and 98 in that: (i) it has not been subject to any proper consultation and on the contrary, it has been the outcome of authoritative, manipulative and abusive processes; (ii) the new bargaining structure will cease to grant an annual salary compensation to compensate workers for the loss of purchasing power based on the inflation rate and will subsume the annual salary compensation to a so-called "yearly minimum increase" where the inflation rate is only one out of four other criteria – namely, "national ability to pay", "national productivity and competitiveness" and "employment and unemployment rate"; the direct impact of such a fundamental change is a reduction in the annual salary compensation granted to workers and an overall salary reduction, thus undermining the capacity of workers to earn a decent wage and decent living standard; (iii) the composition and the mode of designation of union representatives in the new bargaining structure has been carried out so as to favour the employers' side (ten representatives – five from the employers' side and five from the Government as public employer); this gives undue power for the Government to interfere in the nomination of trade union representatives and designate a non-independent chairperson, with the aim of reducing drastically the salary compensation; (iv) when the totality of the union movement pointed out the above issues to the authority, the latter chose to nominate five of its political agents as trade union representatives in the new bargaining structure

and imposed a drastic reduction in the rate of salary compensation granted to workers for 2007.

- 904.** The complainant then provides a brief explanation of the wage determination mechanism of Mauritius and the function of the National Tripartite Committee which was entrusted with wage determination prior to the introduction of the NPC. The National Tripartite Committee, instituted in 1977, was the outcome of intense negotiations and struggles between unions, Government and employers at that time. The National Tripartite Committee, composed of representatives of Government, employers and trade unions, had acted as a quasi-bargaining structure and recommended the quantum of salary compensation based solely on increases in the consumer price index for 30 years until 2006. In that framework, the Government limited its role to that of an arbitrator between employers and employees and subsequently enacted legislation known as the Additional Remuneration Act, to give statutory power to the recommendations of the National Tripartite Committee. Thus, it enforced the payment of a salary compensation which is also referred to as a “cost of living allowance” to all workers, without any sectoral distinction.
- 905.** In Mauritius, there is no national statutory minimum wage. Collective bargaining structures and processes are quasi non-existent due to the legislative framework imposed by the Industrial Relations Act (IRA). On the other hand, there are different state-controlled bodies to determine minimum wages and working conditions in different sectors. There is the Pay Research Bureau which conducts periodic revision for public and parastatal workers. The National Remuneration Board establishes the different minimum wages and working conditions for different areas of the private sector, after taking into consideration factors such as productivity, capacity of employers to pay and other relevant economic factors. These different minima for private sector workers are given statutory power by the regulations made by the Minister under the IRA. There are actually 30 different remuneration orders proclaimed by the minister establishing 30 different wage minima for 30 industrial undertakings, covering more than 80 per cent of private sector employees. The difference between the statutory minimum of one sector and the other is relatively large. For example, the statutory minimum of a factory worker of the free zone sector, the largest economic sector of the country is Rs2,525.55 and that of another factory worker is Rs4,205.761. The difference between the public and private sectors is also considerable.
- 906.** The aim of the annual salary compensation for the last 30 years was to re-establish part of the loss in purchasing power due to the rise of the inflation rate, of ALL workers, of ALL work sectors. Thus the 30 remuneration orders governing minimum wages in the private and public sectors were adjusted annually after the enactment of the Additional Remuneration Act, which itself was a product of negotiations carried out through the National Tripartite Committee. The newly established NPC, with its new criteria, is undermining the annual adjustment of different minima for different work sectors to the detriment of workers.
- 907.** The complainants hold the view that the new system will reduce the quantum of compensation by around 50 per cent. For example, a worker with a basic salary of Rs6,000 was granted less than 50 per cent compensation in 2007. The percentage of compensation for public sector workers has been further reduced. An average public sector worker of the education sector was paid 2.6 per cent compensation in 2006, when the inflation rate was 5.1 per cent and 2.8 per cent compensation in 2007, when the rate of inflation was 10.7 per cent for the financial year 2006–07.

- 908.** During the last 30 years, the ceiling upon which the inflation rate was applied has always been on an upward trend. It was only last year that the Government unilaterally operated a drastic reversal of this tendency. The institution of the NPC aims at institutionalizing this unilateral reversal.
- 909.** The complainant stresses the fact that the salary compensation exercise has helped enormously to maintain social peace and cohesion by protecting workers against rising inflation and allowing them to recover some of the windfall gains derived by major economic sectors due to the systematic national currency depreciation.
- 910.** The complainant then focuses on what it describes as unilateral, manipulative and abusive processes by the Government. According to the complainant, during recent years, employers had on several occasions pressured to dismantle the National Tripartite Committee and promoted its replacement by another body that would take into account notions like productivity, capacity to pay of employers, etc. Nonetheless, no government and political parties had acceded to this demand so far. The complainant adds that the issue never figured in the political manifesto of the governing party in the last general elections, which took place in July 2005, so that there is no democratic mandate for such an intervention.
- 911.** Despite this, in May 2006, during the 2006 meeting of the National Tripartite Committee, the Minister of Finance took the unilateral decision to abolish it and impose a new mode of calculation of salary compensation which halved the average compensation granted to workers for year 2006–07, the rate of inflation being 5 per cent and compensation granted being 2.5 per cent. The Minister announced that the difference would have to be negotiated at sectoral level. The reality is that more than 95 per cent of workers did not get any compensation above the 2.5 per cent granted by the Government. One month later, the Minister of Finance unilaterally announced the abolition of the National Tripartite Committee. In the budget speech 2006–07, he stated the following: “... we are abolishing the present Tripartite mechanism for wage compensation and setting up a National Wage Council [note: which was to become the NPC]. This new organization will retain the spirit of tripartism and will ensure that the level of wages and compensation are linked to productivity and to capacity to pay”.
- 912.** According to the complainant, since the day of this unilateral announcement, the Government and the Ministry of Labour and Industrial Relations have adopted unilateral, abusive and even manipulative processes to impose the NPC, thus proceeding to a drastic alteration of the annual wage adjustment mechanism.
- 913.** In this regard, the complainant provides the following chronology of events. After the Minister of Finance budget statement, the Cabinet of Ministers endorsed two decisions on labour laws and the NPC at its deliberations on 28 July and 4 August 2006 respectively. On 28 July, Cabinet “agreed to the setting up of a ministerial committee to review the proposals made and provide policy directions with regard to further changes that would need to be brought to the new legal framework which is to replace the Industrial Relations Act, to make it more attuned to the new economic environment”. On 4 August 2006, the Cabinet of Ministers instituted a High-Powered Committee, chaired by the Deputy Prime Minister, and Minister of Public Infrastructure, Land Transport and Shipping, in view of “setting up of the National Wages Council [which was to become the NPC], based on the recommendations of Professor Lim Chong Yah’s report [i.e. an earlier report rejected by previous governments] with a view to determining wage increases ...”.
- 914.** In an official correspondence sent by the Ministry of Labour and Industrial Relations to all confederations and federations on 29 August 2006, in the midst of national outcry against the budget of the Minister of Finance, mention was made to the setting up of the

---

ministerial committee decided on 28 July 2006 but not to the decision of 4 August 2007 on setting up the “National Wages Council”. The letter only mentioned that the objectives of the ministerial committee were “to consider proposals made to provide policy decisions for the new legal framework to replace the IRA”.

- 915.** Since the letter sent on 29 August 2006, the Ministry of Labour convened trade union confederations and federations to several meetings on “labour law reform”. At no time was the issue of the setting up of the NPC on the official agenda of the meetings. Unions were convened to a meeting on 18 September 2006, with the agenda being “review of the Industrial Relations Act”. Other convening letters had the agenda “labour law reform”. The Minister or its officials used these meetings to sometimes sneak in the issue of NPC in vague terms and on all these occasions, unions had unanimously objected to the process.
- 916.** On 29 November 2006, the Minister of Labour convened a new meeting with trade union confederations to present the “salient features” of the new legislation to replace the IRA. The NPC never figured among the “salient features” of the proposed Act neither in the official paper distributed to the unions, nor in the Minister’s comments during the meeting.
- 917.** The complainant adds that while all the unions were waiting for an official draft on the new legislation to replace the IRA to be circulated, the Minister decided to call a new meeting on 22 December 2006 (letter dated 19 December 2006). The unions could not attend the meeting, given that all unions and the opposition parties were involved in a national action in relation to hunger strikes of workers. On 22 December 2006, the very same day that the Minister convened the unions, he also gave press statements. To the utter surprise of all trade union organizations of the country, the Minister announced that the “salient feature” *changement majeure* of the new law to replace the IRA will be the institution of a “National Wages Council” to determine annual salary compensation on the basis of criteria other than the inflation rate, as from 2007! This statement was reported in the press on 22 and 23 December 2006.
- 918.** On 3 January 2007, a new meeting was convened, once again, the official agenda being “labour law reform”, a tactic well understood by that time by the unions. The unions therefore protested against the tricky and dishonest procedures through which the issue of the NPC was being raised with them. Even at this meeting, neither the official terms of reference nor the composition and the mode of functioning or designation of representatives of the NPC were mentioned or circulated.
- 919.** Following this meeting, all union confederations and federations of the country sent an official letter to the Minister stating that unions “opposed any attempt to link the long overdue changes to the IRA to the institution of a National Wages Council based on the Lim report. The Government’s persistence in pursuing such a linkage is synonymous to a mere blackmail of workers of the country, who have hard fought for democratic changes to be brought to the repressive Industrial Relations Act. We are officially informing you that the trade union movement will henceforth participate ONLY in ‘consultation’ on the replacement of IRA, not on the introduction of the NWC. This means that the trade union movement WILL NOT participate in any meeting if the said NWC is linked to the replacement of the IRA.”
- 920.** The Minister nevertheless convened the unions to a meeting on 5 February 2007, where again the issue of the NPC was not specifically included in the agenda, the official agenda being “labour law reform and other related matters”, but was yet again raised by the Minister. The Minister said that the Government was delinking the issue of the NPC from the IRA, and was going ahead with the institution of the NPC “administratively”! Instead of coming with a new legislation draft to make the IRA compatible to Conventions Nos 87 and 98 and then hold proper discussions and seek consensus on a new mechanism to

determine annual salary compensation, the Minister decided to impose the NPC and delay the new legislation on the IRA. In the said meeting, no official document was communicated to unions about the objectives, the mode of functioning, the composition and the mode of designation of the NPC for discussion and counter proposals.

- 921.** Instead, more than two months later, in a letter dated 9 April 2007, the Ministry of Labour informed unions of its unilateral decision to set up the NPC. The very letter, through which unions were for the first time officially informed of the terms of reference, composition and the mode of designation of the NPC, requested the confederations and federations to submit names to be “nominated” to the NPC within four days.
- 922.** On 13 April 2007, replying to the Ministry’s letter, the unions objected strongly to the unilateral and manipulative procedures, as well as to the objectives, composition and mode of designation of the said NPC. The unions unanimously pointed out that the objective of the NPC constituted an unacceptable alteration of their working conditions and that transforming the annual salary compensation granted on the basis of inflation into a “yearly minimum increase” for which new criteria would be applied, would have the effect of impoverishing workers and pensioners and that this would result in a definite decrease of real wages or payments. Unions also objected to the composition of this new quasi-bargaining structure in which the employers’ side will have ten representatives (five from the Mauritius Employers’ Federation and five from employers’ representatives in the Public Sector). Unions objected to the choice of the chairperson who has for the last 10–15 years been an official representative of employers. They also objected to the fact that the union representatives were being designated by the Minister. Unions stated that in these conditions, they are not in a position to submit names for “nominations”, even more so since the very notion of “nominations” by the Minister constitutes a violation of trade union rights.
- 923.** On 16 April 2007, the Minister convened a meeting, again without the NPC on the agenda. After raising general points on the new IRA and Labour Act, he decided to sneak in once again the issue of the NPC. When the unions questioned him about the omission, he replied that he was dealing with the same subject. The union representatives disagreed with the procedure adopted and voiced their opposition against the matter quite forcefully. While some of the unions were still in the meeting with the Minister, a new letter was faxed to all unions giving a new ultimatum to all trade union confederations and federations (there are 15 in Mauritius) to submit names for nominations by the Minister. Replying to criticism on the absence of consultations, the Ministry stated that the issue was “intimated” to the unions in previous meetings – a clear admission that there had been no proper consultations. In addition, none of the unions’ fundamental objections were taken on board.
- 924.** Finally on 4 May 2007, the public and unions were informed by the press that the Government had designated five persons to be the representatives of trade unions in the NPC, all of whom were its political agents who openly campaigned for the governing party at the last general elections. The people who have been selected by the Government come from five small unions which represent not more than 2 per cent of the organized workforce in the country, thereby openly choosing to ignore completely the opinion and views of 98 per cent of the working people. Some of those selected are not even executive committee members of a union. They have now all been expelled or suspended by their respective confederation and federation after the scandalous nominations. In addition, the chairman of the NPC was from the side of the employers and has represented employers in many tripartite committees for quite a number of years. It must also be added that at no time the views of the unions were sought in this regard.

**925.** The reason given by the Government for the above, is that there was an emergency in the setting up of the NPC so as to grant workers an annual salary compensation for year 2007; this reason does not stand because the National Tripartite Committee ought to have been called as usual, until proper consultations and consensus is reached by all parties on a new mechanism. The rate of inflation in Mauritius in year 2007 is the highest in the last 15 years, being 10.7 per cent. This inflation rate is in parallel with a massive depreciation of the rupee which on the one hand, has further impoverished workers and on the other hand, has enriched the employers from the main economic sectors. As clearly planned by the Government since the budget speech, after the setting up of the NPC with political nominees, the NPC recommended to grant salary compensation well below the inflation rate for the average salary. Unions estimate that the labour force has lost at least 4 billion rupees with the new mechanism, thus undermining and impoverishing the labour force. While on the other hand, major exporting sectors besides benefiting from under-compensation, benefited some 10 billion rupees as windfall gains derived from the massive depreciation of the rupee.

**926.** In conclusion, the complainant states that the above facts constitute gross violations of ILO Conventions Nos 87 and 98:

- No proper consultation has been carried out to set up a new bargaining structure, even more so as this new bargaining structure has a direct negative impact on the standard of living of workers; changing a bargaining or tripartite structure which has existed for more than 30 years, ought to have followed the same procedures as with the introduction of new legislation. That is, an official draft of the proposed changes should have been given to unions at least one month before implementation so as to enable proper discussions and negotiations on changes that affect the interest of workers and their conditions of employment. In addition to constituting a violation of Conventions Nos 87 and 98, the above also constitutes a flagrant violation of the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113).
- The institution of the NPC represents a modification without the consent of the unions of an historical agreement concluded 30 years ago, on a fundamental issue pertaining to workers' purchasing power. The imposition of the NPC and the unilateral introduction of new criteria such as "productivity" and "capacity to pay" in determining national wages adjustment represents an annulment and forced renegotiation of an historical agreement, contrary to Convention No. 98. Moreover, in Mauritius, compensation granted for loss of purchasing power has always only been applied to workers' basic salary, and not to other components of workers' wages related to productivity criteria (production/productivity bonus, attendance bonus, etc). Furthermore, "productivity" and "capacity to pay" criteria can only be dealt with at sectoral collective bargaining processes, as productivity and capacity to pay differs from one sector to the other, while inflation rate is nationwide.
- The Government has used its position in an abusive way to alter a bargaining structure in which it also actually and directly acts as an employer. It is evident that it is the Government itself which has designated the composition of the NPC when in fact it ought to act as an arbitrator as it had always done during national consultations on salary compensation. Thus, by refusing to negotiate with the union movement and then proceed to nominate its political agents in the NPC, the Government has breached Article 2(2) of Convention No. 98, acting in a manner designed to promote workers' organizations under the domination of employers or employers' organizations. Finally, by nominating its political agents in the NPC, the Government has acted in a manner that discriminates against all workers and their independent unions, who have not publicly supported the governing party in the last general elections.

- For the complainant, it is clear that the Government is honouring its undertaking with the World Bank and the IMF and companies which have financed the present ruling alliance in the last elections. Given the massive discontent in the country against the abolition of salary compensation based on the inflation rate, the Government has adopted authoritative, abusive and manipulative procedures to change in a unilateral and fundamental manner the salary compensation mechanism in the country.
- Finally, the Government has not yet amended the IRA as recommended by the Committee a few years back. This legislation is in total contradiction with ILO Conventions Nos 87, 98 and 144. Instead of implementing the recommendations made by the Committee, it has chosen to introduce the NPC which will definitely contribute to worsen industrial relations, violate the rights of workers and bring down their standard of living.

**927.** The complainant attaches numerous documents in support of its complaint. It requests the Committee to recommend: dissolution of the NPC which was instituted unilaterally in violation of ILO Convention No. 98; amendment of the IRA in line with the recommendations previously made by the Committee on Freedom of Association; exclusive use of the inflation rate criterion to determine the national wage adjustment, so as to re-establish workers' purchasing power; other criteria such as productivity and capacity to pay, should be used at the level of sectoral collective bargaining and sectoral minimum periodical adjustments of remuneration orders (private sector) and Pay Research Bureau (public sector); reinstatement of the previous National Tripartite Committee to determine nationwide wage adjustment based on the inflation rate, pending an agreement with the union movement on an alternative mechanism.

## **B. The Government's reply**

**928.** In its communication dated 3 August 2007, the Government states that for a number of years and up to June 2006, the quantum of salary increase to compensate workers for the rise in the cost of living was determined at an annual National Tripartite Committee meeting in May chaired by the Minister of Finance and Economic Development. Ministers of finance have claimed to have always factored in the state of the economy and the ability of firms to pay in deciding on the quantum of compensation payable. Being an employer and also a constituent of that tripartite forum, the Government has been perceived as acting as both judge and party when deciding on the quantum of the compensation.

**929.** In an ILO study carried out in 1986 on government regulation of wages and industrial relations in the private sector, the following observations were made by the consultants:

... it does not appear that the cost of living allowance (COLA) decisions have been closely aligned with such macroeconomic considerations as balance of payments positions, the levels of employment and unemployment, or productivity movements as indicated by real GNP per capita or other measures.

- (ii) Any sharp worsening of the Mauritian terms of trade or change in the international competitiveness of Mauritian exporters is likely to upset the present basis for Cost of Living Allowance decisions. In such a context, the present system is likely to place a tremendous responsibility on the government. With the main wage adjustment decisions being part of the political process, rather than the outcome of collective bargaining and a direct exposure to market forces, it is not evident that Cost of Living Allowance decisions would be made sufficiently responsive to changing economic conditions.

**930.** In March 2000, a tripartite delegation led by the then Minister of Finance and including also a representative each of the three trade unions confederations, i.e. the Mauritius Labour Congress, the National Trade Union Confederation and the Mauritius Trade Union



Congress, went to Singapore to study that country's experience in the management of industrial relations in a competitive economy, especially in the context of determining the future wages and salaries policy in Mauritius. It was reported that there was consensus among the various stakeholders of the Mauritian delegation that a new salary compensation mechanism had to be worked out, based on the Singapore model but modified to suit Mauritius, and for the new mechanism to take into consideration factors like GDP growth, productivity and the need for Mauritius to stay competitive vis-à-vis other countries. It was felt that workers would derive more benefits when long-term interest overrides short-term gains.

**931.** In 2002, the Government commissioned Professor Lim Chong Yah of Singapore to conduct a study on the existing legal, regulatory and institutional frameworks governing wage determination in Mauritius. In his report, Professor Lim Chong Yah stated, inter alia, the following:

- (a) The Tripartite Committee determines the cost-of-living adjustment (COLA), also known as additional remuneration payment, based on changes in CPI. However, any major cost of living adjustment is itself an invitation to a vicious cycle of pay chasing prices chasing pay.
- (b) .... workers are well rewarded when the economy is performing badly, such as in the aftermath of a cyclone, and receive small pay increases when the economy is doing well. This is contrary to the basic dictum that workers should benefit from the economic progress of the country.
- (c) The annual round of the Tripartite Committee should cease to raise wages based only on CPI increases.

**932.** This report was referred to the National Economic and Social Council, which is the apex consultative body regrouping all stakeholders, for views and the trade union representatives on the Council rejected the report. In view thereof, no further action was taken on the report.

**933.** With regard to the setting up of the National Wage Council, the Government indicates that in the budget speech for financial year 2006–07, it was announced that the National Tripartite Committee mechanism determining annual wage compensation would be abolished and replaced by a National Wage Council which would retain the spirit of tripartism and would ensure that the level of the compensation was also linked to productivity and capacity to pay. The budget 2006–07 was voted in Parliament without any amendment being brought to the proposed establishment of the National Wage Council. Besides, in the recurrent budget for 2007–08, the estimated expenditure in respect of the operating expenses of the National Pay Council – NPC (which replaced the National Wages Council) was voted by the National Assembly.

**934.** On consultations with the stakeholders, the Government indicates that as the review of the labour laws, that is the Industrial Relations Act and the Labour Act, was ongoing, the Ministry of Labour and Industrial Relations considered it advisable to make appropriate provisions in the legislation which is to replace the Industrial Relations Act (IRA), for the establishment of the NPC.

**935.** There were already ongoing consultation meetings on the labour law reforms with employers and workers. At the first such meeting after the budget speech, held on 18 September 2006, with the trade union Common Platform (comprising all the federations of trade unions), the Minister of Labour, Industrial Relations and Employment informed the trade unions representatives of the proposed replacement of the National Tripartite Committee by a new mechanism which would remain tripartite and which would take on board other factors such as productivity. The Trade Union Common Platform

representatives expressed their disagreement to the proposed setting up of the National Wage Council. It is to be noted, however, that of the three representatives of the General Workers' Federation who were present at that meeting, only one intervened but did not make any observation on the proposed setting up of the NPC (the Government attaches a copy of the minutes of the meeting which was sent to all present).

- 936.** Another meeting was held on 29 November 2006 with the representatives of the trade union confederations to discuss the salient features of the new legislation replacing the IRA. At that meeting the Minister of Labour, Industrial Relations and Employment also provided information on the setting up of the NRC, that is, that it would be tripartite and be presided by an independent chairperson and would comprise five representatives of workers, employers and Government. The NPC would make recommendations on the annual compensation payable, based on rises in the cost of living, on productivity and capacity to pay. During the meeting the trade union representatives insisted that the consumer price index should be isolated from the other factors determining the quantum of the increase to be granted. They also expressed the wish to have another meeting with the Minister to discuss further the proposals concerning the NPC (the Government attaches a copy of the minutes of the meeting).
- 937.** At a meeting with the three confederations of trade unions held on 3 January 2007, the Minister again informed of the Government's proposal to replace the annual tripartite meeting by the NPC, as already announced in the budget speech and in previous meetings, and that the NPC would take into consideration the inflation rate and also other factors such as productivity, capacity to pay, etc. (the Government attaches a copy of the minutes of the meeting).
- 938.** The stated purpose of all meetings convened during that period had been for discussion of the labour law reforms as, at that stage, the NPC was to be part and parcel of the new legislation to replace the IRA. It was not deemed necessary in the circumstances to make specific mention of the NPC in the convocation letters to these meetings.
- 939.** While giving due consideration to the matter, on 26 January 2007 the Government decided, in view of the fact that the review of the labour laws would not be completed by June 2007, by which time the compensation for 2006–07 had to be finalized, that:
- (a) the National Wage Council be set up administratively in the first instance and be renamed National Pay Council – NPC;
  - (b) the NPC be constituted of five representatives of Government, five representatives of employers to be appointed following consultations with the Mauritius Employers' Federation and five representatives of workers to be appointed following consultations with workers' organizations;
  - (c) the NPC would make recommendations with regard to a yearly minimum wage increase taking into consideration, inter alia, the:
    - (i) rise in consumer price index;
    - (ii) national ability to pay;
    - (iii) national productivity and competitiveness;
    - (iv) employment and unemployment rate;

- (d) the NPC would submit its recommendations to Government and, once approved, these recommendations would be given force of law to ensure compliance by all concerned.

**940.** In maintaining other economic factors besides the increase in the consumer price index, the Government was inspired also by the provisions of Paragraphs 11 and 13 of ILO Recommendation No. 135 on minimum wage fixing which stipulate the following:

*V. Adjustment of minimum wages*

11. Minimum wage rates should be adjusted from time to time to take account of changes in the cost of living and other economic conditions. ...

13(1). In order to assist in the application of Paragraph 11 of this Recommendation, periodical surveys of national economic conditions, including trends in income per head, in productivity and in employment, unemployment and underemployment, should be made to the extent that national resources permit.

- 941.** In Mauritius, adjustment taking account changes in the cost of living and other economic conditions was made on an annual basis under the National Tripartite Committee and this has not changed under the new system.
- 942.** In a meeting held on 5 February 2007, the Minister of Labour, Industrial Relations and Employment informed the trade union representatives that Government had opted to set up the NPC administratively. The trade union representatives were given the opportunity to express their views. One of the trade union representatives moved that no further discussion be held on the issue, since all the trade unions were against the setting up of the NPC (the Government attaches a copy of the minutes of the meeting).
- 943.** The Government subsequently took steps to identify an independent person with the appropriate profile to chair the NPC. Once this issue was finalized, the federations of trade unions and the employers were invited, on 9 April 2007, to submit by 13 April the names of their representatives who could be appointed as members of the NPC. The employers submitted the names of their five representatives while the federations of trade unions collectively informed the Minister, in a letter dated 13 April 2007, that they would not be submitting any names as they were not agreeable to the setting up of the NPC.
- 944.** In view of the stand of the trade unions, the Minister of Labour, Industrial Relations and Employment met the representatives of the three confederations on 16 April 2007 and made an appeal to them to reconsider their position. A letter was also issued to them on the same day for submission of the names of their representatives by 19 April 2007 at latest. In a letter dated 18 April 2007, the federations of trade unions collectively informed the Minister that they maintained their decision not to be represented on the NPC. Despite the appeal which the Minister made to the federations of trade unions even to participate in the Council under protest, they maintained their stand.
- 945.** In line with its publicly announced policy on the matter and, given the urgency to determine the quantum of compensation and make necessary budgetary provision for the compensation to be payable as from 1 July 2007, the Government decided to proceed with the setting up of the NPC. Appropriate steps were taken to ensure that despite the refusal of the federations of trade unions, workers' interests were duly taken on board at the level of the NPC. Representatives of trade unions and one federation which had expressed willingness to serve on the NPC were appointed. There are currently 339 registered trade unions in Mauritius, but they only represent around 20 per cent of workers.

- 946.** The Government's decision to proceed with the setting up of the NPC is in line with the observations of the Committee of Experts on the Application of Conventions and Recommendations in its General Survey of 1982 on tripartite consultation Convention No. 144, to the effect that:

... in the first place, the views expressed in the course of consultations are not a form of participation in decision making but simply one stage in the process of reaching a decision. During the preliminary work on the instruments concerned, the Office accordingly observed that it was a generally accepted principle that the outcome of the consultations should not be regarded as binding and that the ultimate decisions must rest with the Government or legislature, as the case may be.

The Committee of Experts has maintained the same observations in its General Survey of 2000 and has further observed that the public authorities "are not bound by any of the opinions expressed and remain entirely responsible for the final decision".

- 947.** In making alternative arrangements for the appointment of workers' representatives on the NPC, the Government was guided by the observations of the Committee of Experts in its General Survey of 1992 on wage-fixing machinery, that is:

... it is left to the employers and workers concerned or their organizations to appoint their representatives on the bodies that in one way or another take part in the fixing of minimum wages. This does not prevent the competent authorities, in certain cases where the organizations concerned have made no appointment, from designating representatives of the said organizations on the minimum wage-fixing bodies.

- 948.** With regard to the complainant's contention that the defunct National Tripartite Committee recommended the quantum of salary compensation based solely on the CPI increase, the Government replies that this contention is not correct. The rates of compensation were decided by Government in the light of other factors as indicated above. In fact, the rates of compensation awarded in past years have not always reflected the actual increase in the CPI, which implies that other economic factors have been taken into consideration.

- 949.** As for the allegations of violations of Conventions Nos 87 and 98, the Government indicates that there have been extensive consultations on the setting up of the NPC, although consensus could not be reached. Attention is drawn to the fact that the NPC is not a bargaining structure as such. It is a mechanism which allows all parties to present their case, all relevant technical data to be collected and analysed so that appropriate recommendations can be made to the Government. The final decision rests with the Government. The NPC is also expected to meet regularly to take stock of the evolution of the economic situation to be in a better position to make informed recommendations to the Government in due course. The new legislation to replace the IRA will provide for the proper mechanism for collective bargaining. Moreover, the setting up of the National Tripartite Committee 30 years ago was an initiative of the Government and not the result of any agreement with trade unions or employers. In response to the needs of the new economic situation and in the light of the observations made by various consultants, the Government decided to change the system, favouring a more structured approach for the determination of the annual compensation. There has not been any breach of section 2(2) of Convention No. 98, as alleged. As indicated earlier, the trade unions were constantly informed of developments regarding the proposed NPC and they were, not once but twice, invited to be represented on the NPC. There was even a verbal appeal made by the Minister of Labour, Industrial Relations and Employment to them to attend under protest. The trade unions indicated that they were not prepared to discuss the issue any further and flatly refused to form part of the NPC. There is no reason to believe that the five workers' representatives who expressed willingness to serve on the Council have in any manner forfeited their independence of thought or action.

950. The Government finally indicates that the recommendations of the NPC for compensation payable for 2006–07 have been endorsed in toto by Government and have been very well received by workers generally, employers and the public at large. The rate of compensation payable has, in fact, created a feeling of optimism and confidence, a positive mood in the country.

### C. The Committee's conclusions

951. *The Committee notes that the background of this case concerns the longstanding efforts to amend the Industrial Relations Act, with ILO technical assistance, pursuant to the conclusions and recommendations reached by this Committee in Case No. 2281 concerning Mauritius (333rd Report, paras 613–641). During the last examination of the follow-up to its recommendations, the Committee noted that past efforts made to amend the IRA had not resulted in the adoption of legislation based on broad consensus of social partners and that the Government was considering the drafting of a new bill, based on the proposals made by employers' and workers' organizations, as new issues had surfaced during discussions. The Committee had expressed the hope that these efforts would be vigorously pursued by all parties, and that the Government would do its utmost to ensure adoption of a legislation that was in full conformity with Conventions Nos 87 and 98 [342nd Report, paras 132–137].*

952. *The Committee notes from the facts presented to it in this case, that in that context, the Government undertook consultations on labour law reforms. The present complaint concerns the introduction in these consultations of an unagreed element, namely, changes in the system of minimum wage setting which had been in place in Mauritius for the last 30 years, and furthermore, the Government's decision to eventually stop pursuing consultations on this matter, introduce the amendments administratively and appoint workers' representatives coming from outside the representative workers' organizations in the newly established wage-setting body.*

953. *The Committee notes that the complainant alleges that by setting up the National Pay Council/Committee (NPC) on 9 April 2007, the Government violated an historical tripartite agreement which had been in force for some 30 years so as to guarantee social peace in the country. The essential premise of this agreement was that the National Tripartite Committee on (Annual) Salary Compensation (National Tripartite Committee) would determine wage adjustments on the basis of the consumer price index annual rise in the rate of inflation. The newly created NPC would, on the contrary, determine a minimum wage compensation based not only on the inflation rate but also on criteria such as "national ability to pay", "national productivity and competitiveness" and "employment and unemployment rate". The complainant emphasizes that these changes which led to an overall salary reduction were carried out without any proper consultation and on the contrary, through authoritative, manipulative and abusive processes; it emphasizes in particular, that in accordance with standard practice, an official draft of the proposed changes should have been given to unions at least one month before implementation so as to enable proper discussions and negotiations on changes that affect the interest of workers and their conditions of employment. The complainant considers moreover that criteria such as "productivity" and "capacity to pay" can only be dealt with through sectoral collective bargaining processes or through the numerous bodies which exist for the determination of minimum wages at the sectoral level; productivity and capacity to pay differ from one sector to the other, while the inflation rate is the same nationwide and it is therefore appropriate to determine the relevant wage adjustment at the national level. Furthermore, the complainant objects to the composition and the mode of designation of union representatives in the new bargaining structure which it considers favours the employers' side (ten representatives – five from the employers and five from the Government side as public employer) and gives undue power to the Government to*

*interfere in the nomination of trade union representatives and designate the chairperson of this body, whereas beforehand, the Government had always played a neutral role. Indeed, according to the complainant, the chairperson is an employer representative and has been active during the last 10–15 years in representing employer interests in tripartite bodies. Moreover, the complainant emphasizes that at no time were the views of the unions sought in this regard. The very letter through which unions were for the first time officially informed of the terms of reference, composition and the mode of designation of the NPC, requested the confederations and federations to submit names to be nominated to the NPC within four days. Finally, the complainant emphasizes that when the totality of the union movement pointed out the above issues to the authority, thus refusing to nominate representatives in the NPC, the Government nominated five of its political agents as trade union representatives; these come from five small unions which represent not more than 2 per cent of the organized workforce in the country; some of those selected are not even executive committee members of a union since they were all expelled or suspended by their respective confederations and federations after the scandalous nominations.*

- 954.** *The Committee notes that according to the Government, the creation of the National Tripartite Committee 30 years ago was based on a government initiative and was not the result of any agreement with trade unions. In response to the needs of the new economic situation, and in the light of the observations made by various consultants, the Government decided to change the system, favouring a more structured approach for the determination of the annual compensation. The rates of compensation were never decided upon exclusively on the basis of the rate of inflation and the Government always took into consideration other economic factors when making such a determination, on the basis of the recommendations of the National Tripartite Committee. The establishment of a new body [initially named National Wage Council and later on National Wage Commission and then National Pay Commission (NPC)], was announced in the budget speech for financial year 2006–07. The Minister of Labour, Industrial Relations and Employment informed the trade union representatives of the proposed replacement of the National Tripartite Committee at the meetings of 18 September and 29 November 2006 and 3 January 2007, in the framework of discussion of the labour law reforms. Provisions on the NPC were to be inserted in the draft legislation which would replace the IRA. However, on 26 January 2007, the Government decided to set up the NPC administratively, and not by law, and to determine the issues of its composition and functioning; the reason for this was that the review of the labour laws would not be completed by June 2007, by which time the compensation for 2006–07 had to be finalized. The unions were informed of this decision on 5 February 2007 and given the opportunity to express their views. On 9 April 2007 they were invited to submit, by 13 April, the names of their representatives to be appointed as members of the NPC. Given that the unions refused to appoint representatives, the Minister of Labour, Industrial Relations and Employment appointed representatives of trade unions and one federation which had expressed their willingness to serve on the NPC; on the issue of representativeness, the Government adds that the 339 registered trade unions in Mauritius only represent around 20 per cent of workers.*
- 955.** *The Committee would first refer to the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), Paragraph 1 of which provides that measures should be taken to promote effective consultation and cooperation between public authorities and employers' and workers' organizations without discrimination of any kind against these organizations. In accordance with Paragraph 5 of the Recommendation, such consultation should aim at ensuring that the public authorities seek the views, advice and assistance of these organizations, particularly in the preparation and implementation of laws and regulations affecting their interests [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 1068]. It is important that consultations in future take place in good faith, confidence and mutual respect, and that the parties have*

sufficient time to express their views and discuss them in full with a view to reaching a suitable compromise. In particular, in view of the implications for the standard of living of the workers of the Government's wage policy in general, the Committee has pointed out the importance it attaches to the effective promotion of consultation and cooperation between public authorities and workers' organizations in this respect, in accordance with the principles laid down in Recommendation No. 113, for the purpose of considering jointly matters of mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions [**Digest**, op. cit., para. 1087]. The process of consultation on legislation and minimum wages helps to give 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 [**Digest**, op. cit., para. 1076]. Thus, any decisions concerning the participation of workers' organizations in a tripartite body should be taken in full consultation with all the trade unions whose representativity has been objectively proved [**Digest**, op. cit., para. 1090].

**956.** *The Committee regrets that the consultations with the social partners were unilaterally interrupted without giving sufficient time to fully discuss the views of the parties and give every opportunity to arrive at a common position. It also regrets the allegations to which the Government has not replied, that consultations were carried out without having given the social partners a copy of the draft legislation in question, as the lack of a written text unavoidably limits the scope of possible discussion and a clear understanding of all the issues that may need to be addressed. The Committee also regrets the allegations that the chairperson of the new body cannot be considered to be a neutral party, having the confidence of all parties concerned, to which the Government has not replied. Finally, the Committee regrets that faced with the unions' denial to participate in the newly created NPC, the Government unilaterally appointed representatives from trade unions and one federation representing not more than 2 per cent of the organized workforce. The Committee recalls in this regard that any decisions concerning the participation of workers' organizations in a tripartite body should be taken in full consultation with all the trade unions whose representativity has been objectively proved [**Digest**, op. cit., para. 1090]. The Committee also notes with regret that contrary to the effective administrative introduction of the NPC, the amendments to the IRA requested by the Committee in earlier cases, have still not been adopted. The Committee therefore requests the Government to conclude the revision in consultation with the social partners as soon as possible.*

**957.** *In view of the fact that the NPC has been established and functioning for more than a year, the Committee requests the Government to take a renewed initiative aimed at full and frank consultations with representatives of the social partners whose representativity has been objectively proved, with a view to holding in-depth discussions on ways and means to improve the functioning, composition and objectives of the NPC so as to arrive at a conclusion in this regard, which is satisfactory to all parties concerned. The Committee requests to be kept informed of developments in this respect.*

## **The Committee's recommendation**

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

*The Committee requests the Government to take a renewed initiative aimed at full and frank consultations with representatives of the social partners whose representativity has been objectively proved, with a view to holding in-depth discussions on ways and means to improve the functioning, composition and objectives of the NPC so as to arrive at a conclusion in this regard, which is satisfactory to all parties concerned. The Committee requests to be kept informed of developments in this respect.*

CASE NO. 2536

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

**Complaint against the Government of Mexico  
presented by  
the Puebla State Independent Union of Education Workers (SETEP)**

*Allegations: The complainant organization alleges that the authorities have refused its registration as a trade union since 2004 in violation of ILO Convention No. 87*

- 959.** This complaint is contained in a communication from the Puebla State Independent Union of Education Workers (SETEP) dated 20 September 2006. This organization sent additional information in a communication dated 15 February 2007. The Government sent its observations in a communication dated 17 September 2007.
- 960.** Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 961.** In its communications of 11 December 2006 and 15 February 2007, SETEP alleges that on 20 September 2004 it held an assembly in which it was established as an independent trade union separate from the official union (National Union of Education Workers) which initiated the procedures for registration as a trade union on 1 October 2004. SETEP adds that after eight months, it was notified that its registration had been refused. It therefore appealed to the federal court seeking protection of constitutional rights (*amparo*), which was granted (*amparo* case No. 824/2005). Subsequently, the Puebla State Arbitration Court, Mexico, continued to refuse registration. In the face of this explicit refusal by the said court, the federal court instructed it to issue a new decision. This again refused registration, indicating that the State Public Service Workers Act only recognized the existence of a sole trade union.
- 962.** Faced with this renewed refusal, SETEP again sought *amparo* protection from the federal court, attacking the State Public Service Workers Act as unconstitutional (Fourth District Court, *amparo* case No. 478/2006), but the federal courts stayed the case, arguing that the person who filed the appeal did so as Secretary General, when a new executive committee of the organization had been elected (despite the fact that the minutes of the meeting containing the decisions empowering the said person to initiate the *amparo* proceedings were annexed). This situation is the result of complicity between the labour authority of the



Government of Puebla State and the official trade union, which have done everything possible to drag out the proceedings.

- 963.** SETEP adds that it has asked the local legislative body to amend article 62, section V, of the Puebla State Public Service Workers Act to revoke the prohibition of establishing more than one trade union and to allow the free establishment of trade unions in the Puebla State, but there was no positive response. In the opinion of SETEP, the present situation violates the National Constitution and Convention No. 87.
- 964.** In its communication of 15 February 2007, the new Secretary General of SETEP indicates that the complaint submitted to the Committee of Freedom of Association continues and sends the documentation on the administrative and judicial decisions since 2004 on the matter set out in this complaint.

## **B. The Government's reply**

- 965.** In its communication of 17 September 2007, the Government states that on 1 October 2004, Mr Alejandro Luna Blanco, Mr Mauro Tomás Silicia Jiménez and Ms Susana Villalobos Mantilla, representing themselves as Secretary General, Organization and Propaganda Secretary and Minutes and Decisions Secretary of SETEP, respectively, requested its registration as a trade union in the Puebla State Local Conciliation and Arbitration Board. On 29 November 2004, the local board declared that it did not have the necessary competence, and ordered the documentation to be referred to the Puebla State Arbitration Court. On 4 February 2005, the Puebla State Arbitration Court admitted the application for registration No. 1/2004, but declared that it was not competent to hear it. It therefore ordered it to be referred to the Collegiate Labour Court of the Sixth Circuit to determine which was the competent authority. The Collegiate Court decided that the Puebla State Arbitration Court was competent to decide the application for registration of SETEP as a trade union.
- 966.** The Government adds that on 21 June 2005, the Puebla State Arbitration Court refused the application submitted by SETEP, because it considered that the promoters did not comply with the provisions of article 365, paragraphs I, II, III and IV, of the Federal Labour Act, because the documentation submitted was not duly authorized by the trade union representatives in accordance with the provisions of the final part of article 366 of that Act. These legal provisions state:

Article 365. Trade Unions must be registered with the Secretariat of Labour and Social Security in cases where they have federal competence and with conciliation and arbitration boards for those with local competence, for which purpose they shall submit in duplicate:

- I. an authorized copy of the decision of the constituent assembly;
- II. a list showing the No., names and addresses of its members and the name and addresses of the employers, companies or establishments in which they provide their services;
- III. an authorized copy of the statutes; and
- IV. an authorized copy of the minutes of the assembly which elected the executive board.

The documents to which the foregoing paragraphs refer shall be authorized by the Secretary General, the organization secretary and the minutes secretary except as otherwise provided in the statutes.

Article 366. Registration may only be refused:

- I. if the trade union does not fulfil the purpose set out in article 356;
- II. if it was not formed with the No. of members set out in article 364; and
- III. if it does not present the documents to which the previous article refers.

If the requirements established for the registration of trade unions are satisfied, none of the authorities concerned may refuse it.

If the authority to which the application for registration is submitted does not decide within sixty days, the applicants may request it to give a decision, and if it does not do so within the three days following the filing of the request, it will be deemed to be registered for all legal purposes, and the authority shall be obliged within the three days following, to issue the respective certificate.

- 967.** Contrary to the foregoing, those promoting the union filed an appeal for *amparo* No. 824/2005 in the Fourth District Court in Puebla State. The *amparo* court is the final appeal court for the majority of judicial and administrative proceedings including over legislative questions, so as to safeguard the entire national legal order against violations by any authority, provided that such violations have an actual, personal and direct effect on the rights of a legal person, whether individual or collective. On 18 August 2005, the Fourth District Court held that SETEP has produced the originals and copies for registration, whereby it requested the registration of the trade union, the minutes of the assembly, the list of workers, the minutes of the meeting of the State Executive Committee Meeting, and the statutes of the said trade union, which contain the signatures of the Secretary General, the Organization Secretary and Minutes Secretary, and it was held that those signatures granted their authorization in the said documents, since the law did not provide for a specific form for such authorization. In the light of the foregoing, the Fourth District Court, granted the promoters *amparo* and protection of the federal court, with the effect that the Arbitration Court should set aside the decision of 21 June 2005, and, instead, issue another which accepted the documents presented by SETEP as complying with the provisions of article 365 of the Federal Labour Act and should proceed with its registration.
- 968.** The Puebla State Arbitration Court filed for review No. 179/2005 against the decision of the Fourth District Court in Puebla State in the Collegiate Labour Court of the Sixth Circuit. As the appeal was not allowed, the judgement of the Fourth District Court remained final.
- 969.** On 8 November 2005, the Puebla State Arbitration Court entered an innominate motion for prior and special pronouncement on the existence of impediments to complying, in full, with the order of the Fourth District Court in Puebla State. The Arbitration Court alleged that it was impossible in law for it to do so, among other things, because it could not be required to apply article 365 of the Federal Labour Act in complying with the order of the Fourth District Court, on the grounds that the said provision has the same requirements for the registration of a trade union as article 62 of the Puebla State Public Service Workers Act.
- 970.** The Fourth District Court held this proceeding as unfounded because it considered that the provisions of the Federal Labour Act and the Puebla State Public Service Workers Act were the same, as both Acts contained the same requirements concerning the documentation for registration of a trade union. For that reason, it ordered the Arbitration Court to continue with full jurisdiction with the proceedings for obtaining trade union registration under article 62, paragraph V, of the Puebla State Public Service Workers Act, which states as follows:

Article 62. Trade Unions in the State Service shall be registered by the Arbitration Court, for which purpose they shall submit in duplicate:

...

V. The Arbitration Court, on receiving the application for registration, shall determine by such means as it considers practical and efficient, whether the applicant is the sole trade union association, or it has the majority of workers in the State, so as to proceed, if applicable, with its registration.

- 971.** In compliance with the decision of the Fourth District Court of Puebla State, on 15 December 2005, the Puebla State Arbitration Court requested the Secretary of Public Education of Puebla State to ascertain whether SETEP was the only trade union association which existed as such between education workers employed by the Secretariat or whether, on the contrary, general agreements of conditions of work with another trade union association existed, and to inform it of the number of workers belonging to it. It also ordered the Puebla State and Decentralized Agencies Public Service Workers' Union to provide information on the number of their members, and ordered the Secretary General of the Arbitration Court to carry out a search of the Register of Trade Union Associations on the number of trade unions registered there.
- 972.** The Puebla State Arbitration Court informed the Fourth District Court in Puebla State of this situation. On 13 January 2006, the Fourth District Court issued a decision in which it held the order of 25 August 2005 in the *amparo* case No. 824/2005 to have been fulfilled. The said court informed the promoters of the union accordingly, giving them three days to respond, but as they did not do so, the Fourth District Court held that the Arbitration Court had essentially complied with the *amparo* judgement.
- 973.** In a letter of 19 January 2006, Mr Alejandro Luna Blanco, Mr Mauro Tomás Silicia Jiménez and Ms Susana Villalobos Mantilla presented a document stating that they did not agree with the reasoning whereby the Fourth District Court in Puebla State held that the Arbitration Court had essentially complied with the *amparo* judgement in case No. 824/2005 on 13 January 2006. The Collegiate Labour Court of the Sixth Circuit gave a decision declaring the motion of nonconformity No. T-1/2006 of 23 February 2006 founded. Its legal reasoning states expressly:

Following this logic, the proper course is to declare the motion of nonconformity founded. In the light of this, the impugned decision must be declared inadmissible and following the lines of the present order must require the responsible authority to comply with the protecting order, to the extent set out in this decision and which basically mean that the responsible authority must complete the outstanding proceedings or orders to issue a new decision on the admissibility or otherwise of the requested trade union registration, which must, of course, be notified to the trade union being promoted. Insofar as these acts are not completed, the District Judge must insist on compliance with the order for *amparo* issuing such legal warnings as it considers relevant.

- 974.** In compliance with the abovementioned decision, on 3 March 2006, the Puebla State Arbitration Court, with full jurisdiction after evaluating the information provided by the Secretariat of Public Education of Puebla State and the National Union of State Service and Decentralized Agencies Workers of Puebla State and the Secretary General of the Arbitration Court, decided that there were no grounds for granting the registration requested by SETEP because it did not satisfy the requirements of the law set out in article 62, paragraph V, of the Puebla State Public Service Workers Act, since it did not have the majority of education workers nor was it the sole trade union association, for the following reasons:
- (a) The State Secretariat of Public Education reported that the National Union of Education Workers (SNTE), represented in that federal State by its sections 23 and 51 as having the right to conclude collective labour relations for basic workers employed by the Secretariat, is the trade union association recognized by the state government and the Secretariat. The SNTE is the sole union with which it has agreed and recognized general conditions of work. The foregoing is shown in clauses I, II and III

of the agreement in the framework of the National Agreement on Modernization of Basic Education signed on 18 May 1992 by the Governor of Puebla State and the Secretary General of the Executive Committee of the SNTE, which was approved by decree of the State Congress and published in the *Official Journal* of the State on 9 June 1992.

- (b) The Secretariat of Public Education indicated that the number of workers belonging to the SNTE in section 23 is 42,492 and in section 51, the number is 25,663, which is the vast majority compared with the 395 applications for membership shown by SETEP.
- (c) The Puebla State and Decentralized Agencies Public Service Workers' Union stated that the basic workers making up that union totalled 3,531 and that, of those, 3,424 were employed by the state authorities and the remainder, 107, worked for decentralized agencies. This shows that the Puebla State Public Service Workers' Union has a total of 3,531 workers and SETEP has only 395 members.
- (d) The Puebla State Education Act, fifth transitional provision, recognizes the SNTE, represented in Puebla State, through its sections 23 and 51, as being entitled to represent workers in labour relations in accordance with their current registration, while the Puebla State Public Service Workers Act, third transitional article recognizes the Puebla State Public Service Workers' Union, constituted by a general meeting held on 8 August 1964, thus constituting the Puebla State and Decentralized Agencies Public Service Workers' Union.
- (e) The Secretary General of the Puebla State Arbitration Court certified that the Independent College Workers' Union of Puebla State and the Puebla State Public Service Workers' Union are registered in the Government Archives, Nos 1/2000 and 1/67 respectively.

**975.** On 17 March 2006, Mr Alejandro Luna Blanco, representing himself as Secretary General of SETEP filed an appeal for *amparo* No. 478/2006 in the Fourth District Court of Puebla State, against the decision of 3 March 2006 whereby the Puebla State Arbitration Court decided that the application for registration by SETEP was not admissible. As part of the application for *amparo* No. 478/2006, Mr Alejandro Luna Blanco filed an appeal in case No. Q-16/2006 before the Collegiate Labour Court of the Sixth Circuit against the judgement of the Fourth District Court of Puebla State on 4 April 2006, in which he alleged that he was a third party prejudiced by sections 23 and 51 of the National Education Workers' Union. The Collegiate Court held the appeal to be founded on 19 May 2006, whereupon the Fourth District Court set aside the said judgement. On 19 June 2006, the Fourth District Court of Puebla State issued a decision ordering SETEP within a period of three days after notification, not subject to extension, to inform it of the results of the election of the Secretary General of SETEP for the period 2006–09, in order to pronounce itself on the possible review of a ground for inadmissibility alleged by the Puebla State Arbitration Court, i.e., that Mr Alejandro Luna Blanco did not have the power of representation that he claimed in the appeal for *amparo* No. 478/2006. SETEP filed appeal No. 26/2006 in the Collegiate Labour Court of the Sixth Circuit against that judgement. On 14 August 2006, the Collegiate Court declared the appeal unfounded.

**976.** On 20 September 2006, the Fourth District Court of Puebla State gave its judgement in the appeal for *amparo* No. 478/2006, staying the constitutional judgement because those promoting the trade union had not justified satisfactorily the power of representation claimed on behalf of SETEP. The Court thereby upheld the grounds for inadmissibility alleged by the Puebla State Arbitration Court, as laid down in article 73, paragraph XVIII, and article 4, both of the Amparo Act, which state as follows:

Article 73. The application for amparo is inadmissible:

XVIII. In other cases where the inadmissibility results from a provision of the law.

Article 4. The application for amparo may only be filed by the party prejudiced by the law, international treaty, regulation or any other act that is appealed, in person, through his representative or legal defence attorney in the case of an act which involves a criminal case, by any relative or other person in cases expressly permitted by this Act, and may only be pursued by the injured party, by his legal representative or defence attorney.

**977.** In that judgement, the Fourth District Court indicated that on 15 March 2006, the date when Mr Alejandro Luna Blanco filed the appeal for *amparo* No. 478/2006, he no longer held the office of Secretary General of SETEP. That was because on 16 March 2006, when the 21st state general meeting of SETEP was held, a new state committee was elected for the period 2006–09, headed by Ms Laura Artemisa García Chávez as Secretary General.

**978.** In the said meeting, following the declaration of the office conferred, the Secretary General-elect, Ms Laura Artemisa García Chávez submitted for approval the workplan of the new trade union administration, paragraph 1 of which stated:

1. To conclude the legal and political process of obtaining recognition of SETEP by means of the following strategies: (A) to continue the legal process initiated by Professor Alejandro Luna Blanco in accordance with the decision of the state extraordinary general meeting of 2 September 2005 and the powers conferred on me by article 24, paragraph II, subparagraphs (a) and (c) of our Statutes, Professor Alejandro Luna Blanco will continue to represent this organization in all proceedings inherent in the registration of the trade union until its full conclusion and so long as the federal and local authorities do not grant registration, he shall continue in the role in which he began the proceedings and, once the admissibility or otherwise of the registration is determined, we will inform the changes that at this date have been decided in the state administration of the union for the present administration before the corresponding labour authorities, unless a state general meeting decides otherwise ...

**979.** What is clear is that the said authorization granted by the current Secretary General to Mr Alejandro Luna Blanco to continue to exercise the office which he held at the time of submission of the application was not appropriate or sufficient for him to be recognized in law as having such authority in the appeal for *amparo* No. 478/2006. This is because under article 24, paragraph II, subparagraphs (a) and (c), of the statutes of SETEP, the Secretary General of the state executive committee, in addition to the powers indicated, shall have the following rights:

- (a) To grant general or partial powers, with or without substitution clauses, to members of the legal committee or such persons as they deem appropriate, for trade union matters; and also to revoke the powers granted by himself, other executives or other organs of the trade union, whether or not in office or have ceased to hold office.
- (c) To select and accredit members of SETEP to collaborate in its union committees of an administrative, technical, manual and management character.

**980.** Consequently, the Fourth District Court of Puebla State determined that the Secretary General did not have the power to grant the authorization in question in the terms that she did, since under this provision, she can extend general or partial powers as described above, revoke powers granted previously by her or by other organs of the trade union, and designate members of the union to collaborate on various committees, but the authorization she claimed to justify the power to act in *amparo* case No. 478/2006 was not contemplated in any of these cases.

**981.** Mr Alejandro Luna Blanco filed appeal for review No. R-186/2006 in the Collegiate Labour Court of the Sixth Circuit against the decision of the Fourth District Court of Puebla State on 20 September 2006. On 10 November 2006, the Collegiate Court upheld the decision of the Fourth District Court.

**982.** On 5 December 2006, in giving effect to the decision of the Collegiate Labour Court of the Sixth Circuit with respect to review No. R-186/2006, the Puebla State Arbitration Court stated that it had stayed *amparo* case No. 478/2006, of the Fourth District Court of Puebla State, filed by Mr Alejandro Luna Blanco, and that the decision it had given on 3 March 2006, in which it ordered that the trade union registration requested by SETEP should be refused, remained final.

**983.** The Government concludes by indicating that:

- The facts indicated by SETEP in its communication do not constitute failure by the Government of Mexico to comply with the principles of freedom of association and the right to organize enshrined in ILO Convention No. 87.
- The information provided shows that SETEP was not prevented from freely exercising its right to form a trade union. It was not prevented from exercising its right to draw up its statutes and regulations freely to elect its representatives, organize its administration and activities or formulate its action programme. Neither was the acquisition of legal personality by SETEP subject to conditions which by their nature limit the application of the provisions of articles 2, 3 and 4 of the Convention, and finally, neither Mexican law or practice diminished the guarantees set out in the said instrument.
- In this respect, SETEP, as a trade union organization, held its 21st state general meeting to elect a new state committee for the period 2006–09, led by Ms Laura Artemisa García Chávez as Secretary General on 16 March 2006. That meeting also approved the workplan of the union’s new administration.
- It was on the basis of the provisions of article 24, paragraph II, subparagraphs (a) and (c), of SETEP’s own statutes that the Fourth District Court in Puebla State had to stay *amparo* case No. 478/2006, as the Secretary General of the State executive committee did not have the power to grant, the way she did, the necessary authorization to Mr Alejandro Luna Blanco to pursue the said appeal.
- The members of the state committee had legal personality to apply to the labour and legal authorities to assert the rights of SETEP. A clear example is the *amparo* and protection granted by the Fourth District Court in Puebla State to the applicants in *amparo* case No. 824/2005, when the Court held that the law did not provide for any special formality for the Secretary General, Organization Secretary and Minutes Secretary to authorize the documents accompanying the application for registration.
- In the case of *amparo* case No. 478/2006, this could not be admitted because Mr Alejandro Luna Blanco was no longer a member of the state committee by a decision of the SETEP state general meeting of March 2006, and he did not have the authority to pursue it in accordance with the law.
- SETEP was able to assert its rights before the competent legal authorities, exercising the corresponding legal actions and, as applicable, the appeals and means of recourse established in the legal system.

### C. The Committee's conclusions

984. *The Committee observes that in this complaint, the complainant organization, SETEP, which comprises education workers in the State of Puebla, alleges that the authorities, in particular the Puebla State Arbitration Court, refused its inscription and registration as a trade union organization since it was established in October 2004. SETEP indicates that, although legal appeals had decided otherwise, the federal judicial authority finally stayed the case arguing that the person who signed the appeal for amparo no longer held the office of Secretary General of the union (the new committee of SETEP indicated, however, that it was continuing with the complaint submitted to the Committee on Freedom of Association and with the application for trade union registration). According to SETEP, there is already an official trade union and the legislation prohibits there being another.*
985. *The Committee notes the Government's statements from which it seems that the judgement of the Fourth District Court holding that the SETEP documents complied with the provisions of the legislation became final although the Puebla State Arbitration Court alleged in an objection that it was impossible for it to comply fully with the judgement. Based on this objection, the Arbitration Court was authorized to continue with the proceeding to obtain the trade union registration established in article 62, paragraph V, of the Puebla State Public Service Workers Act (to examine whether "the applicant is the sole trade union association or has the majority of workers in the State"). In this regard, the Arbitration Court asked SETEP to respond within three days, which it did not do. The Arbitration Court decided not to grant the registration as SETEP did not satisfy the requirements of article 62, paragraph V, above (having a majority of education workers and not being the sole trade union association). In particular, there are other trade unions: the SNTE which is the signatory of the collective agreement and the Puebla State and Decentralized Agencies Public Service Workers' Union which have the vast majority of members compared with SETEP. The subsequent appeals by SETEP were submitted by a person who no longer held the office of Secretary General following the election of the new committee in March 2006, and the judicial decision of December 2006 refusing registration of SETEP remained final.*
986. *The Committee regrets that the question of the registration of SETEP has dragged on from October 2004 to 2006, when the judicial authority ordered that it should not be granted in a decision that became final in December 2006, invoking problems of the (continuity of) representation of the applicant party.*
987. *With regard to the substance, the Committee observes that the principal reasons for not granting registration lay in the previous judicial appeals, in application of article 62, paragraph V, of the Puebla State Public Service Workers Act, whereby registration requires having the majority of workers in the state and there not being another trade union organization ("it must be the sole trade union association"). In this respect, observing that the new committee of the complainant trade union continues to seek registration, the Committee wishes to emphasize that this provision is in flagrant violation of Convention No. 87, Article 2 of which enshrines the right of all workers to form such organizations as they deem appropriate. The Committee also recalls that a provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied the right to join the organization of their own choosing, contrary to the principles of freedom of association [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 328].*

**988.** *In these circumstances, the Committee requests the Government to take measures to ensure that the competent local authorities grant without delay the registration of SETEP irrespective of its greater or lesser representativeness, and to amend the legislation of Puebla State such that it does not impose as a condition on state workers the non-existence of a representative trade union in order to be able to register a trade union.*

### **The Committee's recommendations**

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

*(a) The Committee requests the Government to take measures to ensure that the competent local authorities grant without delay the registration of SETEP irrespective of its greater or lesser representativeness, and to amend the legislation of Puebla State such that it does not impose as a condition on state workers the non-existence of a representative trade union in order to be able to register a trade union.*

*(b) The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2541

DEFINITIVE REPORT

### **Complaint against the Government of Mexico presented by the General Federation of State and Municipal Workers (FGTEM)**

***Allegations: Irregularities on the part of the authorities in the procedure for electing the worker member of the conciliation and arbitration board of the state of Jalisco with responsibility for the public sector***

**990.** The complaint is contained in a communication from the General Federation of State and Municipal Workers (FGTEM) of December 2006. The Government sent its observations in a communication dated 18 September 2007.

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

#### **A. The complainant's allegations**

**992.** In its communication of December 2006, the FGTEM, an organization of unions of workers serving the state of Jalisco, Mexico, as well as its municipalities and decentralized public bodies, alleges that on 5 December 2006 a convention was held for the purpose of electing a worker representative to Local Conciliation and Arbitration Board No. 11, with responsibility for decentralized public bodies and state and municipal workers, further to the corresponding meeting summons issued by the State Governor and Government Secretary-General, calling for the registration of all of the workers' organizations.



993. The FGTEM adds that, together with 14 trade union organizations of public bodies belonging to the Federation, it attended the convention with a total of 10,900 votes on the registered voting list, following a reduction by the Secretariat of Labour of the number of voters on the union lists. Also attending were 22 trade union organizations belonging to the Federation of Employees serving Jalisco and its Municipalities (FESESEJ), the governmental federation, which receives economic and political support from the State Government and had 6,389 voters registered with the Secretariat of Labour, with no subsequent reduction being made in its lists.
994. The official from the Secretariat of Labour illegally allowed the presence at the convention of a person representing, as a delegate, nine transport unions from the municipality of Puerto Vallarta, without there being any union belonging to any decentralized public body in that locality, with a total of 9,000 votes. According to the FGTEM, the said transport unions from the municipality of Puerto Vallarta should have taken part in Local Board No. 2, which is the one responsible for private transport enterprises. The purpose of its participation was to boost, in an illegal, unlawful and fraudulent manner, the number of votes pertaining to the governmental organization FSESEJ. The government of the state of Jalisco, through the Secretariat of Labour, enabled the participation of these workers, despite the objections made by the representatives of the FGTEM organizations (the documents used to draw up the list of those workers lack an official stamp beside the signature which is assumed to be that of the Secretary of Labour, in addition to which they lack the date of acknowledgment of receipt on both sides as was required of the other organizations).
995. In view of the fact that the objection raised during the convention by the FGTEM representatives was illegally overruled, it was requested that a public notary be brought in to draw up a report of the irregularities occurring during the Board No. 11 convention. However, the public notary was prevented from doing so by the law enforcement officers.

## **B. The Government's reply**

996. In its communication of 18 September 2007, the Government states that none of the facts that are recounted in the communication presented by the FGTEM establish the alleged failure on the part of the Government of Mexico to abide by the principle of freedom of association and right to organize enshrined in the Convention in question. The FGTEM alleges that, on 5 December 2006, during the course of the state convention held to elect the worker representative to Special Local Conciliation and Arbitration Board No. 11 of the state of Jalisco, with responsibility for workers in decentralized public bodies and their outsourced state and municipal services, the Secretary of Labour and Social Insurance of Jalisco – in his capacity as organizing official – reduced, without any apparent grounds for doing so, the list of registered FGTEM voters, while at the same time registering voters belonging to the FESESEJ, without ascertaining whether they met the legal requirements, and registering the vote of nine trade union organizations not belonging to the decentralized public sector.
997. In this regard, the Government draws attention to the context in which the events referred to by the FGTEM took place and points out that conciliation and arbitration boards are bodies responsible for resolving disputes between capital and labour. Each of them is made up of an equal number of workers' and employers' representatives plus one representative of the Government (article 123, section "A", subsection XX of the Political Constitution of the United Mexican States). There are two types of conciliation and arbitration board. On the one hand, there is the Federal Board of Conciliation and Arbitration, which hears and resolves labour disputes arising between workers and employers, workers and workers or employers and employers, within the context of labour relations in the industrial and enterprise branches as foreseen in article 527 of the Political Constitution of the United

Mexican States. On the other hand, there are local conciliation and arbitration boards in each of the 31 federative entities and in the Federal District, with responsibility for hearing and resolving labour disputes not falling within the purview of the Federal Conciliation and Arbitration Board (articles 604 and 621 of the Federal Labour Act). The workers' representatives and employers' representatives on the federal and local conciliation and arbitration boards are elected during conventions which are organized and held every six years (article 648 of the Federal Labour Act). The Governor of the state or head of government of the Federal District is empowered, when the needs of labour and capital so require, to establish one or more local conciliation and arbitration boards in a given location and with responsibility for a given territory.

**998.** The Government states that, in accordance with article 652 of the Federal Labour Act, the workers' representatives on federal and local conciliation and arbitration boards are elected during conventions by delegates who have been previously designated, in accordance with the following rules:

- (1) the right to designate delegates to conventions lies with:
  - (a) duly registered workers' unions; and
  - (b) non-affiliated workers having provided services to an employer for a period of no less than six months during the year preceding the date of the call to the convention, where there are no registered unions;
- (2) they shall be considered registered members of workers' unions when:
  - (c) they are providing services to an employer; and
  - (d) they have provided services to an employer for a period of six months during the year preceding the date of the call to the convention;
- (3) non-affiliated workers as referred to in section 1(b) above shall designate a delegate in each enterprise or establishment; and
- (4) delegates' credentials shall be issued by the respective union executive committee or by the one designated by the non-affiliated workers.

**999.** It will be seen from the foregoing that the FGTEM's allegations relate to events that supposedly took place during the election of the workers' representatives to sit on Special Local Conciliation and Arbitration Board No. 11 of the state of Jalisco, which is a tripartite administrative body responsible for seeking a balance among the factors of production through conciliation and the rendering of justice. The Government makes clear that at no time did the FGTEM state that it had been prevented from exercising its right to draw up its constitutions and rules, elect its representatives in full freedom, organize its administration and activities or formulate its programmes. Nor does it mention the manner in which Mexico's legislation impairs, or is so applied as to impair, the guarantees provided for in the instrument to which reference is made, the provisions in question being Articles 3 and 8 of ILO Convention No. 87, on which the federation bases its communication.

**1000.** The Government adds that the FGTEM fails to demonstrate that the authorities engaged in acts of anti-union discrimination against the workers belonging to that federation, or that the trade union members belonging to the FGTEM were required to join a specific organization or cease to be members of the one to which they already belonged. Even less so does it argue or prove that the government authorities dismissed public workers belonging to the federation or caused them any harm on account of their membership of or

affiliation to a trade union organization, or of having taken part in its normal union activities. Finally, the FGTEM in no way demonstrates that other trade union organizations of public employees in the state of Jalisco are dependent on the public authorities. Consequently, the Government of Mexico has not interfered in the establishment, functioning or internal administration of the FGTEM. If the FGTEM considered itself to have been in any way wronged by the actions of the authority in the elections for the workers' representative to Special Local Conciliation and Arbitration Board No. 11 of the state of Jalisco, the Mexican legal system allows for recourse to various means of appeal, both administrative and adjudicatory, that are available to it before the competent authorities. From the content of the FGTEM's communication there is no evidence of its having had such recourse.

### **C. The Committee's conclusions**

- 1001.** *The Committee notes that in the present case the complainant organization alleges irregularities in the process of electing the worker representative to the Local Conciliation and Arbitration Board (a tripartite body for conciliation and the rendering of justice) of the state of Jalisco with responsibility for decentralized public bodies and state and municipal workers. More specifically, the complainant organization alleges that, although having a greater number of voters within the sector, it was prevented from securing a seat on the aforementioned local board when the Secretariat of Labour – taking no account of the objections raised by the representatives of the complainant organization – allowed the participation both of a delegate with close ties to a governmental federation and of nine transport sector organizations which ought to have participated in the elections of a different local board responsible for private transport enterprises; in addition, according to the complainant organization, the documents presented by the private transport workers lacked an official stamp beside the signature which is assumed to be that of the Secretary of Labour, as well as the date of acknowledgment of receipt on both sides (as is stipulated by law and as was required of the other organizations); finally, the law enforcement officials prevented the entry of the public notary whose presence had been called for by the complainant organization in order to take note of the said irregularities.*
- 1002.** *The Committee notes the Government's statements that: (1) the allegations do not refer to the Government of Mexico or imply any violation of Convention No. 87 or any harm to public employees by reason of their trade union membership or activities; (2) the workers' representatives in conciliation and arbitration boards are elected by the delegates designated by the trade unions or non-affiliated workers of an enterprise or establishment; (3) the complainant organization has failed to demonstrate that other (allegedly "governmental") trade union organizations of public employees in the state of Jalisco are dependent on the public authorities; (4) there is no evidence in the complainant organization's communication that it has availed itself of the administrative or judicial means of appeal before the competent authorities.*
- 1003.** *The Committee observes that indeed, as the Government maintains, there is nothing to suggest that representatives of the complainant organization lodged administrative or judicial appeals against the decision by the Secretary of Labour of the state of Jalisco to allow nine transport unions to present themselves for the elections in question and to ignore the formal irregularities in the documentation referred to by the complainant organization.*
- 1004.** *The Committee regrets that the Government has not provided reports from the Jalisco labour authorities or specific information on the alleged irregularities or on the alleged use of law enforcement officials to prevent a public notary from drawing up a report in that regard, while at the same time also regrets that the complainant organization has failed to present administrative or legal appeals or adequate proof in regard to its*

*representativity and that of other organizations within the sector. The Committee observes, moreover, that it is clear from the minutes of the electoral convention (which the complainant organization attaches) that at least some of the transport unions were from the public transport sector.*

**1005.** *In these circumstances, the Committee does not have sufficient information to reach a decision on the alleged irregularities, in view of which, given the period of time that has since elapsed and the fact that the complainant organization decided not to lodge administrative or legal appeals which would have enabled determination of the factual elements necessary to permit a decision on the allegations, it has decided that examination of this case should not be pursued.*

### **The Committee's recommendation**

**1006.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that the present case does not call for further examination.*

CASE NO. 2577

DEFINITIVE REPORT

### **Complaint against the Government of Mexico presented by**

- **the Union of Workers of the National Autonomous University of Mexico**
- **the National Union of Workers of the Secretariat of Agriculture, Livestock, Rural Development, Fisheries and Nutrition**
- **the United Trade Union of Workers in the Nuclear Industry**
- **the Independent Union of Workers of the Autonomous Metropolitan University and**
- **the National Union of Education Workers – section XI – (SNTE)**

***Allegations: Unilateral imposition of new legislation governing freedom of association in violation of ILO Conventions Nos 87 and 98***

**1007.** The complaint is contained in communications of June 2007 presented by the Union of Workers of the National Autonomous University of Mexico, the National Union of Workers of the Secretariat of Agriculture, Livestock, Rural Development, Fisheries and Nutrition, the United Trade Union of Workers in the Nuclear Industry, the Independent Union of Workers of the Autonomous Metropolitan University and the National Union of Education Workers – section XI – (SNTE). These organizations submitted further information in a communication of 20 August 2007. The Government sent its observations by a communication dated 31 October 2007.

**1008.** Mexico has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## A. The complainants' allegations

**1009.** In their communications of June and August 2007, the complainant unions allege that on 28 March 2007 the Congress of the Union issued a decree law concerning the Government Workers' Social Security and Services Institute, which in practice is a new provision of domestic law of the Mexican State pertaining to the social security of government workers that constitutes both a regressive measure by comparison with the previous legislation and a piece of legislation that directly contradicts the Political Constitution of the United Mexican States and ILO Conventions Nos 87 and 98 inasmuch as it unilaterally imposes, by means of legislation, modifications of the collective labour benefits for which unions have the right to collective bargaining. The new Act omits and excludes collective labour rights and benefits, without collective bargaining mechanisms having been established with the unions of government workers; and, in particular, without any mechanism for negotiation with the unions having been established. The benefits that have been unilaterally affected by means of legislation include the following:

- *Retirement.* This right is provided for in article 123(XI)(a) of the Constitution for all government workers. However, in the Act now being challenged, this right will be accorded solely to those workers who, being in active service at the date of entry into force of the Act, agree to be bound by the provisions of transitory section 10. This implies that both those workers who are active at the date of entry into force of the Act and agree to be bound by the provisions of transitory section 13 and workers entering subsequent to the date of entry into force of the Act are denied the constitutional right to a retirement pension.
- *Rental or purchase of low-cost housing.* Article 123(XI)(f) clearly spells out this right, which is omitted under the Act being challenged through the present application for protection (*amparo*). This right was fully recognized under the previous ISSSTE Act:

*Section 3* – The following insurances, benefits and services are established with mandatory effect ... XIII. Rental or sale of low-cost housing belonging to the institute.

However, the Act approved on 28 March 2007 does not provide for this benefit, with the effect that the Act being challenged is unconstitutional on the grounds that it does not provide for even the minimum rights recognized under article 123 of the Constitution.

- *New basis for the calculation of pensions.* In its section 17, the new Act provides as follows:

*Section 17.* – The basic wage to be taken into account for the purposes of this Act shall be the wage indicated in the regional wage scale that has been drawn up for each post.

The contributions and rates established in this Act shall be applied to the Basic Wage, with the lower limit to be a Minimum Wage and the upper limit to be the amount equivalent to ten times that Minimum Wage.

It shall be the basic wage, up to the upper limit equivalent to ten times the Minimum Wage in the Federal District, which shall be taken into account for the purpose of determining the amount of the benefits payable under the occupational injury or illness, disability and life insurances established by this Act.

This approach to the calculation of pension amounts represents a significant and damaging reduction when compared with the level of protection that was afforded under the previous Act, whose section 15 provided as follows:

*Section 15.* – The basic wage to be taken into account for the purposes of this Act shall comprise solely the budgeted wage, allowance and compensation as referred to below, to the exclusion of any other benefit that the worker may receive in respect of his work.

Budgeted wage is the ordinary remuneration specified in the worker’s job description or letter of appointment in relation to the post or job in which he is employed. “Allowance” refers to additional remuneration paid to the worker in recognition of insalubrious conditions or high cost of living at the place of employment.

“Compensation” is the payment, granted on a discretionary basis in regard to amount and duration, that is made to a worker over and above the budgeted wage and allowance in recognition of exceptional responsibilities or tasks associated with his post or of special services provided, and which comes under the special heading “Additional compensation for special services”.

- *Reduction in the amount of the state-assured pension.* In addition to generally reducing the amount of pensions, the new Act provides, in its section 6(XIX), that the State will only guarantee pensions upon cessation at an advanced age or old age up to the amount of 3,034.20 pesos, whereas under the previous Act the State was responsible for the actual amount corresponding to the worker.
- *Cancellation of the right to a “lump-sum benefit”.* In none of its sections does the Act published on 31 March 2007 provide for the right to a “lump-sum benefit” (for a worker who, without having the right to a retirement pension or pension based on age and length of service, cessation at an advanced age or disability, separates from service on a permanent basis) – something which was provided for in sections 3, 87 and 88 of the previous ISSSTE Act.
- *Granting of benefits based not on the fulfilment of rights but on “results”.* The former ISSSTE Act clearly established the State’s commitment to ensuring that the Institute was able to meet its obligations vis-à-vis the workers’ rights, including in circumstances where the Institute’s assets were insufficient to satisfy those rights.

*Section 177.* – Should it at any time be the case that the Institute’s resources are insufficient to enable it to meet the obligations that are incumbent upon it under the act, the shortfall shall be covered by the agencies and entities in the proportion corresponding to each of them.

By contrast, the new Act bases the allocation of resources for the granting of benefits on commercial and macroeconomic equilibrium considerations, thereby reducing the degree to which the Institute will be in a position to protect human rights in the future.

- *An additional criterion is added for exercising the right to a retirement pension.* The new Act introduces an additional criterion to be met by workers opting to be bound by the provisions of transitory section 10 and wishing to exercise the right to a retirement pension, by requiring them to have reached a minimum age. In addition to the length of service requirement, it is now also necessary to have reached a specified minimum age for retirement, as laid down in the following transitory section:

TEN. – For those workers not opting to be credited with ISSSTE Pension Bonds the following arrangements will apply:

...

II. As from the first day of January in the year two thousand and ten:

- (a) Workers (male) having contributed for a period of thirty years or more and workers (female) having contributed for a period of twenty-eight years or more shall be entitled to a retirement pension in accordance with the following table:

Years	Minimum retirement age for male workers	Minimum retirement age for female workers
2010 and 2011	51	49
2012 and 2013	52	50
2014 and 2015	53	51
2016 and 2017	54	52
2018 and 2019	55	53
2020 and 2021	56	54
2022 and 2023	57	55
2024 and 2025	58	56
2026 and 2027	59	57
2028 and after	60	58

- 1010.** The complainant organizations emphasize that the legislative process covering the analysis, discussion, approval and publication of a reform of vital significance to the entire system of social security for government workers, involving the intervention of two legislative chambers, the Presidency of the Public, the Secretariat of Government and the Official Bulletin of the Federation, was completed in only 16 calendar days. They add that the Mexican State, in its dual role as both authority and employer, failed to submit the reform of its workers' social security system to any form of prior negotiation with the workers' organizations. In particular, it failed, before, during and after the approval of the legislative reform, to respect the right to collective bargaining of the organizations having submitted the complaint to the Committee on Freedom of Association.
- 1011.** Indeed, not only was the reform not brought before the day-to-day collective bargaining forums, but also no special representative machinery was set up for negotiation with the complainant organizations, nor with the unions of government workers as a whole, on the question of modernizing the social security system.
- 1012.** The complainant organizations go on to affirm that the Mexican State, through its legislature, had access to various mechanisms to enable consultation and negotiation with the organizations of unions as part of the legislative process. These mechanisms include the holding of forums, public consultations, round tables, hearings, etc., all of which have been widely used in the course of reform processes of lesser complexity and national significance. However, owing to the State's political decision to impose the reform at any price and in the shortest possible time, the Legislature not only failed to implement any of the said mechanisms but also expressly voted against the proposal that the legislative commissions involved in analysing the initiative should hold forums and consultations with the trade union organizations and civic leaders, as can be attested to by the legislators of the Social Security Commission who presented a work plan along those lines. Unfortunately, the Legislature likewise refused to establish a formal mechanism for dialogue with the complainant unions, which were received only by a handful of legislators on a personal basis.
- 1013.** The complainant unions point out that what took place was a fast-track reform process without any social dialogue and without adequate legislative discussion. This is a blatant illustration of the fact that the reform amounted to a legislative imposition by the political parties holding a voting majority. It needs to be pointed out that the legislative process and practice were violated in the interests of approving the Act by what has come to be known as a fast-track procedure. From the typed record of the session of the Chamber of Deputies in which the initiative was presented it can be seen that the initiative was then passed in

turn to the “Combined Commissions for Treasury and Public Spending and for Social Security”. This is a violation of the parliamentary process and practice whereby, where Combined Commissions are concerned, the matter must be brought in turn before all of the commissions which may have any interest in the subject of the initiative, with the first of those commissions being the one that will be most involved in the final drafting of the report. In this case, the commission most clearly competent to study the initiative was the Commission on Social Security, which should thus have come first. In addition to the Commission on Social Security and Treasury Commission, direct competence also lay with the Labour Commission.

- 1014.** Despite the fact that the majority of the political parties expressly contested these situations during the session, the President approved the decision to exclude the Labour Commission and to accord first place to the Treasury Commission (the manner in which the forces for and against were lined up meant that including the Labour Commission and giving first place to the Social Security Commission would have resulted in a more detailed analysis of the matter, the opening of a public consultation and, probably, the proposal’s ultimate rejection).
- 1015.** In a similar manner, only five days after the initiative was put to the commissions for study, its approval was discussed in the Chamber of Deputies, “dispensing with” the normal practice of examining the initiative on second reading; further, and as various deputies pointed out, the matter being put to the vote was a complex and far-reaching legal opinion which had been presented with only two hours’ forewarning, making it impossible to consider it in any realistic or effective manner. It is thus clear that the order of the day was to approve the Act in as short a time as possible, excluding from any dialogue or analysis not only the unions and civil society, but also the very members of the Legislature.
- 1016.** In achieving this objective, the Mexican State has violated the right to collective bargaining, to consultation prior to legal modifications, and to citizen participation, these being human rights which impose absolute limits on the State in the exercise of its legislative authority.

## **B. The Government’s reply**

- 1017.** In its communication dated 31 October 2007, the Government states, with reference to the rules on the receivability of complaints, that the facts recounted by the complainant unions in their communications fail to establish the alleged failure on the part of the Government of Mexico to abide by the principles enshrined in the two ILO instruments, for the following reasons:
- The trade union organizations and sections do not indicate in their communications that they have been prevented from freely exercising their right to establish themselves with their own legal personality and assets in order to defend the interests of their members, in the manner and on the terms that they deem necessary; nor have they been prevented from exercising their right to formulate by-laws and regulations, elect representatives freely, organize their administration and activities or draw up a programme of action. Such are the rights which these unions enjoy and which the Government of Mexico undertook to guarantee through the adoption of appropriate measures when it ratified ILO Convention No. 87 on 1 April 1950.
  - Nor do the matters raised by the union organizations and sections relate to the right to collective bargaining enshrined in ILO Convention No. 98, which, as is the case, has not been ratified by Mexico. They do not indicate that they have been inadequately protected against acts of anti-union discrimination in respect of their employment or against acts of interference by employers in their establishment, functioning or



administration; that they lack appropriate machinery for the purpose of ensuring respect for the right to organize; or that appropriate measures have not been taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between them and employers, with a view to the regulation of terms and conditions of employment by means of collective agreements.

- In addition, under its Article 6, ILO Convention No. 98 does not deal with the position of public servants engaged in the administration of the State. Thus, since some of the trade unions and their branches which lodged the present complaint are subject to article 123(B) of the Political Constitution of the United Mexican States (state administration), the provisions of that international instrument would not apply to them.

**1018.** For these reasons, the Committee on Freedom of Association should not examine these communications. However, in order to contribute in good faith to the work of the Committee on Freedom of Association, and bearing in mind that its mandate is confined to the examination of communications concerning alleged violations of the principle of freedom of association and the right to collective bargaining, we should nevertheless like to make the following comments on the communications submitted by the union organizations and sections.

**1019.** As regards the argument put forward by the union organizations and their branches to the effect that no collective bargaining took place during the examination of the Act on the Government Workers' Social Security and Services Institute (ISSSTE), published in the *Official Bulletin* of the Federation on 31 March 2007 (hereinafter "new ISSSTE Act"), the Government will begin by referring to the reasons for the reform:

- Ever since its creation in 1959, the Government Workers' Social Security and Services Institute (ISSSTE) has been providing government workers with protection in the form of social security.
- The ISSSTE had for several years been experiencing serious operational and financial problems which had resulted in a deterioration in the quality of its services and put at risk the fulfilment of its function as a pension system.
- These problems had arisen because the architecture of the ISSSTE's pension system had been surpassed by a demographic and epidemiological transition which had pushed up the operating costs, while the level of income remained unchanged.
- The pension and health funds presented a growing financial deficit, which was covered by means of fiscal transfers, placing great pressure on public finances.
- The Pensions Bill was absorbing almost the whole of the subsidy that the Government was providing to the Institution.
- This situation ultimately reached a level of unmanageable complexity, making it necessary to undertake a structural reform of the ISSSTE.

**1020.** The Government adds that, in accordance with the provisions of article 71 of the Political Constitution of the United Mexican States, the right to initiate acts of law lies with the President of the Republic, the deputies and senators in the Congress of the Union and the legislatures of the states, as can be seen below:

*Article 71.* – The right to introduce laws or decrees lies with:

- I. The President of the Republic;
- II. The Deputies and Senators in the Congress of the Union; and
- III. The Legislatures of the States.

Bills submitted by the President of the Republic, by the legislatures of the States or by deputations thereof shall be referred at once to the committee. Those submitted by deputies or senators shall be subject to the procedure prescribed in the regulations on debate.

**1021.** During the legislative process to approve the new ISSSTE Act, the federal deputies held various working meetings with legislators and representatives of workers' unions in order to hear their opinions and observations. In the statement of reasons for the "decree issuing the Act on the Government Workers' Social Security and Services Institute", published in the *Official Bulletin* of the Federation on 31 March 2007, it is stated that:

- The Mexican President, Felipe Calderón Hinojosa, called together the main representations of the government workers to discuss the challenges and options involved in building a new ISSSTE on the existing foundations, and to seek together the best ways in which to resolve the Institute's problems.
- Meetings were held with the widest possible spectrum of opinion and organizations of public sector workers, in particular with the Federation of Unions of Workers in the Service of the State (FSTSE) and the SNTE, which represent the vast majority of beneficiaries and, as such, had an in-depth knowledge of the Institute's situation.
- The negotiation process for the structural reform of the ISSSTE included popular representatives associated with the workers' organizations and with social security issues, who made valuable inputs that have been incorporated into the new ISSSTE Act.
- An agenda was drawn up which allowed for agreements not only on the diagnostic side but also in regard to the comprehensive reform that the ISSSTE needed in order to rebuild it as a new institution capable of satisfying the demands of its beneficiaries, supplying efficient services in the areas of health, housing finance and economic, social and cultural benefits, and guaranteeing that those working in the service of the Mexican State will, upon retirement, have a secure, befitting and proper income.
- In joining the project for the new ISSSTE Act, the workers' organizations set out with the common view that the Government's initial proposals, both formal and informal, for resolving the critical situation of the ISSSTE were in no way acceptable. They then demanded that the round table put aside rigid and ideology-based approaches which bypassed or undervalued the social vision with which the problem should essentially be approached, and which focused on solutions only to its financial aspect.
- One of the elements that was agreed upon in pursuing the initiative for the new ISSSTE Act was that of transparency, requiring that it be presented as being a combined exercise for the building of agreements between FSTSE, SNTE and other important trade union representations, and the Federal Government, through the Secretariat of Finance and Public Credit and the ISSSTE.
- At the insistence of FSTSE, SNTE and other workers' organizations, the following points were expressly incorporated in the ISSSTE Act:
  - (1) The ISSSTE shall not be privatized; on the contrary, endorsement is given to the Mexican State's commitment, rooted in solidarity, to the social security of its workers.

- (2) The funds for workers' retirement pensions shall be administered by a public body known as PENSIONISSSTE, and not by a private administrator.
  - (3) Pensioners and retirees shall not pay any fee in respect of the services they receive, and the federal Government shall, by law, assume the full cost of the current pension payroll.
  - (4) The present generation of workers shall have the option to receive a length-of-service recognition bond for migrating to individual accounts, without it being in any way possible for this to be made mandatory.
  - (5) The amount of the guaranteed pension is doubled.
  - (6) The parametric changes needed to strengthen the solidarity between the current and future generations of workers are situated far lower than the international average and will be applied gradually so as to reduce their impact to a minimum.
  - (7) The State will increase its mandatory contributions to social security from 19.75 to 25.145 per cent of the contributory salary.
  - (8) The State will make a specific social contribution for the purpose of improving health services, equivalent to 3.5 per cent of the contributory salary of each worker, representing an annual injection of additional resources of over 6 billion pesos under this heading alone.
  - (9) The State will make a specific social contribution for the pension fund, equivalent to 5.5 per cent of the minimum salary.
  - (10) The new generation of workers will have an individual account into which their own contributions and those of the State will be paid. At the request of the trade unions, this individual account will be increased and strengthened by means of a solidarity-based savings scheme in which, for each peso contributed by the worker, the State will contribute 3.25 pesos.
- In addition to the agreements achieved in the course of the negotiations held between the federal Government and major workers' organizations for the benefit of the Institute and its beneficiaries, a historic agreement was reached to extend social security coverage to include casual workers, for the first time and in addition to the thousands of workers regularly employed in the different state agencies and entities under fee, contract and payroll arrangements, thereby giving them and their families access to the ISSSTE's system of insurance, benefits and services.
  - The trade unions, seeing the comprehensive reform of the ISSSTE as an opportunity to construct a new institution with a genuine ability to achieve its high objectives, demanded a reform that would guarantee the institute's future viability, but that would above all enable it to meet the call for better services. On these premises, they called for and achieved a broad agreement with the federal Government, subject to the approval of the legislators, for the immediate injection of supplementary resources designed to eliminate shortcomings and enable a prompt, efficient, timely and quality response to the unsatisfied need for services for beneficiaries.
  - The new ISSSTE Act responds both to the interest of the Mexican State and to that of the workers themselves, who decided to undertake a comprehensive reform of the institute in the interests of building a new social security institution. This Act serves to balance and harmonize the legitimate interests of millions of workers and their families with those of society as a whole, which has each year been assigning

increasing volumes of resources which can and should be channelled into meeting other pressing requirements pertaining to our development.

- 1022.** The first consideration of the legal opinion issued by the Combined Commissions for Treasury and Public Spending and for Social Security of the Chamber of Deputies, in regard to the Bill on the Government Workers' Social Security and Services Institute, emphasizes the importance of recognizing that in the course of elaborating the reform account was taken of the opinions expressed by a range of interested sectors in different forums and working meetings held since 2003, with the active participation of trade unions, social leaders, governors, local and federal authorities, and deputies and senators of the Republic. Furthermore, the Congress of the Union – Chamber of Senators and Chamber of Deputies – is made up of representatives elected by the people.
- 1023.** Regarding the arguments of the trade union organizations and their branches as to the existence, further to the adoption of the new ISSSTE Act, of alleged violations of trade union rights in Mexico, consisting in the omission and exclusion of collective labour benefits, the Mexican Government affirms that that Act contains no provision which impairs or modifies the collective labour agreements, which establish bilateral rights and obligations between the parties to the agreement. The new ISSSTE Act is an instrument which governs the social security services provided by the ISSSTE to government workers, and is not intended to impose limitations on or make modifications to the terms of the collective labour agreements.
- 1024.** In all events, the new ISSSTE Act will serve as a legal foundation for the agreement, through collective bargaining, of working conditions that provide improved benefits to the parties.
- 1025.** The Government recalls the statement by the trade union organizations and sections that the right to a retirement pension will be granted only to those workers who are active as at the date of entry into force of the Act and who opt to be bound by the provisions of transitory section 10. This implies that the constitutional right to a retirement pension is denied both to those workers who are active as at the date of entry into force of the Act and who opt for the provisions of transitory section 10, and to workers entering subsequent to the entry into force of the Act. The Government declares that it refutes that argument, since both section 3 of the new ISSSTE Act and its transitory section 10 provide for retirement insurance and pension without distinction, which means that, in terms of the foregoing, the ISSSTE Act, particularly transitory sections 3 and 10 thereof, refer to the same legal concept, the conclusion being that they do not violate the guarantee established in article 123(B)(XI)(a) of the Political Constitution of the United Mexican States.
- 1026.** The Mexican Legal Encyclopaedia of the Institute for Legal Research of the Autonomous National University of Mexico defines retirement pension as follows:

RETIREMENT PENSION [*JUBILACION*]. – Pension granted to a worker or to an employee in the public service or public administration for having completed a specific number of years of service, with monthly payment of a remuneration calculated on the basis of the proportional amount of the salary or wage received.

...

In concrete terms, retirement is the cessation of any form of employment relationship with the simultaneous ending of any current contract of employment, enabling the worker to enter a state of retirement and thereby obtain a monthly annuity payment upon reaching a threshold age or having provided an employer with a specified number of years of work, be that employer an individual, a company or business, or the State.

- 1027.** From the above definition, it may be concluded that a retirement pension is the retirement benefit that is granted to a worker. This being the case, section 3 of the new ISSSTE Act, in making retirement insurance mandatory for the ISSSTE, does not contravene the provisions of article 123(B)(XI)(a) of the Constitution by the simple fact of not using the word *jubilación* (retirement pension), since, as has been shown, it corresponds to the same concept.
- 1028.** Section 3 of the new ISSSTE Act, in providing for retirement insurance, grants the right to a retirement pension, which is the retirement benefit that is granted to a worker in the form of a lifelong monthly remuneration once he or she has reached the threshold age or has served his or her employer for a given number of years.
- 1029.** Transitory section 10 of the new ISSSTE Act provides as follows:

TEN. – For those workers not opting to be credited with ISSSTE Pension Bonds, the following arrangements will apply:

- I. As from the date of entry into force of this act and until the thirty-first of December of the year two thousand and nine:
- (a) Workers (male) having contributed for thirty years or more and workers (female) having contributed for twenty-eight years or more shall be entitled to receive a retirement pension equivalent to one hundred per cent of the average amount of their basic wage in their final year of service, with receipt of such pension beginning as from the day following that on which the worker receives his final salary before separating from service; ...

This being the case, the trade union organizations and their branches are mistaken in their view that the retirement pension insurance was not included in the new ISSSTE Act, since it is clear from the statement of reasons for the “decree issuing the Act on the Government Workers’ Social Security and Services Institute”, published in the *Official Bulletin* of the Federation on 31 March 2007, that the proposal was to group the 21 insurances provided for under the previous Act, without eliminating them, into four insurances similar to those of the Mexican Social Security Institute (IMSS), with the aim of facilitating the portability of social security rights between the two institutes. These generic insurances are: (1) retirement, cessation at an advanced age and old-age; (2) disability and life; (3) occupational risks; and (4) health.

- 1030.** The fifth consideration of the legal opinion issued by the Combined Commissions for Treasury and Public Spending and for Social Security of the Chamber of Deputies, in regard to the Bill on the Government Workers’ Social Security and Services Institute states:

... consider to be well-conceived the proposal relating to the corporate and financial changes by which the services, insurances and benefits provided by the institute are grouped into four insurances similar to those operated by IMSS: (I) retirement, cessation at an advanced age and old-age; (II) disability and life; (III) occupational injury; (IV) health; as well as the social and cultural services and the Housing Fund.

This measure will put an end to the confusion that is experienced by workers migrating from one scheme to another by facilitating the transfer of rights between the two institutes. Furthermore, the 1997 reform of IMSS has proved to be an effective tool in meeting the current needs of the beneficiary population, ensuring that institute’s financial viability and safeguarding workers’ rights.

- 1031.** The pension insurance, although it is no longer referred to as such in the new ISSSTE Act, has neither been abolished nor has it disappeared, but has simply been grouped under the generic heading of “Insurance for retirement, cessation at an advanced age and old-age” with the clear and specific intention of facilitating the migration of benefits between the

IMSS and the ISSSTE when those concerned provide personal subordinate services, be it for the State or for a private enterprise.

**1032.** As regards the assertion by the trade union organizations and their branches that the new ISSSTE Act fails to provide for the rental or purchase of low-cost housing, the abrogated Act did indeed provide for such rental, with a purchase option, in line with the programmes previously approved by the executive board (section 127). Although article 123(B)(XI)(f) of the Political Constitution of the United Mexican States provides that “Workers will be allotted low-cost housing for rent or sale”, it then continues with the words “... in accordance with the previously approved programmes”. Thus, the fact that the ISSSTE Act does not expressly provide for the possibility of rental, this does not imply that any guarantee has been violated, since under the provisions of our Constitution, the executive board of the ISSSTE can, at any time, establish a rental programme. It is, moreover, to be noted that workers derive far more benefit from a programme that enables them to purchase their home than from one which merely enables them to rent it. It is to be understood that the rental of housing is not governed by the regulations of the Act, since, under article 123(B)(XI)(f) of the Constitution, such housing is provided in accordance with previously approved programmes.

**1033.** In cases where the constitutional body has intended that the Act is to make provision for a given right or obligation, it has made such provision in express terms. It is illustrative in this regard to see what is provided for in article 123(B)(IX), (XI)(b), (d) and the second paragraph of (f) and (XIV) of the Constitution.

**1034.** Furthermore, the new ISSSTE Act is in line with the constitutional precept inasmuch as its section 4 provides as follows:

*Section 4.* – The following benefits and services are established with mandatory effect:

- I. Mortgage and general financing for housing, be this for the purchase of land or existing housing, or for construction work, repairs, extensions or improvements thereto; as well as for the settlement of liabilities incurred in the course of such activities.
- II. Personal loans:
  - (a) ordinary;
  - (b) special;
  - (c) for the purchase of long-term consumer goods; and
  - (d) extraordinary, for those affected by natural disasters.
- III. Social services, consisting in:
  - (a) programmes and services providing support for the purchase of basic and consumable household products;
  - (b) tourist services;
  - (c) funeral services; and
  - (d) care services for child well-being and development.
- IV. Cultural services, consisting in:
  - (a) cultural programmes;
  - (b) educational and training programmes;
  - (c) care for retirees, pensioners and persons with disabilities; and
  - (d) programmes to foster sporting activities.

- 1035.** From the above transcription, it is clear that the new ISSSTE Act does indeed foresee the provision of workers' housing; and that is not all, since it also foresees the provision of loans to enable workers to purchase land, construct, make repairs, extend or remodel their homes and pay any debts they may have in regard to the foregoing. The aforementioned benefits are handled by the Institute's Housing Fund (FOVISSSTE), which has its legal basis in section 5 of the new ISSSTE Act.
- 1036.** As regards the assertion by the trade union organizations and their branches that section 17 of the new ISSSTE Act establishes a different basis for the calculation of pensions (the wage that is shown in the regional wage scale for each post) that represents a significant loss for the worker in comparison to what is provided for in section 15 of the previous Act (budgeted wage, allowance and compensation), the Government declares that it refutes that argument, there being no grounds for the allegation of violation since the concepts of allowance and compensation had previously been replaced by the concept of regional wage scales, which serve to establish, generally speaking, the wage that corresponds to each worker on the basis of the varying average cost of living in the country's different economic zones. Thus, in order to calculate the daily pension rate it was necessary to consider only the corresponding amount according to the regional wage scale used to establish the worker's wage.
- 1037.** The decree of 29 December 1984, published in the *Official Bulletin* of the Federation of 31 December 1984, established that the amounts that workers received by way of allowances or compensation, to which sections 35 and 36 of the Federal Act on State Employees referred, were incorporated in a single wage; in other words, regional wage scales were established which generally determine the wage that corresponds to each worker on the basis of the varying average cost of living in the country's different economic zones. Thus, in order to calculate the daily pension rate it was necessary to consider only the corresponding amount according to the regional wage scale.
- 1038.** The concept of allowance was replaced in 1984 by that of regional wage scales. Section 36 of the Federal Act on State Employees, which provided for additional compensation for special services, according to the extraordinary responsibilities or duties arising out of such special services, has been repealed, as can be seen from section 2 of the Decree reforming the Federal Act on State Employees of 29 December 1984, published in the *Official Bulletin* of the Federation on 31 December 1984. It is clear from the foregoing that the repealing of section 36 of the Federal Act on State Employees implied the elimination of the additional compensation for special services, to which paragraph 4 of section 15 of the abrogated ISSSTE Act refers.
- 1039.** Transitory section 3 of the decree by which section 36 of the Federal Act on State Employees was repealed provides that "where, in the Act on the Government Workers' Social Security and Services Institute and other legal texts, a different connotation is given to wage or salary as applicable to government workers, this shall be understood as being included under the terms of section 32 of this Act".
- 1040.** Section 32 of the Federal Act on State Employees states that:

The wage or salary laid down in the regional wage scales for each post constitutes the total wage to be paid to the worker in exchange for the services rendered, without prejudice to other benefits already established.

Where wage levels in the wage scale are equivalent to the minimum wage, they shall rise by the same percentage as the minimum wage. ...

**1041.** Similarly, section 33 of the Federal Act on State Employees provides that:

The wage or salary shall be uniform for each of the posts listed in the general catalogue of Federal Government posts, and shall be included in the regional wage scales and respective disbursement budgets.

**1042.** In the light of the foregoing, continues the Government, the definition of “basic wage” in the new ISSSTE Act is intended to be a broad reflection of the same definition of salary or wage that is given in section 32 of the Federal Act on State Employees, with the result that both have the same legal effects. Nevertheless, should an interpretation arise other than the one given here, only the terms of the aforementioned section 32 are to be applied, in accordance with the provisions of transitory section 3 of the Federal Act on State Employees.

**1043.** As regards the assertion by the trade union organizations and sections that section 6(XIX) of the new ISSSTE Act indicates that the State will only guarantee pensions for cessation of work at an advanced age or old age up to the amount of 3,034.20 pesos, whereas under the previous Act the State was responsible for the actual amount corresponding to the worker, the Government declares that it refutes that argument: the guaranteed pension is that which the Mexican State will pay to those who meet certain requirements, and its monthly amount under the new ISSSTE Act will be the equivalent of two general minimum wages for the Federal District (3,034.20 pesos), to be updated annually in accordance with the national consumer price index.

**1044.** The fact that the Mexican State, given the risk or contingency that an insured person may not accumulate adequate resources to purchase a lifetime annuity, undertakes, under the terms of the Social Security Act, to provide the necessary additional amount to enable that person to receive the guaranteed pension, is the most ample demonstration of the unquestionably reliable nature of the arrangements for retirement, cessation at an advanced age and old age.

**1045.** The Institute maintains its support in solidarity with workers with fewer resources, i.e. the federal Government protects low-income workers by ensuring that they receive a guaranteed minimum pension. The new ISSSTE Act raises the amount of the guaranteed minimum pension from one to two minimum wages, equivalent to one minimum official wage. This modification is more in line with the actual wage situation of public sector workers, who have a higher minimum wage at the lower income end of the scale.

**1046.** As regards the assertion by the trade union organizations and their branches that nowhere in the new ISSSTE Act is provision made for the right to a “lump sum”, whereas this was provided for in sections 3(X), 87 and 88 of the previous Act, the Government declares that it refutes this argument, since the lump sum is not an acquired right of active workers under the Political Constitution of the United Mexican States, given that the normative assumption is updated when workers definitively separate from service, meaning that this was an expected entitlement. The fact that the new ISSSTE Act does not provide for the granting of a lump sum causes no harm whatsoever to the trade union organizations and their branches, since:

- Under the previous Act, a worker wishing to retire had to have reached a minimum age and length of service. The new ISSSTE Act, while providing that workers retire at 60 or 65 years of age, also gives them the option of retiring before those ages provided they have sufficient funds in their individual accounts to purchase a lifetime annuity at least 30 per cent greater than the guaranteed pension.



- Under the new ISSSTE Act, workers ceasing to contribute to the ISSSTE do not lose the funds in their individual accounts, i.e. their own contributions, those made by their employer agency, the social contribution made by the State and the solidarity fund, which continue to be invested and to generate interest even though the worker is independent, in addition to which the worker will have the right to withdraw the accumulated balance upon reaching the age of 65.
- 1047.** With entitlement portability, a worker can move from public to private employment and accumulate in a single (individual) account both his/her resources and length of service. The lump sum thus ceases to have any meaning under the new arrangements, whereas previously the absence of entitlement portability made it a necessity.
- 1048.** The trade union organizations and sections assert that the new ISSSTE Act bases the allocation of resources for the payment of benefits on commercial and macroeconomic equilibrium considerations, thereby reducing the degree to which the Institute will be in a position to protect human rights in the future. However, this argument on the part of the trade union organizations and sections is unfounded inasmuch as their statements amount to purely subjective considerations lacking in legal substance. In no precept of the new ISSSTE Act is the provision of the services covered by the health insurance made conditional on the financial reserves and actuarial studies carried out by the ISSSTE; on the other hand, in order to guarantee provision of the services, section 42 lays down the manner in which the insurance is to be financed, establishing the dues to be paid by workers, contributions to be made by agencies and entities, and the daily social contribution that the federal Government is obliged to pay on a monthly basis for each worker.
- 1049.** The statement of reasons for the “decree issuing the Act on the Government Workers’ Social Security and Services Institute”, published in the *Official Bulletin* of the Federation on 31 March 2007, establishes quite clearly that the purpose of the regulations on reserves is to prevent “other insurances from absorbing resources from the medical area or vice-versa”. It also explains that “this change makes the costs and requirements of the different services transparent at all levels, at the same time ruling out cross-subsidies between insurances – a practice which has in the past led to an erosion of the resources that are essential to the maintenance and enhancement of the health services”.
- 1050.** The text of the aforementioned statement of reasons states that the functional separation between the health service provision and financial areas is in line with the aim of providing beneficiaries with better results at lower cost. This is why the new ISSSTE Act provides for such functional separation, in order to “ensure the existence of an area dedicated solely to the achievement of sound results on the medical and health side, as well as other areas with special responsibility for the financial evaluation of those actions and the adequate and equitable allocation of resources among the different providers”.
- 1051.** Indeed, the statement of reasons for the new ISSSTE Act points out that:
- To facilitate the portability of social security entitlements, the initiative groups together, without eliminating any of them, the 21 insurances, services and benefits under the current ISSSTE Act into four insurances similar to those that exist under the IMSS, plus one social and cultural services item. The four insurances are in the areas of (i) retirement, cessation at an advanced age and old-age; (ii) disability and life; (iii) occupational injury; (iv) health ...
- The statement of reasons for the new ISSSTE Act likewise states that:
- ... this includes strict regulations governing the management of reserves whereby it is prohibited to use funds from any given insurance for any other purpose, even where that purpose forms part of the institute’s objectives ...

The proposed system of reserves implies that each insurance and service accumulates the resources which correspond to it in order to meet its current and future obligations, it being prohibited to transfer resources from one heading to another ...

- 1052.** The trade union organizations and their branches state that the new ISSSTE Act introduces an additional criterion, not present in the previous Act, to be met by workers opting to be bound by the provisions of transitory section 10 and wishing to exercise the right to a retirement pension, by requiring them, in addition to the length of service requirement, to have reached a specific minimum retirement age. The Government points out in this regard that it cannot be maintained that modifying the age, length of service and amount of contributions is unconstitutional, as is argued, on the alleged grounds that the new precepts are less beneficial to workers than were those of the abrogated ISSSTE Act. In order to countenance the retroactive application of the Act in question, it has to be shown that there were acquired rights which are being undermined or curtailed by the application of a new legal instrument.
- 1053.** It is to be noted that the foregoing does not violate rights acquired by active workers, since at the time of entry into force of the new ISSSTE Act, the right to a retirement pension was still not an acquired right, since not all of the specified requirements had been met to that end, and all they actually had was the expectation of an entitlement.
- 1054.** Indeed, the Supreme Court of Justice of the Nation has reiterated its case law to the effect that where a new Act gives rise to a situation whereby those to whom it applies obtain fewer benefits than those who benefited under a previous Act, this does not imply that there is any kind of violation of the guarantees inherent in the non-retroactive nature of law, equality and the certainty of law. The court bases this reasoning on the theories of acquired rights and of legal components. This being the case, no additional consideration is introduced in regard to the previous Act to allow for the exercise of the right to a retirement pension.
- 1055.** The Government's conclusions are as follows:
- (1) The facts that are recounted by the trade union organizations and their branches in their communications do not amount to any failure on the part of the Government of Mexico to abide by the principles of freedom of association and collective bargaining enshrined in ILO Conventions Nos 87 and 98, respectively. This being so, Case No. 2577 should not be accepted for review by the Committee on Freedom of Association.
  - (2) During the process of adopting the new ISSSTE Act, each of the arguments put forward by the workers through their representatives was taken into consideration.

This is clear from the statement of reasons for the "decree issuing the Act on the Government Workers' Social Security and Services Institute", published in the *Official Bulletin* of the Federation on 31 March 2007, where it is stated that consultations were held with FTSE and SNTE, the two trade union organizations accounting for the greatest number of government workers.

The trade union organizations and their branches which lodged the present complaint do not represent a significant proportion of the workers covered by the new ISSSTE Act, an example of this being the fact the present complaint was lodged only by Committee D II-CT-04 of section 10 of SNTE and the Executive Committee and 11 delegations of section XI, whereas SNTE was consulted during the process of adopting the new ISSSTE Act.

- (3) The new ISSSTE Act does not contain any provision ordering the omission or exclusion of collective labour benefits or impairing the benefits provided for in collective labour agreements. It is an instrument which governs the social security services provided by the ISSSTE to government workers, and is not intended to impose limitations on, or make modifications to, the terms of the collective labour agreements.
- (4) The new ISSSTE Act meets the current requirements of the entire insured population and pensioners, in addition to which the reform not only improves the amount of pensions but also the level of medical and hospital care and all of the services which the ISSSTE is called upon to provide to its beneficiaries.
- (5) The Mexican legal system provides for means of appeal that can be used both by individuals and by organizations of workers who consider themselves affected by the entry into force of the new ISSSTE Act.

It is to be noted in this regard that the Supreme Court of Justice of the Nation has reiterated in its case law that where a new Act gives rise to a situation whereby those to whom it applies obtain fewer benefits than those who benefited under a previous Act, this does not imply that there is any kind of violation of the guarantees inherent in the non-retroactive nature of law, equality and the certainty of law. The court bases this reasoning on the theories of acquired rights and of the elements of legal rules.

### C. The Committee's conclusions

- 1056.** *The Committee notes that in this case the complainant unions allege the adoption of a legislative reform to the Act on the Government Workers' Social Security and Services Institute, imposed unilaterally and modifying labour benefits which ought to have been the subject of negotiation; according to the complainant unions, the legislative reform is unconstitutional and regressive by comparison with the previous legislation pertaining to retirement, the rental or purchase of low-cost housing, the basis for the calculation of pensions, the state-assured pension, cancellation of the right to a "lump-sum benefit", granting of benefits based not on the fulfilment of rights but on "results", and a new additional criterion for exercising the right to a retirement pension; according to the complainant unions, there was no negotiation or consultation with the trade union organizations either before or during the legislative process, which they also allege was tainted by irregularities.*
- 1057.** *The Committee takes note of the Government's statements challenging the receivability of the complaint on the grounds that it does not imply any failure on the part of the Government to abide by the principles of Conventions Nos 87 and 98 or to apply Convention No. 98 (not ratified by Mexico) to officials working in the state administration. Concerning the substance of the complaint, the Government emphasizes that prior negotiations were held with the public sector unions, including the Federation of Unions of Workers in the Service of the State and the National Union of Education Workers – both of them majority organizations – (only one of the SNTE committees is a complainant in the present case), which succeeded through agreements in having ten points included in the bill, as detailed by the Government; the Government likewise asserts that the Chamber of Deputies took account, as from 2003, of the opinions of – among other actors – the unions and social leaders. The Government argues, moreover, that there is no truth in the allegation as to the omission or exclusion of collective labour benefits or in the alleged regression in the areas referred to by the complainants, and emphasizes that the Act neither impairs nor modifies the collective labour contracts or constitutes an obstacle to the granting of increased benefits by agreement of the parties, and that the reform, moreover, improves the amount of pensions, the level of medical and hospital care and all*

*of the services which the Social Security and Services Institute is called upon to provide. In any case, the Committee notes that, unlike in other cases, the present case does not involve the modification or cancellation of clauses in current collective agreements or restrictions on the right to collective bargaining in regard to improvements in pensions and other benefits.*

- 1058.** *The Committee draws the attention of the Government to the fact that complaints lodged with the Committee can be submitted whether or not the country concerned has ratified the freedom of association Conventions, and that the mandate of the Committee 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 [see **Digest of decisions and principles of the Committee on Freedom of Association**, 2006, paras 5 and 6]. The Committee further recalls that complaints may be lodged not only in relation to acts by the Government but also to acts by any public or private authority that curtails the exercise of trade union rights, which means that in the present case, where allegations have been made regarding a lack of consultation in relation to the legislative reform in the area of social security, the complaint must be declared receivable.*
- 1059.** *As regards the alleged absence of negotiation or consultation, the Committee wishes to emphasize that bills do not require consultations or negotiations with each and every one of the trade union organizations, it being sufficient that these take place with the most representative organizations at the national or sectoral level. Such consultations and negotiations would appear to have taken place in the present case, having resulted, according to the Government, in agreement on numerous points. The Committee recalls that such consultations must take place prior to the legislative procedure, but that they do not necessarily have to take place during the parliamentary proceedings.*
- 1060.** *As regards the alleged regressive and unconstitutional nature of the legislative reform in question and the alleged irregularities in the legislative process, the Committee, while noting that the Government radically denies those allegations, must emphasize that these questions lie outside its mandate and that, in any case, the Government draws attention to the existence of legal channels for those who consider themselves to be disadvantaged by the entry into force of the new legislation.*

### **The Committee's recommendation**

- 1061.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that the present case does not call for further examination.*

CASE NO. 2591

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

**Complaint against the Government of Myanmar  
presented by  
the International Trade Union Confederation (ITUC)**

***Allegations: The complainant alleges that six labour activists were arrested, tried for sedition and association with the Federation of Trade Unions of Burma (FTUB) and handed down extremely harsh prison sentences after they had tried to organize celebrations and a seminar on labour issues for International Labour Day on 1 May 2007***

- 1062.** The complaint is set out in a communication by the International Trade Union Confederation (ITUC) dated 17 September 2007.
- 1063.** The Government forwarded its observations in communications dated 16 October 2007 and 3 March 2008.
- 1064.** Myanmar has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), but has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1065.** In its communication dated 17 September 2007, the ITUC alleges that six labour activists were arrested, tried for sedition and association with the Federation of Trade Unions of Burma (FTUB) and handed down extremely harsh prison sentences after they had tried to organize celebrations and a seminar on labour issues for International Labour Day on 1 May 2007.
- 1066.** According to the ITUC, Thurein Aung, Kyaw Kyaw, Shwe Joe, Wai Lin, Aung Naiug Tun and Nyi Nyi Zaw were among some 33 persons reportedly detained following the May Day meeting at the "American Center" in Rangoon, held on 1 May 2007. After being held at a special interrogation centre, the six were transferred to the central prison, where they were held in separate buildings, denied visits and subjected to cruel treatment. Two of them, Shwe Joe and Aung Naing Tun, were released on 4 May, but on 10 May, two other persons, Kyaw Win and Myo Min, were arrested for going to the Thai–Burma border to inform the outside world about the arrests.
- 1067.** On 16 July 2007, the trial of Thurein Aung, Kyaw Kyaw, Wai Lin, Nyi Nyi Zaw, Kyaw Win and Myo Min opened inside the Rangoon's Insein prison. Relatives were not allowed to the first hearing, but were able to attend subsequent hearings which started on 20 July in a court outside the prison. After that, however, the hearings were transferred back to the prison premises, to which outsiders were unable to obtain access. On 2 August, the two defence lawyers sought for the case to be transferred back to open court, in accordance with section 2(E) of the Judiciary Law, 2000, which provides that "dispensing justice [should be] in open court unless otherwise prohibited by law". However, due to the

constant harassment upon entering and leaving the court premises, the two lawyers withdrew from the case on 4 August. The defendants therefore had no attorneys for the rest of the trial.

- 1068.** On 7 September, the six men were convicted for sedition under section 124(A) of the Penal Code and sentenced to 20 years and a fine of 1,000 Kyat. In addition, Thurein Aung, Wai Lin, Myo Min and Kyaw Win were convicted under section 17(1) of the Unlawful Associations Act for associating with an unlawful organization and for illegally crossing the border. They each received an additional five years' sentence for the unlawful association charge and three years for illegal border crossing – the latter being covered by the Immigration Provisions Act.
- 1069.** During the interrogations of the six convicted activists, the security forces focused specifically on finding links with the FTUB. In fact, the Burmese junta has always depicted the FTUB as a criminal or even a terrorist organization. However, the ITUC and its predecessor organizations, the ICFTU and the WCL, have always rejected these claims, and recognized the FTUB as a legitimate organization, which merely tries to defend workers' rights in Burma under very difficult circumstances. The FTUB has an associated organization status with the ITUC.

## **B. The Government's reply**

- 1070.** In its communication dated 16 October 2007, the Government indicates that the six persons are not workers at any factory or workplace and therefore doubts their capacity to represent workers' interests. Their arrest was not related to holding the May Day event. There were many May Day events held nationwide by various organizations, but no one was arrested in this connection.
- 1071.** The six persons have been charged with offences under section 124(A) of the Penal Code for inciting hatred or contempt for the Government, section 17(1) of the Unlawful Association Act, 1908, for being a member of or contacting an unlawful association, and section 13(1) of the Immigration (Emergency) Provisions Act, 1947, for illegally leaving and re-entering the country. The above laws do not impair the obligation under Convention No. 87.
- 1072.** Myanmar has acceded to a number of international Conventions for the suppression of terrorism and, in particular, to the International Convention for the Suppression of the Financing of Terrorism. Bombing and terrorist acts committed by the FTUB were uncovered in Myanmar in June 2004. The FTUB supported financially and took part in these terrorist acts and supplied explosive materials to cause an unstable situation in the country. All of these terrorist acts are forbidden under the abovementioned Conventions. On 12 April 2006, the Ministry of Home Affairs issued Declaration No. 1/2006 pronouncing the FTUB to be a terrorist group. The FTUB does not represent any workforce in Myanmar; although it has taken the name of Burma, it is a terrorist group in the guise of a workers' organization. The six persons were arrested and sentenced because of joining and cooperating with the terrorist group.
- 1073.** The Government denies the allegation that after being held at a special interrogation centre, the six persons were transferred to the central prison, where they were held in separate buildings, denied visits and reportedly subjected to cruel treatment. To the contrary, the detainees could meet their guests and relatives. Because of the security, the trial took place in the court near the Insein prison (the Western District Court of Yangon). Everybody had the chance of being heard, including the accused, the lawyers and persons interested in this case. While initially two defence lawyers represented the accused labour activists, following an application filed by them on their own initiative, the court

authorized their withdrawal from the case. The court also asked the accused whether they would like to hire a lawyer, but they expressed the will to defend their case themselves. Thus, the case continued under the formal procedure.

- 1074.** In its communication dated 3 March 2008, the Government indicates that the six persons appealed the decisions of the Western District Court of Yangon to the Yangon Divisional Court. When the appeals were summarily dismissed by the Divisional Court, appeals before the Supreme Court were lodged and the respective three cases were opened on 20 February 2008 and were still pending.
- 1075.** The Government denies the allegation that the Burmese military was unwilling to take into account demands of Burma's workers and people to ensure respect for workers' rights and punished all attempts by Burma's workers to organize and carry out legitimate, collective activities in defence of their social and economic interests. The Government states that, to the contrary, workers in Myanmar enjoyed the rights under the existing labour laws. In line with the international labour standards, ratified by Myanmar and, under the existing labour laws, workers and their organizations can bargain individually or collectively on working conditions, wages, salaries and overtime work. All disagreements between workers and employers related to bargaining (80 disputes in 2006 and 140 disputes up to September 2007) have been settled by the representatives of the Government, employers and workers through conciliation and negotiation process. Thus, industrial peace has been maintained between employers and workers.

### C. The Committee's conclusions

- 1076.** *The Committee notes that the complainant in this case alleges that six labour activists were arrested, tried for sedition and association with FTUB, declared to be an unlawful organization in Myanmar, and sentenced to from 20 to 28 years of imprisonment after they had tried to organize celebrations and a seminar on labour issues for International Labour Day on 1 May 2007.*
- 1077.** *In particular, according to the ITUC, Thurein Aung, Kyaw Kyaw, Shwe Joe, Wai Lin, Aung Naiug Tun and Nyi Nyi Zaw were among some 33 persons detained following the May Day meeting at the "American Center" in Rangoon. After being held at a special interrogation centre, the six were transferred to the central prison, where they have been held in separate buildings, denied visits and subjected to cruel treatment. Two of them, Shwe Joe and Aung Naing Tun, were released on 4 May, but on 10 May, two other persons, Kyaw Win and Myo Min, were arrested for going to the Thai-Burma border to inform the outside world about the arrests.*
- 1078.** *According to the complainant, most of the trial of the six detainees, opened on 16 July 2007, took place inside the Rangoon's Insein prison, which outsiders were unable to access. The lawyers of the accused sought for the case to be transferred to the open court, however, due to constant harassment upon entering and leaving the court premises, the lawyers withdrew from the case on 4 August. The defendants therefore had no attorneys for the rest of the trial. On 7 September, all six were convicted for sedition under section 124(A) of the Penal Code and sentenced to 20 years and a fine of 1,000 Kyat. In addition, Thurein Aung, Wai Lin, Myo Min and Kyaw Win were convicted under section 17(1) of the Unlawful Associations Act for associating with an unlawful organization and for illegally crossing the border. They each received an additional five years' sentence for the unlawful association charge and three years for illegally crossing the border, the latter being covered by the Immigration Provisions Act.*

1079. *The Committee notes that the Government does not dispute the fact of the arrest and the sentencing of the six persons. However, the Government doubts that these six persons could represent workers as they are not workers of any factory or workplace. They were not arrested and sentenced for activities related to the May Day celebration, but rather for the illegal acts committed under the national legislation, i.e. inciting hatred or contempt for the Government, association with the FTUB, an unlawful organization, and for illegally crossing the border. The Government further contests the complainant's allegation with regard to the conditions of detention and states that security reasons were behind the decision to hold the court hearings near the Insein prison. However, all interested persons had the chance of being heard and the accused persons could have been represented by new lawyers had they so chosen after their lawyers withdrew from the case on their own initiative. Finally, the Government declares that workers in Myanmar enjoy labour rights under the national legislation.*
1080. *At the outset, the Committee is obliged to observe the seriousness of the allegations and must recall the specific background concerning freedom of association against which they are presented. The ILO supervisory bodies have closely followed the application of Convention No. 87 by Myanmar over several years. This Committee, the Committee of Experts on the Application of Conventions and Recommendations and the Committee on the Application of Standards of the International Labour Conference have repeatedly drawn the Government's attention to its continued failure to apply the Convention. The Conference Committee has regularly mentioned (the last occasion of which was at the 93rd Session (June 2005) of the International Labour Conference) the application of the Convention by Myanmar in a special paragraph of its general report, thereby underlining the seriousness of the matter. These comments go to the very heart of the Convention and draw attention to the total absence of a legislative framework and climate sufficient to enable trade unions to exist in Myanmar.*
1081. *With regard to the complainant's allegation of ill-treatment of the detained, the Committee emphasizes that detained trade unionists, like all other persons, should enjoy the guarantees enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights according to which, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. Furthermore, in cases of alleged torture or ill-treatment while in detention, governments should carry out inquiries into complaints of this kind so that appropriate measures, including compensation for damages suffered and the sanctioning of those responsible, are taken to ensure that no detainee is subjected to such treatment [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 54 and 56]. The Committee therefore requests the Government to carry out an independent investigation without delay into this allegation and, if it is found that the detainees suffered any ill-treatment, to take appropriate measures, including compensation for damages suffered, giving precise instructions and apply effective sanctions so as to ensure that no detainee is subject to such treatment in the future. It requests the Government to keep it informed in this respect.*
1082. *The Committee takes note of the court judgements in the three following cases.*
1083. *The Committee notes that Case No. 82 was filed against Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min on the grounds of intentional instigation of workers to hold a discussion on protection of workers rights at 2 p.m. on 1 May 2007 in Dagon Township (prosecuted under section 124 of the Penal Code). The Committee notes that according to the findings of the court, "the defendants received monetary support from illegal associations such as the NLD(LA) and the FTUB, arranged and facilitated the dissemination of information about these associations to workers in Myanmar and acted in defaming the Government in the course of these activities". In particular, a public lecture*



was organized by the defendants on 1 May 2007 to discuss “problems encountered by workers at their respective workplaces, which had an effect of agitating them”. A speech prepared by Thurein Aung (the draft of which was confiscated during a search and submitted to the court by the prosecution as evidence) concerned the following matters: “salaries, disproportional prices for goods, right to take leaves, pension and the failure of the Government to address these issues”. Hence, this speech “was meant to be used to defame the Government”. A speech on the legal protection of workers’ rights was made by defendant Kyaw Kyaw. The main objective of his statement was to point out that “the present Government availed the workers with no remedies”. He further stated that “workers could exercise their rights by submitting complaints to the relevant authorities”. However, Kyaw Kyaw is an “ordinary civilian and had no rights to make such statements”. Nyi Nyi Zaw also participated in the activity and “indirectly defamed the Government by clarifying the rights of workers”. Other defendants, Wai Lin, Kyaw Win and Myo Min also were involved in organizing and participating in the May Day activity. All six were “found guilty for committing a crime under section 124 of the Penal Code”, which stipulates: “whoever by words either spoken or written, or by signs, visual representation or otherwise brings or attempts to bring hatred or contempt, or excites or attempts to excite disaffection towards the Government ..., shall be punished with a transportation for life or a shorter term, to which fine may be added, or with an imprisonment of up to three years, to which fine may be added, or with a fine”. The defendants were “condemned to life imprisonment and to a fine of Ks1,000 each, the failure to pay the fine, resulting in an additional six-month imprisonment”.

- 1084.** Case No. 83 was filed against Thurein Aung, Wai Lin, Kyaw Win and Myo Min on the “grounds of receiving monetary support from the members of an unlawful association, such as the NLD(LA) and the FTUB”, operating in Thailand “to arrange and facilitate the internal political movements and establishing of workers’ unions” (prosecuted under section 17(1) of the Unlawful Association Act, 1908). The Court concluded that the monetary contribution of these organizations made possible the distribution to the public of hats with a motto “Just do it now”, which the Court saw as a political movement. The Court considered that the defendants have violated section 17(1) of the Unlawful Association Act, 1908, which provides: “whoever is a member of an unlawful association or takes part in a meeting of any such association or contributes or receives or solicits any contribution for the purpose of any such association or any way assists the operation of such association, shall be punished with imprisonment for a term which shall not be less than two years and more than three years and shall also be liable to a fine”. Thurein Aung, Wai Lin, Kyaw Win and Myo Min were sentenced to three years of vigorous imprisonment.
- 1085.** Finally, the same persons were convicted under section 13(1) [Emergency promulgation] of the Immigration Act 1947 and sentenced to five years of vigorous imprisonment for having crossed the border between Myanmar and Thailand on about four occasions between 2004 and 2007 to meet the NLD(LA) and the FTUB representative and to receive financial support (Case No. 84). According to section 13(1) of the above Act, “whoever enters or attempts to enter the Union of Burma, or whoever after a legal entry remains or attempts to remain in the Union of Burma is in contravention of any of the provisions of this Act or the rules made there under or any of the conditions set out in any permit or visa and shall be punished with imprisonment to a maximum of five years or with a fine of a minimum of Ks1,500 or with both”.
- 1086.** The Committee will first examine the question of procedure, before turning to the matter of substance.

- 1087.** *Firstly, with regard to the procedure, the Committee notes that the Government's reply with regard to the trial procedure is extremely brief and appears to evade the main issues. While the Committee does not have sufficient information available to it to determine whether the court proceedings were held inside the prison or in the court near the prison, or whether it was an open or a closed trial, the Committee observes that the Government has not directly replied to the allegations that the defendants' lawyers had repeatedly requested that the trial be held in an open court and that they were forced to withdraw from the case due to constant harassment. In these circumstances, while the Committee does not have sufficient information available to it to ascertain whether the defendants did indeed refuse a subsequent offer from the court to retain new legal counsel, it firmly believes that the right to legal counsel of one's own choosing should have resulted in an obligation on the Government to investigate the allegations of harassment and ensure that the defendants could benefit from unobstructed legal counsel. In addition, the Committee recalls the general principle that any trade unionist who is arrested should be presumed innocent until proven guilty after a public trial during which he or she has enjoyed all the guarantees necessary for his or her defence [see **Digest**, op. cit., para. 117]. A reading of the three judgements leads the Committee to conclude that there indeed appears to have been an absence of sufficient guarantees for due process of law.*
- 1088.** *Finally, the Committee recalls that article 14 of the International Covenant of Civil and Political Rights provides that everyone convicted of a crime shall have the right to his/her conviction and sentence being reviewed by a higher tribunal according to law. The Committee is deeply concerned by the indication in the judgement that the court explicitly ordered the destruction of all but some evidence presented to it (Case No. 82), thus rendering any review by a higher tribunal virtually impossible.*
- 1089.** *Turning to the substance matter of the three cases, the Committee understands that Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min were, in fact, convicted and received long prison sentences for merely organizing a May Day activity on workers' rights and contacting and receiving financial assistance from the FTUB (a trade union organization having associated status with the ITUC). Hence, it is undeniable that the six persons were punished for exercising their fundamental right to freedom of association and the freedom of expression. The Committee recalls that the detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious interference with civil liberties in general and with trade union rights in particular. A genuinely free and independent trade union movement can only develop where fundamental human rights are respected [see **Digest**, op. cit., paras 33 and 64].*
- 1090.** *While noting the Government's statement that the appeals were lodged and still pending before the Supreme Court, in the light of the preceding paragraphs, the Committee strongly urges the Government to take the necessary measures to release the six activists without delay and to keep it informed in this respect.*
- 1091.** *The Committee recalls that holding of public meetings and the voicing of demands of a social and economic nature on the occasion of May Day are traditional forms of trade union action [see **Digest**, op. cit., paras 135 and 137]. Furthermore, the Committee emphasizes that the full exercise of trade union rights calls for a free flow of information, opinions and idea, and, to this end, workers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities [see **Digest**, op. cit., para. 154]. The Committee expects the Government to take the necessary measures so as to ensure that no person is punished for exercising his or her rights to freedom of association, opinion and expression.*

**1092.** *The Committee notes that the Government considers the FTUB to be unlawful. It recalls in this respect that it had to examine this issue in pending Case No. 2268, in respect of which it had formulated interim conclusions on three occasions [see 333rd, 337th and 340th Reports]. In particular, the Committee recalls the following recommendation appearing in paragraph 1112(b) of its 337th Report:*

*Recalling that the right of workers and employers to freely establish and join organizations of their own choosing cannot exist unless such freedom is established and recognized in both law and practice, the Committee once again requests the Government to refrain from any acts preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including ... organizations which operate in exile [such as the FTUB] since they cannot be recognized in the prevailing legislative context of Myanmar. The Committee further requests the Government to issue instructions to that effect to its civil and military agents as a matter of urgency.*

*The Committee reiterates its previous request and asks the Government to keep it informed of the measures taken in this respect.*

### **The Committee's recommendations**

**1093.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

*(a) The Committee requests the Government:*

- (i) to take the necessary measures to amend the national legislation so as to allow trade unions to operate in conformity with Conventions Nos 87 and 98; and*
- (ii) to recognize the Federation of Trade Unions of Burma (FTUB) as a legitimate trade union organization.*

*It requests the Government to keep it informed in this respect.*

*(b) The Committee requests the Government to carry out an independent investigation without delay into the allegation of ill-treatment of the detained persons and, if it is found to be true, to take appropriate measures, including compensation for damages suffered, giving precise instructions and apply effective sanctions so as to ensure that no detainee is subjected to such treatment in the future. It requests the Government to keep it informed in this respect.*

*(c) The Committee strongly urges the Government to release Thurein Aung, Wai Lin, Nyi Nyi Zaw, Kyaw Kyaw, Kyaw Win and Myo Min without delay and to keep it informed in this respect.*

*(d) Recalling that the holding of public meetings and the voicing of demands of a social and economic nature on the occasion of May Day are traditional forms of trade union action and that the full exercise of trade union rights calls for a free flow of information, opinions and ideas and, to this end, workers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities, the Committee expects that no person will be punished*

*for exercising his or her rights to freedom of association, opinion and expression.*

- (e) *Once again recalling that the right of workers and employers to freely establish and join organizations of their own choosing cannot exist unless such freedom is established and recognized in both law and practice, the Committee once again requests the Government to refrain from any acts preventing the free operation of any form of organization of collective representation of workers, freely chosen by them to defend and promote their economic and social interests, including organizations which operate in exile, such as the FTUB, since they cannot be recognized in the prevailing legislative context of Myanmar. The Committee further requests the Government to issue instructions to that effect to its civil and military agents as a matter of urgency and to keep it informed in this respect.*

CASE No. 2590

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

**Complaint against the Government of Nicaragua  
presented by  
the Confederation of Labour Unification (CUS)**

*Allegations: The Confederation of Labour Unification (CUS) alleges that in the context of a campaign to cause the disappearance of trade unions which do not agree with the Government, the trade union leader Mr Donaldo José Chávez Mendoza was dismissed*

**1094.** This complaint is contained in a communication dated 9 August 2007.

**1095.** The Government sent its observations in communications dated 21 September and 18 October 2007.

**1096.** Nicaragua has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

**1097.** In its communication of 9 August 2007, the Confederation of Labour Unification (CUS) alleges that Mr Donaldo José Chávez Mendoza was dismissed on 12 July 2007 from his post in the Directorate General of Taxes (DGI), a decentralized agency attached to the Ministry of the Treasury and Public Borrowing, despite his position as trade union official, serving as finance secretary to the Democratic Staff Union of the DGI.

- 1098.** According to the complainant organization, the arguments presented by the employer for proceeding with the dismissal were that Mr Chávez Mendoza exercised a position of trust. The complainant organization adds that neither the right of employment stability established in article 37 of the Act on the Civil Service and the Administrative Career, nor the trade union rights established in article 231 of the Labour Code, whereby the dismissal of a trade union official requires the authorization of the Ministry of Labour, were respected.
- 1099.** The CUS alleges that Mr Chávez Mendoza submitted a judicial appeal on 23 July 2007, which has still not been decided, and indicated that there are considerable delays in issuing judgements in the judicial system in Nicaragua.
- 1100.** The complainant organization adds that this dismissal is part of a policy aimed at the destruction of trade unions which oppose the new Government. The complainant organization indicates that the directors of public entities, recently appointed by the new Government, interfere in trade union activities and participate in trade unions supportive of the Government, with the intention of destroying organizations which are not in agreement with the Government, dismissing the latter's officials, without respecting trade union rights or legal provisions, due to their trade union activities in defence of workers' rights and collective agreements concluded previously.

## **B. The Government's reply**

- 1101.** In its communications of 21 September and 18 October 2007, the Government indicates that Mr Donaldo José Chávez Mendoza was dismissed from the DGI in accordance with the legislation. Mr Chávez Mendoza was employed as adviser in the Procurement Unit of the Material and Financial Resources Division of the DGI. According to the Government, this is a position of trust within the institution, as laid down in article 7 of the Labour Code and article 14 of the Act on the Civil Service and the Administrative Career, which provides that the category of employee and official in a position of trust applies to those "whom the Administration of the State contracts to provide personal services or hold permanent advisory posts in technical assistance and technical assistance and/or directive administration in offices of the principal public officials". Mr Chávez Mendoza was the sole adviser on procurement matters in the DGI. It was he who directly advised the administrative finance director on legal matters related to State contracts. Without his signature, the finance director could not contract or acquire the goods and services needed by the DGI at national level. In addition, he acted as legal adviser to the Tenders Committee, which is the administrative organ which administers over 35 per cent of the public budget allocated to the Directorate General of Taxes.
- 1102.** The Government adds that article 11 of the Act on the Civil Service and the Administrative Career establishes exceptions relating to the administrative career for officials and employees in positions of trust, whereby there is no prior legal procedure or requirement for terminating their employment.
- 1103.** In addition, the Government indicates that Mr Chávez Mendoza did not instigate administrative actions against his dismissal but appealed directly to the court, where the action is still pending.

## **C. The Committee's conclusions**

- 1104.** *The Committee observes that this case refers to the dismissal of a trade union official in the Directorate General of Taxes (DGI) without the relevant removal of trade union immunity.*

1105. *The Committee notes that, according to the allegations submitted by the Confederation of Labour Unification (CUS), Mr Donaldo José Chávez Mendoza was dismissed on 12 July 2007 from his post in the DGI despite his trade union immunity as finance secretary to the Democratic Staff Union of the DGI. The Committee notes that, according to the complainant organization, the dismissal was part of a policy aimed at the destruction of all those trade unions which opposed the new Government. The Committee also notes that Mr Chávez Mendoza initiated legal action for reinstatement, which despite the time elapsed is still pending.*
1106. *The Committee notes the Government's observation that Mr Chávez Mendoza was employed in the Directorate General of Taxes in a position of trust, in relation to which article 11 of the Act on the Civil Service and the Administrative Career establishes exceptions relating to the administrative career for officials and employees in positions of trust, whereby there is no prior legal procedure or requirement for terminating their employment. The Committee notes that the Government indicates that Mr Chávez Mendoza resorted to the court, and that no judgement has been given up to now.*
1107. *In this respect, the Committee emphasizes that although according to the Government, Mr Chávez Mendoza exercised a position of trust and consequently in accordance with the law, it could terminate his services without any prior proceedings, he was also a trade union official and by virtue of that position, should have been the subject of the special protection provided by the guarantee of trade union immunity according to which an official cannot be dismissed without the authorization of the Ministry of Labour, which was not done. In this respect, the Committee recalls that one way of ensuring the protection of trade union officials is to provide that these officials may not be dismissed, either during their period of office or for a certain time thereafter except, of course, for serious misconduct. One of the fundamental principles of freedom of association is that workers enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly desirable in the case of trade union officials because, in order to be able to perform their trade union duties in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate which they hold from their trade unions. The Committee has considered that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest of decisions and principles of the Committee on Freedom of Association**, fifth edition, 2006, para. 804].*
1108. *As regards the allegations that the dismissal of Mr Chávez Mendoza is part of a policy intended to destroy trade unions opposed to the new Government, the Committee observes that the Government does not send its observations in this respect. The Committee recalls that freedom of association entails respect for the right of trade unions and their officials to their opinions, even in those cases where they criticize the country's social and economic policies.*
1109. *In these circumstances, bearing in mind the status of Mr Chávez Mendoza as a trade union official, and that the legislation requires the authorization of the Ministry of Labour to dismiss a trade union official, which did not occur in the present case, the Committee requests the Government to take the measures necessary to ensure that he is reinstated in his post without loss of pay until the judicial authority gives its final judgement and to send a copy of the ruling as soon as it is handed down. The Committee further requests the Government to take the necessary measures so that an independent investigation is carried out to determine if there is in fact an anti-union policy against trade unions that are not in agreement with the Government and, if these allegations are shown to be true, to put an immediate end to such anti-union measures and to guarantee the free exercise of trade*

*union activities of those organizations and their officials. The Committee requests the Government to keep it informed in this respect.*

### **The Committee's recommendations**

**1110.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*

- (a) Bearing in mind the status of Mr Chávez Mendoza as a trade union official, and that the legislation requires the authorization of the Ministry of Labour to dismiss a trade union official, which did not occur in the present case, the Committee requests the Government to take the measures necessary to ensure that he is reinstated in his post without loss of pay until the judicial authority gives its final judgement and to send a copy of the ruling as soon as it is handed down.*
- (b) The Committee further requests the Government to take the necessary measures so that an independent investigation is carried out to determine if there is in fact an anti-union policy against trade unions that are not in agreement with the Government and, if these allegations are shown to be true, immediately to put an immediate end to such anti-union measures and to guarantee the free exercise of trade union activities of those organizations and their officials. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2545

DEFINITIVE REPORT

**Complaint against the Government of Norway  
presented by  
the Finance Sector Union of Norway (FSUN)**

*Allegations: The complainant organization alleges that the Government unduly interfered in collective bargaining through the imposition of compulsory arbitration to end a legal strike held by employees in the financial sector*

- 1111.** The complaint is contained in a communication dated 6 February 2007 from the Finance Sector Union of Norway (FSUN).
- 1112.** The Government forwarded its observations in a communication dated 5 May 2007.
- 1113.** Norway has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1114.** By its communication dated 6 February 2007, the FSUN alleges that the Government unduly interfered in collective bargaining by Act No. 19 of 16 June 2006, which referred the dispute between the FSUN and the Norwegian Employers' Association for the Financial Sector (FA) for settlement by the National Wages Board. The above legislation put an end to a legal strike held in connection with the revision of the general agreement. The complainant also alleges undue interference in the dispute by the Minister of Labour and Social Inclusion on 9 June 2006.
- 1115.** The complainant recalls that in recent years, the Norwegian Government has used essentially similar legislative intervention in the collective bargaining process on a number of occasions and refers in this respect to Cases Nos 1099, 1255, 1389, 1448, 1576, 1680, 1763 and 2484. The FSUN asserts that the circumstances described in, and the issues raised by, the present case are similar to those that the Committee has dealt with previously with regard to Norway. It further explains that under Norwegian labour law, the use of compulsory arbitration and prohibition of strike action has to be approved by a special Act of Parliament. It is for Parliament to decide whether the dispute in question should be solved by compulsory arbitration. However, there is no law specifying the circumstances in which compulsory arbitration can be imposed.
- 1116.** The complainant explains that collective bargaining between the FSUN and the FA with a view to revise the general agreement, including wages, working conditions and pension schemes began on 20 April 2006. In particular, the Finance Sector Union of Norway tabled the demand to establish a collective bargaining system if changes in existing pension schemes should be made. Most employees in the financial sector have a contribution-based occupational pension scheme, which is not currently covered by the collective agreement. During the last years companies have reorganized their collective pension scheme. This has been done without involving the shop stewards in a satisfied way. For that reason, the Finance Sector Union of Norway claimed that there should be made a system for the process when companies consider making changes to their existing pensions schemes, which gives the shop stewards codetermination. However, the employers rejected the union's demand that the workers' representatives be included in the negotiations for an agreement-based occupational pension scheme. They argued that it would undermine the employers' managerial prerogatives as well as their ability to run companies properly. They further argued that the content of occupational pension schemes normally does not form part of the bargaining rights of a trade union.
- 1117.** Following mediation, in which the two parties failed to reach an agreement, the negotiations reached a state of deadlock on 3 May 2006. On 5 May 2006, the FSUN served a strike notice on the employers on behalf of its 6,020 members (all employed in the insurance sector). The decision that a small number of trade union members and only from one sector would participate in the strike was made by the union to demonstrate that the strike targeted only the employers and as to limit the inconveniences of the strike on the general public. On 12 May 2006, the FSUN warned that 1,573 employees in the banking sector (6 per cent of the FSUN's active members) would join the strike on 12 June 2006, which would have brought the total amount of strikers to 7,593 members or 29 per cent of the active members of the FSUN. The employers responded the same day by issuing notice of a full lockout of all banks and insurance companies, members of the FA, thereby stopping most of the bank and insurance services from 12 June 2006. In an attempt to call off the planned strike in the insurance sector, further mediation with the National State Mediator was carried out on 30 and 31 May 2006, however, to no avail.



- 1118.** On 1 June 2006, 6,020 FSUN members from the insurance sector went on strike. On 7 June 2006, the National State Mediator called the parties twice for meetings, in order to try to lift the deadlock. On 9 June 2006, the Minister of Labour and Social Inclusion, called representatives of the two parties for a meeting to plead the parties to solve the dispute before the escalation of the strike and the lockout by the employers on 12 June 2006 and ordered the parties to report back. The parties met the next day, on 10 June 2006, but did not reach an agreement. The complainant considers that the actions of the Minister constituted an act of interference and pressure, affected the exercise of the right to strike in practice and violated the rights and guarantees provided for by Article 3 of Convention No. 87 and Article 2 of Convention No. 98.
- 1119.** On 11 June 2006, the Government informed the organizations about its intention to intervene in the conflict by means of compulsory arbitration. It based its decision on reports from the Financial Supervisory Authority of Norway, the Central Bank of Norway (hereafter, the Bank) and social insurance authorities. The Government then put forward a legislative proposal to Parliament, which, on 16 June 2006, adopted an Act on Compulsory Arbitration. The Act referred the dispute to compulsory arbitration before the National Wages Board and put a ban on strikes to solve the conflict. The decision of the National Wages Board was made on 16 August 2006.
- 1120.** In the complainant's opinion, the legislation of 16 June 2006 on compulsory arbitration, specifically, and the entire system of compulsory arbitration, in general, as applied by the Government, contravenes the guarantees provided for by Conventions Nos 87 and 98. The warned employee lockout and thus the rapid intervention of the Government with compulsory arbitration restricted the right to strike and the right to bargain collectively.
- 1121.** According to the complainant, the Government's legislative proposal did not discuss whether the banking sector was an essential service, but addressed the possible consequences of escalation of the conflict on the Norwegian securities and its financial market, and the society in general. The main arguments used by the Government to introduce the legislation on compulsory arbitration were based on reports from the Financial Supervisory Authority of Norway and the Bank. The reports, however, contained an assessment of the consequences of the strike and lockout in the banking sector only, and did not discuss the insurance sector. In a press release dated 11 June 2006, the Government claimed that the decisive factor for the compulsory arbitration was that an escalation of the conflict would quickly lead to comprehensive and grave societal problems. The Government further stated that the conflict would paralyse so many key functions of the society that its intervention would be necessary before the warned chaos would occur.
- 1122.** According to the Bank, the strike and lockout would affect most of the banks in Norway in one way or the other. The Bank considered that in a situation of a full lockout, it would be necessary to resort to implementation of the "closing-down-doctrine", meaning that all infrastructures of the common services of all banks would cease to function. In practice, the "closing-down-doctrine" would imply that even the banks that were not a part of the strike and the lockout would be prevented from providing payment services and executing transactions, as the common services of the BBS (an IT-based knowledge company owned by Norwegian banks to handle credit card payment, Internet banking and wire transactions) would not function. It would therefore not be possible for the public to use any kind of banking transaction services, salaries would not be deposited to employees' accounts, applications for loans would not be considered, approved loans would not be deposited to accounts, enterprises would not be able to execute payments. The Bank's assessment goes on to assess how the inconveniences could be minimized, for example, through agreements on advance payments. Credit cards could be used as payment for services and goods through a non-electronic system. Payments in cash could be made, assuming that the public has a sufficient reserve of cash to last through a possible duration of the

strike/lockout. Although a few banks could remain open, because of the non-functioning of the common banking services of the BBS, they would have limited possibilities to provide payment services. While most households would be able to prepare for a strike by accumulating cash, some would not be in a position to withdraw large amounts of cash before the planned strike, as the monthly payment of social security and pensions would be received on 12 June 2006, the day of the strike and lockout. For people dependent on social service benefits, the situation could prove to be serious, as they could be prevented from buying basic commodities such as food or medicine.

- 1123.** According to the Financial Supervisory Authority, financial institutions would be able to sustain a certain activity if the key employees were on duty and the strike did not last for a long time. However, a longer industrial action might lead to grave and long-term consequences for the international reputation of the Norwegian financial institutions.
- 1124.** The Government's legislative proposal discussed the relevant ILO Conventions, but concluded that compulsory arbitration would not be in breach of any of the Conventions as the escalation of the conflict would lead to a full interruption of financial services and activity, which, in turn, would lead to grave consequences for the society. The Government furthermore considered that there was a need to interfere in the conflict by imposing compulsory arbitration, even if that would prove to be in breach of Norway's international commitments.
- 1125.** The complainant considers that the Government intervention was untimely as it interfered in a conflict in one sector that was not allowed to escalate into another sector. Moreover, it was not warranted as the financial sector is not an essential service in the strict sense of the term. In fact, the Government failed to demonstrate how the interruption of these services would involve a clear and imminent threat to the life, personal safety or health of the whole or part of the population. Possible actions that the Government could have initiated to reduce the possible effects of the strike were neither assessed nor discussed. In this respect, the complainant indicates that the master agreement between the FSUN and the FA contains a clause on work during an industrial dispute (minimum services) (see annex). This allows both for a system of minimum services as well as a system of granting dispensations in the course of a conflict to alleviate the immediate dangers. A list containing the names and positions of those selected shall be prepared in good time before the voluntary bargaining is to be conducted. Dispensations can further be granted during the conflict. Both of these activities were undertaken. During the strike in the insurance sector, some services were in fact provided, for example, at the Maritime Insurance Company Guard, where many dispensations were given. However, recourse to such services was overruled by the planned utilization of the "closing-down-doctrine" by the Finance employers. Moreover, the warned lockout disqualified the earlier agreements between the parties. Thus, the FSUN questions the compelling need to have recourse to compulsory arbitration in the dispute in question, as the agreed minimum services had not been allowed to be implemented.
- 1126.** The complainant argues that the strike did not concern an essential service, nor did it pose an imminent threat to the life, personal safety or health of whole or part of the population. While one of the effects of the escalation of the conflict would have led to banking facilities being closed down, all banking transactions stopped, thus implying that payments in cash would be necessary for all purchases, steps could be taken to mitigate this inconvenience. As both the Government and the public were warned well in advance that banks could be closed, most would have been able to use cash. It would furthermore be possible to use credit cards to pay for the basic commodities. For those dependent on social service benefits and pension, the Government could have considered alternative dates or means of payment. The Government's assessment of the situation was based on hypothetical risks and possible results. In addition, the advance notice given on the strike

and the lockout could have enabled the Government to ensure advance payment on social security benefits such as to resolve any immediate problems for vulnerable groups. If the Government had demonstrated a more critical thinking to the “closing-down-doctrine”, the industrial action might have been continued, possibly allowing for other mechanisms or solutions to evolve through negotiations by the conflicting parties.

- 1127.** Finally, the complainant alleges that the leader of the executive committee of the FA had stated that the lockout was declared in order to provoke the Government to resort to compulsory arbitration. According to the complainant, this tactic proved right: the use of the “closing-down-doctrine” and the subsequent compulsory arbitration was thus a way of undermining the possibility of genuine negotiations between the parties.

## **B. The Government’s reply**

- 1128.** In its communication dated 5 May 2007, the Government expresses its understanding that while the right to industrial action is not expressly provided for by the Articles of Conventions Nos 87 and 98, the right to strike is considered to be one of the principles of freedom of association. The Government further understands that, according to the ILO supervisory bodies, the consequences of a labour dispute could become so serious that restrictions on the right to strike could become compatible with the principles of freedom of association. When a strike involves public servants engaged in the administration of the State or essential services in the strict sense of the term, i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population, restrictions or prohibitions of strikes are considered acceptable by the ILO supervisory bodies. The Government declares to be aware of the principle according to which the banking sector is not an essential service. However, the cases in relation to which these principles were applied are rather old. Since then, there has been a radical technological development towards a growing dependency on electronic means of payment. Norway is among the most “modern” countries approaching “the money-less society”.

- 1129.** The Government stresses that Norway makes great efforts to comply with ILO Conventions. Interference in a labour dispute is made only when life and health or important public interests are endangered. The Government considers that its interference to impose compulsory arbitration by an Act of 16 June 2006, as well as the meeting of 9 June 2006 called by the Minister of Labour and Social Inclusion, do not violate Conventions Nos 87 and 98.

- 1130.** The Government indicates that the dispute arose in connection with the 2006 revision of the general agreement between the FSUN and the FA. After the negotiations broke down on 3 May, the FSUN gave a warning of a collective work stoppage for 6,020 members within insurance companies covered by the general agreement with effect from 1 June. On 5 May, the State Mediator prohibited the stoppage of work until mediation had been tried. On 12 May, the FSUN announced an escalation of the conflict by giving a warning of a collective work stoppage for another 1,573 members, working in 76 banks within one group of banks (Terra group), with effect from 12 June. The FA responded the same day by giving a warning of a lockout of all remaining 15,000 members of the FSUN covered by the collective agreement, also with effect from 12 June. Thus, the lockout was provoked by the announcement by the union of the escalation of the strike. As only one group of banks would be affected by the strike, the employers saw that as a distortion of competition. On 18 May, the Norwegian Union of Commercial and Office Employees as well as the Postal and Communication Union announced sympathy strike action for 1,657 members within the finance sector with effect from 12 June 2006.

- 1131.** All attempts to resolve the conflict through mediation (on 1, 6 and 7 June 2006) bore no results. The Minister of Labour and Social Inclusion then summoned the parties to a meeting on 9 June. He referred to the extensive consequences of the escalation of the conflict and underlined the responsibility of the parties. He strongly urged them to come to an agreement as soon as possible. The Minister explicitly stated that he had summoned the parties because the employers' organization had openly speculated through the media that the Government would intervene to impose compulsory arbitration. The Minister saw this as an attempt by this party to renounce its own responsibility to find a solution to the dispute and shift the responsibility on to the Government. After the parties had notified the Minister that they had not found a mutually acceptable solution, the Minister summoned the parties to a new meeting on 11 June. He informed them that in light of the imminent escalation of the conflict in the financial sector, which would cause a full stoppage in all payment systems, entailing serious social problems, chaos and concern, the Government would put forward a Bill to Parliament proposing to solve the dispute through compulsory arbitration. The Minister requested the parties to prevent an escalation of the conflict and resume work, which the parties confirmed that they would. The Government fails to see how the actions of the Minister could be considered as an intervention in the dispute and, as such, a breach of Article 3 of Convention No. 87 and Article 2 of Convention No. 98.
- 1132.** The Bill was submitted to Parliament on 12 June and adopted on 16 June. The National Wages Board then handled the case. The Government indicates that the Board is an independent body consisting of nine members (three neutral, two from the largest workers' and employers' organizations and two from each of the conflicting parties). Five of the members have the right to vote (three neutral members and one from each of the conflicting parties), while the remaining four attend in their advisory capacity. The Board's decision, which has the effect of a collective agreement between the parties, was made on 17 August 2006.
- 1133.** From 1 June, the conflict included all members of the FSUN employed in insurance companies (about 65 per cent of the workers of the insurance companies). The strike had resulted in a strongly reduced capacity within the insurance sector, causing a wide range of problems and inconveniences for customers. However, the announced extension of the conflict as from 12 June caused even deeper concern. All members of the FSUN would then be either on strike or locked out, and the conflict would have expanded to all but 11 banks of Norway. However, even those 11 banks would also be strongly affected by the conflict, as all joint operations within payment service systems and settlements would be closed down due to safety reasons.
- 1134.** The Government received assessments from the Bank and the Financial Supervisory Authority of Norway, which informed that the conflict would have such an extent that a "closing-down-doctrine" would have to be implemented, putting the banks' joint infrastructure out of function. It was further explained that computer technology did not allow a large number of transactions to be put on hold if the receiving bank's operational systems were not in function. Therefore, rather than risking the systems collapsing, it was most secure to perform a controlled close down of the payment and settlement systems. The Bank furthermore described how the dependency on modern payment services has increased over the last years. While paper money and coins were used in 16 per cent of the transactions made in 1996, this share was halved by the end of 2005. In the same period, cashless transactions increased by 137 per cent. The use of cheques almost disappeared in the same period and went from 3.4 per cent in 1996 to 0.007 per cent in 2005. During the conflict, it would not have been possible for the public to carry out payments through the banks, as the banks would be closed, and the payment terminals, telebanks, Internet banking and ATMs would not be available. Paper-based wire transfers would not be handled. Credit cards could be used in some places, provided that paper-based, non-electronic solutions were at hand. However, most grocery shops no longer have them.

The Bank further stated that neither wages nor national insurance benefits would be available at the receivers' accounts. The public could still use cash for payment of goods and services but, as ATMs and bank premises would be closed, people would have to depend on the cash they had at their disposal before the strike. Furthermore, as the banks' night safes would be closed, there would be an accumulation of cash in trade. The Bank stated that while many households could prepare for this situation by accumulating cash, this was not an option for all. Many people were not in an economic position to build up cash reserves beforehand. Many depended on immediate access to wages or benefits. For these people, the situation could become serious if they could not buy food, medicines, etc. In the opinion of the Bank, the absence of banking services would rapidly have serious consequences on the society.

- 1135.** For persons dependent on unemployment benefits, old-age pensions or social service benefits the situation would immediately become difficult. According to the social insurance authorities, 11.7 million Norwegian kroner (NOK) in unemployment compensation and NOK86 million in social benefits, including pensions, were due for payment on 12 June. The following day, another NOK144 million in unemployment compensation and NOK154 million in social benefits, including pensions, were due for payment. Considerable amounts were also due for payment the rest of the week. A request for an advanced payment of pensions was submitted to the banks. However, in case of the announced lockout, the money would still be inaccessible to the receiver as daily payments are based on approved decisions made consecutively. Unemployment benefits are paid out in arrears every fortnight based on submitted reports from the unemployed. Consequently, it was not possible to counter the effects of the conflict by paying out the money before 12 June. On 9 June, the social insurance authorities applied to the FA for a dispensation from the announced lockout. The application was denied.
- 1136.** The Government adds that the escalation of the conflict would have had obvious safety consequences: an accumulation of cash in shops as well as by individuals would increase the risk for robbery and other crimes.
- 1137.** In the afternoon of 9 June, the Bank was informed that the international foreign exchange settlement system, the Continuous Linked Settlement (CLS), had decided that settlements in NOK would be suspended from 12 June if the conflict escalated as announced. The CLS was established in 2002 in order to reduce the risks connected to settlements of foreign exchange transactions. This would have been the first time any participating currency ever had been suspended from the CLS. The CLS explained its view by referring to a considerable nervousness among foreign parties towards the settlement in NOK when banks are closed. The CLS feared that the trust in the system would suffer. It also emphasized that the use of emergency procedures constituted an unnecessary risk. In order to restore peace in the market, CLS thus decided to suspend the NOK.
- 1138.** The Financial Supervisory Authority of Norway also warned that an extensive conflict in the bank and financial sector would have rapidly paralysed many vital functions of the society, financial institutions and the stock market. It considered that contrary to the labour conflicts in the health or transport sectors, where it was possible to reduce the most serious consequences by ensuring the functioning of essential services, in the financial sector, one could hardly differentiate between serious and less-serious functions that needed to be maintained during the dispute.
- 1139.** Against this background, the Government was of the opinion that the consequences of the announced escalation led to a situation where public interests were endangered and were so detrimental to society that the situation had to be avoided. The Government emphasizes that transfer of payments constitutes an infrastructure which is critical to modern society and which could not be disrupted. The conflict would cause a close down of practically all

bank activities and would immediately result in serious problems for receivers of national insurance benefits, for the individual consumer and for trade and industry. It was beyond any doubt that the conflict would have to be stopped very shortly. The meetings the Minister of Labour and Social Inclusion had with the parties clearly showed that the situation was deadlocked with limited possibilities for the parties to come to terms.

- 1140.** The Government disagrees with the FSUN's statement that the legislation of 16 June 2006 on compulsory arbitration specifically, and the entire system of compulsory arbitration as applied by the Norwegian Government, in general, contravene the guarantees provided by Conventions Nos 87 and 98. In Norway, workers enjoy a very far-reaching right to strike. No prohibition against the right to strike exists, except for the military forces and senior civil servants. However, there is a broad consensus that the Government has an ultimate responsibility for preventing labour conflicts from causing serious damage to the society. There has been a long tradition of special acts on intervention in labour conflicts causing serious damage to society adopted by Parliament. In the earlier years, some interventions were undoubtedly in breach of the Conventions. During the last 10 to 15 years there has, however, been a positive development, due to the increased awareness of international human rights. The crucial point is that each conflict and its effects have to be considered individually.
- 1141.** The Government rejects the FSUN's characterization of the Government's assessment of the situation as based on hypothetical risks and possible results. The Government based its assessment on the reports and evaluations by the surveillance authorities, which are independent institutions. Moreover, the weekend before the announced strike/lockout, many ATMs were emptied; this was a warning of the difficult situation that could have rapidly arisen.
- 1142.** With regard to the union's statement that minimum services could have been ensured as provided in the agreement, the Government points to the complainant's statement, according to which the lockout disqualified the earlier agreements between the parties. Moreover, if the union was of the opinion that their minimum services agreement could have replaced the use of the "closing-down-doctrine", the union should have addressed the matter at the meetings with the Minister on 9 and 11 June, in order to bring this to the Government's attention. In the Government's understanding of the ILO recommendations concerning minimum services, agreements to that effect should preferably be concluded by the parties and, preferably, not during the conflict. As to whether it should have tried to impose minimum services, the Government does not believe that it would have been possible or have had any effect. In its opinion, the responsibility for an agreement on minimum services rests with the two conflicting parties. The Government has, however, noted the Committee's recommendations in Case No. 2484 and will study them carefully.
- 1143.** With regard to the FSUN's statement, the Government would use compulsory arbitration even if it were in breach with the ILO Conventions, the Government confirms that this wording is in fact used in all bills proposing compulsory arbitration. This wording was included in the Bill due to the internal legal conditions and the position of the international law in the Norwegian legal system.

### **C. The Committee's conclusions**

- 1144.** *The Committee notes that this case concerns the imposition by the authorities of a compulsory arbitration procedure to end a strike in financial services. According to the information provided by the complainant and the Government, the strike, which started on 1 June 2006 in connection with the revision of a collective agreement in the financial sector in spring 2006, was ended by an Act of Parliament dated 16 June 2006; the dispute*

---

was referred to the National Wages Board and decided on 17 August (16 August according to the complainant) 2006.

- 1145.** *The Committee notes that, according to the complainant, the negotiations reached a dead end when the employers refused to negotiate on procedures relating to changes in occupational pension schemes, arguing that occupational pension schemes were not matters on which trade unions had the right to bargain collectively. A strike notice was then served on 5 May 2006 announcing that a strike in the insurance sector would begin on 1 June. On 12 May, the FSUN warned that 1,573 employees of the banking sector (6 per cent of its members) would join the strike on 12 June. The FA responded on the same day declaring a full lockout of all banks and insurance companies on 12 June.*
- 1146.** *The Committee notes from the information provided by the complainant and the Government that both parties tried to reach an agreement through mediation. It further notes that the Minister of Labour and Social Inclusion met with the parties to urge them to find a mutually acceptable solution. The Committee notes that the complainant considers that this interference of the Minister in the dispute was in breach of Conventions Nos 87 and 98.*
- 1147.** *The Committee notes that while the complainant considers that financial services are not essential in the strict sense of the term, the Government argues that in view of the technological progress which allowed money-less transactions, nowadays, banking services should be considered essential, the interruption of which could paralyse the functioning of society and would have threatening effects on trade, commerce and on the life and health of the population. It provides an extensive argumentation to support its view.*
- 1148.** *The complainant, on the other hand, considers that the Government should have required minimum services instead of imposing compulsory arbitration and sought alternative solutions to any immediate problems rather than making an assessment on hypothetical results and bringing to an end all industrial action, including that which had already begun in the insurance sector and for which no imminent threat to the life, personal safety or health of whole or part of the population could be adduced. The complainant adds that some agreed minimum services had indeed been provided in accordance with the collective agreement in force; however, these would have been suspended following the employers' decision to impose a full lockout and resort to the "closing-down-doctrine" where the common services of all banks would cease to function. The Government, for its part, considers that minimum services should have been determined by the parties themselves without its interference in the matter. According to the complainant and the Government, an extensive lockout by the employers annulled all agreements between the parties in this respect and created a situation wherein the minimum service required could not be met.*
- 1149.** *The Committee considers that it is difficult to reconcile arbitration imposed by the authorities at their own initiative with the right to strike and the principle of the voluntary nature of negotiation. It further recalls 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 a dispute in the public services 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, the interruption of which would endanger the life, personal safety or health of the whole or part of the population. The insurance and banking services do not constitute such services [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 564 and 587].*

- 1150.** *In the first place, the Committee observes that the impact of the Act of 16 June 2006 was to impose compulsory arbitration not only in respect of the banking sector, but also as regards the initial strike action on 1 June concerning employees in the insurance sector and for whom the same arguments of paralysis of the economy had not been made by the Government nor had the Government even referred to the consequences of this strike necessitating a minimum service. The Committee therefore considers that recourse to compulsory arbitration in respect of the strike in the insurance sector was contrary to general principles relating to the right to strike and the voluntary nature of collective bargaining. It expects that the Government will avoid in the future enacting legislation which has the effect of bringing to an end all industrial action in a dispute especially where it relates to a sector that cannot be considered essential in the strict sense of the term and for which no particular difficulties have arisen to justify the imposition of a minimum service, such as the insurance sector in this case.*
- 1151.** *As regards the banking sector, the Committee appreciates the arguments presented by the Government with respect to the impact of the warned total lockout in that sector, but notes that by linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could effectively be impeded. Moreover, the Committee expresses its concern at the extensive lockout declared by the FA (apparently in conflict with the provisions of the Master Agreement in relation to minimum services) in response to the FSUN's declaration of extension of the strike to the banking sector with a call to an additional 6 per cent of its members to go on strike (1,573) and the allegations that the FA made a statement to the effect that the lockout was declared in order to provoke the Government to resort to compulsory arbitration. The Committee cannot ignore the impact which the declaration of a full lockout in the banking sector, combined with the reference to the necessity of recourse to the "closing-down-doctrine", had upon the assessment of the vast consequences upon daily life in Norway expected by the industrial action.*
- 1152.** *While the Committee considers that banking services are not essential in the strict sense of the term, the Committee does consider that in order to avoid damages which are irreversible, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authority could have imposed respect for the procedures relating to the minimum services agreed to by the parties in the Master Agreement rather than impose compulsory arbitration. While the Committee does consider that, ideally, the minimum services to be provided should be negotiated by the parties concerned, preferably prior to the existence of a dispute, it does recognize that the minimum service to be provided in cases where the need arises only after the declaration of the strike can only be determined during the dispute. In the absence of any agreement by the parties in this regard at the specific enterprise level, an independent body having the confidence of the parties could have been set up to impose a minimum service sufficient to address the concerns of the Government about the consequences of the dispute in the banking services, while preserving respect for the principles of the right to strike and the voluntary nature of collective bargaining. In the present case, the Committee regrets that the Government made no attempt to negotiate a minimum service in the banking sector with the parties concerned and, in the event of a disagreement, to refer the matter for determination by an independent body.*
- 1153.** *In the light of the above, the Committee expresses its concern that the Act of 16 June 2006 is not in conformity with Conventions Nos 87 and 98. It recalls that a minimum service could be appropriate as a possible alternative in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met [see **Digest**, op. cit., para. 607]. The Committee further notes that the situation was aggravated mainly by the full lockout and*



*refusal of the FA to grant dispensation or request the minimum services contained in the Master Agreement to apply. Noting the Government's indication that it will study the Committee's recent recommendations in Case No. 2484 concerning the imposition of compulsory arbitration in the elevator sector, in particular as concerns the question of the establishment of minimum services, the Committee expects that the Government will ensure that, in the future, consideration will be given to the negotiation or determination of a minimum service rather than imposing an outright ban on industrial action through the imposition of compulsory arbitration.*

- 1154.** *With regard to the complainant's allegation that the FA had refused to negotiate on procedures relating to changes made in occupational pension schemes under the pretext that this matter was excluded from the scope of collective bargaining, the Committee recalls that matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation, etc.; these matters should not be excluded from the scope of collective bargaining by law [see **Digest**, op. cit., para. 913]. The Committee considers that procedures relating to changes in occupational pension schemes are legitimately within the ambit of subjects relating to terms and conditions of employment upon which collective bargaining may be engaged in and notes in this respect that nothing in Norwegian legislation would appear to limit collective bargaining in this regard and that, to the contrary, the Government had intervened initially merely to encourage the parties to reach an agreement on the matter.*
- 1155.** *Finally, with regard to the complainant's allegation of undue interference by the Minister of Labour and Social Inclusion in the dispute, the Committee notes that according to the information provided by the complainant and the Government, the Minister met with the parties to urge them to come to an agreement. In these circumstances, the Committee considers that urging the social partners, within the framework of the encouragement and promotion of the full development and utilization of collective bargaining machinery, to find a mutually acceptable solution to the conflict, is not contrary to Conventions Nos 87 and 98.*

### **The Committee's recommendation**

- 1156.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*The Committee expects that, in the future, unless it faces an emergency situation, which would endanger the life, personal safety or health of the whole or part of the population, the Government will avoid enacting legislation which has the effect of bringing to an end all industrial action in a dispute, especially where it relates to a sector that cannot be considered essential in the strict sense of the term and for which no particular difficulties have arisen to justify the imposition of a minimum service, such as the insurance sector in this case, and that consideration will be given to the negotiation or determination of a minimum maintenance service in a sector such as the banking sector, rather than imposing an outright ban on industrial action through the imposition of compulsory arbitration.*

## Annex

### Master Agreement between the FSUN and the FA

#### Chapter 8

#### Sundry Provisions

##### 28. Formation of wage agreement

As a general rule, the Finance Sector Union of Norway will follow the established practice that has existed for many years in Norwegian working life to use industrial action for the formation of a wage agreement if only a minority of the employees are organized.

##### 29. Submission of the collective agreement at company level

The parties to the collective agreement at company level shall be under an obligation to submit a new or revised collective agreement at company level to the Employers' Association of the Norwegian Finance Sector and the Finance Sector Union of Norway respectively.

##### 30. Work in connection with industrial dispute/exempt group

###### A. Work in connection with industrial dispute

1. The Employers' Association of the Norwegian Finance Sector and the Finance Sector Union of Norway presuppose that, if required and in good time before the expiry of the General Agreement, guidelines will be prepared or agreements will be entered into in the individual enterprise that regulate conditions regarding the stoppage and resumption of the activities in the enterprise in order to protect assets to the greatest possible extent and, moreover, to contribute to rapid and efficient resumption of the work after the end of the industrial dispute.

2. Agreements covered in the previous sub-clause shall require approval by the Employers' Association of the Norwegian Finance Sector and the Finance Sector Union of Norway.

###### B. Exempt group

1. The enterprise may demand that named employees of a number stated below shall not be covered by a collective notice of termination (exempt group):

- enterprises with more than 1,000 permanent employees may demand a number of exempt employees corresponding to 2 per cent;
- enterprises with less than 1,000 permanent employees may demand a number of exempt employees of up to 2 per cent, however, at least one employee if such enterprises have not appointed a deputy for the enterprise's chief executive.

The purpose of this scheme is to prevent permanent loss of major assets and is, moreover, not meant to weaken the effect of any official work stoppage in pursuance of the Norwegian Industrial Disputes Act.

CASE NO. 2532

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

**Complaint against the Government of Peru  
presented by  
the National Trade Union of Health Social Security Workers (SINACUT EsSalud)**

***Allegations: The complainant organization alleges that the social security authorities withheld the use of facilities which it had been using and that the administrative authority failed to adopt any position on the matter***

- 1157.** The complaint is contained in a communication from the National Trade Union of Health Social Security Workers (SINACUT EsSalud) dated 30 October 2006.
- 1158.** The Government sent its observations by communications dated 26 October 2007 and 3 March 2008.
- 1159.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Labour Relations (Public Service) Convention, 1978 (No. 151).

**A. The complainant's allegations**

- 1160.** In its communication dated 30 October 2006, SINACUT EsSalud stated that, pursuant to section 122 of DS (Supreme Decree) No. 005-90-PCM and section 9 of DS No. 026-82-JUS, it had been freely exercising its right to use meeting facilities on the ninth floor (which has an auditorium plus rooms 1 and 2) and the tenth floor (which has halls A, B and C) of the Lima building located at Jr Domingo Cueto No. 120 and Av. Arenales No. 1402 in the Jesús María district of the Province and department of Lima, Peru. The union used the facilities to hold meetings of its National Executive Council (CEN), general assemblies of delegates and meetings of members, peacefully and as mandated by its regulations, and in accordance with its organizational and administrative role, i.e. for the election of its representatives and for managerial and executive activities. The union alleges that, in May 2005, the deputy services and transport manager and the assets and services manager, who were responsible for the administration of the said facilities, expressed their displeasure at the exercise of the legitimate right to use these facilities. As officials who had recently joined EsSalud from the private sector, not having followed a career in the administrative service, they found it strange that unionized workers of their own institution should meet on its premises. They attempted to avoid taking responsibility by delaying the processing of the request, arguing that the prior opinion of the Central Human Resources Office was required before the union's request to use the facilities could be met. They also declared that the aforementioned office had to state its position if the person making the request was also indicated as being the beneficiary of the entitlement.
- 1161.** The complainant states that the Central Human Resources Office of EsSalud declared, by means of letter No. 2704-GCRH-EsSalud-2005 of 15 June 2005, that it was not responsible for adopting a position with regard to the request made by SINACUT, as it came within the competence of the Assets and Services Office to issue the formal authorization for using the facilities of the institution. Moreover, by letter No. 2721-GCRH-EsSalud-2005 of

15 June 2005, it stated that Mr Octavio Rojas Caballero is the General Secretary of SINACUT EsSalud, as shown by the attached registration record. It adds that SINACUT, by means of notice No. 234-CEN-SINACUT-EsSalud-2005 of 2 August 2005, formalized its request to reserve hall A and room 2 for 18, 25 and 31 August 2005 and 6 September 2005, respectively. Regrettably, the institution persisted with its delaying tactics and its failure to grant the requested facilities. The trade union therefore had no alternative but to express its disquiet at being deprived of the facilities requested for 25 August and 6 September 2005, considering its request to have been refused and putting on record that it considered its rights to have been violated, as it had been prevented from holding its meetings despite the fact that these had been scheduled in advance.

- 1162.** On 7 September 2005, SINACUT made a reservation for hall A and room 2 for 4, 11 and 18 October 2005 and 25 October 2005, respectively. This request to use the facilities was also rejected. Seeking to improve the existing climate, the union asked for the necessary arrangements to be made, given that a meeting of union leaders at national level had already been convened, taking into account that the reservation was made giving due notice for 4 October 2005. Furthermore, it enclosed the printout of the email of 30 September 2005 and circular letter No. 006-CEN-SINACUT-EsSalud-2005 of 29 September 2005 as proof that the communications concerning its management meeting of 4 October 2005 had been made. Replying to this request, the Assets and Services Office claimed, by means of letter No. 1754-GPyS-GDAO-ESSALUD-2005, that for the moment it was not possible to meet the request as the rooms on the ninth floor were occupied, in accordance with the reservations made giving due notice. However, it did not mention that for 4 October 2005 a reservation had not been made for any of the rooms on the ninth floor but rather for hall A on the tenth floor. On 10 October 2005, SINACUT again requested the competent authority to take the necessary steps to enable the facilities to be used on 11 October 2005, in accordance with the communication made with due notice. Despite the request, no steps were taken. On 12 October 2005, the union told the Assets and Services Office of its disquiet at being deprived of the use of hall A on the tenth floor of the Lima building, which had been reserved for 11 October 2005. The union considered its request to have been refused and its rights to have been infringed, as it had been prevented from holding the scheduled CEN meeting. The Assets and Services Office replied that section 9 of DS No. 026-82-JUS does not impose an obligation and that the union would understand the institution giving priority to its own development, using its facilities at headquarters. It also pointed out that the meeting rooms at the Lima building were reserved for various scheduled events for the remainder of the year and therefore it was not possible to grant permission for their use at the present time. It recommended the union to make arrangements to conduct its activities outside headquarters. SINACUT challenged this communication, considering it prejudicial and contrary to the internal regulations of the union. By notice No. 313-CEN-SINACUT-EsSalud-2005 of 24 October 2005, it declared that the entitlement to facilities was an inalienable part of trade union rights and law, and it therefore had a legitimate right to use the facilities of EsSalud for its meetings as part of the union's organizational, administrative and managerial activities. Moreover, it pointed out that its rights were protected by section 9 of DS No. 026-82-JUS and section 122 of DS No. 005-90-DCM, regulations which had a restrictive and binding character, i.e. laying down provisions regardless of the wishes of the parties concerned, thus imposing the obligation on the authority to take steps to permit the exercise of such a right. Given that the facilities are essential, inalienable resources which must be made available to the workers' representatives to guarantee the continuing activity and existence of the trade unions, it considers that the deprivation, denial or disruption thereof constitutes an act of interference which is damaging to its functioning or management, all of which violates the fundamental right, in both human and labour terms, of freedom of association.

- 1163.** The complainant organization states that the Central Human Resources Office of EsSalud made a pronouncement by means of letter No. 5911-GCRH-EsSalud-2005 with regard to the advisory opinion issued by the Assets and Services Office. In the aforementioned document, with reference to the facilities, it states briefly that the matter is not specifically regulated and that it should be settled according to what is reasonable; if any group of workers wishes to use the facilities, due notice should be given, taking account of the scheduling established by the institution for its official events. This could be interpreted as meaning: provided that the trade union makes its reservation in advance, further to incurring expenditure in connection with convening the meeting and the presence of the participants, prior to any official event requiring the same facilities. As was the case on a previous occasion, it also pretended that reservations had been made for official events, whereas in fact the facilities were not being used. The complainant adds that because the procedures for expediting the appeal lodged on 24 October 2004 had been frozen, SINACUT addressed notice No. 014-CEN-SINACUT-EsSalud-2006 dated 11 January 2006 to the Assets and Services Office, requesting it to duly expedite the procedures and submit the facts of the matter to the hierarchical superior in the form of writs, in accordance with the administrative procedure regulated by Act No. 27444 and in observance of the principle of legality, guaranteeing the exercise of the constitutional right of defence and the plurality of instances. Since December 2005 the case has been frozen, which implies that the competent authority has still not resolved the merits of the issue which was brought before it. Furthermore, SINACUT has continued to be deprived of its right to use the facilities of EsSalud for more than a year (from August 2005 to the present time). The complainant organization considers that this constitutes a violation of ILO Conventions Nos 87, 98 and 151.
- 1164.** The complainant also affirms that, to ensure that facilities, materials and rooms for holding meetings on the premises of the employer are available to trade unions and to safeguard the normal and efficient running of union activities, the Government of Peru adopted section 9 of Supreme Decree No. 026-82-JUS, which states that (union) general assemblies shall be held on government department premises, and both general assemblies and ordinary meetings shall be held outside working hours. The Government also adopted section 122 of DS No. 005-90-PCM, which states that trade unions shall represent their members in the matters laid down by the respective law, and their leaders shall enjoy facilities to act as legal representatives. It should also be noted that the Government placed limits on the scope of the public authority, stipulating that the State must refrain from any act likely to coerce, restrict or jeopardize the right of freedom of association. Section 6 of DS No. 003-82-PCM, implementing ILO Convention No. 151, states that the public authority shall refrain from any act likely to restrict or impede the exercise of the right to organize, or from intervening in the establishment, organization or administration of trade unions. Trade union organizations of public servants shall enjoy complete independence vis-à-vis the public authorities and shall not form part of government administrative structures. Moreover, it should be emphasized that, apart from the fact that the provision of meeting facilities is not prohibited by any part of national law, observance of the international Convention and the specific implementing regulations is essential, given their normative status laid down in article 51 of the Political Constitution of Peru and as a source of law in the national legislation, since failure to recognize the existence of such a prerogative would imply a clear lack of compliance with ILO Convention No. 151, DS No. 026-82-JUS and DS No. 005-90-PCM. Finally, account has to be taken of the fact that the right to use meeting facilities is irrevocable and inalienable, since the rescinding or deprivation thereof would also mean jeopardizing the fundamental human and labour right of freedom of association, bearing in mind that the attitude of anti-union discrimination on the part of the public authority severely restricts or limits the exercise of trade union activity.

**B. The Government's reply**

- 1165.** In its communication of 26 October 2007, the Government indicates that there is a lack of understanding between the parties in relation to the application of the regulations referred to by the complainant organization concerning the use of premises for union activities, observing that there is constant disagreement between the institution and its workers. The documentation attached by the Central Human Resources Office of EsSalud by means of letter No. 5911-GCRH-EsSalud-2005 shows that the issue is not specifically regulated and has to be settled on the basis of what is reasonable. This means that the union members need to reserve the facilities in advance – taking account of the schedule that the institution has established for its official events – in order to be able to hold its meetings without any unforeseen obstacles.
- 1166.** The Government also states that the members of the union do not accept that position and voice their concern that the damaging situation can arise where the union reserves one of the institution meeting rooms in advance, but the institution then suspends the reservation prior to the event in order to hold an event of its own. The Government points out that the purpose of the regulations referred to by the complainant organization, as the text thereof shows, is to guarantee the appropriate use of public authority premises, ensuring the provision and continuity of public services and the efficient functioning of the administration. Hence it considers that use of public authority premises by the unions should be subject to the hours which do not interrupt the performance of the institution's own activities. Thus, if an adverse situation arises for the employer, this has to constitute grounds for refusing to grant the use of the facilities, as the normal functioning of the public activities might be disrupted. Finally, the Government indicates that a communication (No. 163-2008-MTPE/91) has been sent to the President of EsSalud requesting him to provide information on the measures taken by the institution to give effect to the requirements of Conventions Nos 87, 98 and 151 in respect of the premises where trade union meetings will take place at EsSalud.

**C. The Committee's conclusions**

- 1167.** *The Committee observes that in the present case the complainant organization alleges that the health social security authorities refused to grant the use of facilities (meeting rooms) which it had been using, and that although it lodged an appeal against the decision with the Assets and Services Office of the institution in October 2004, the latter did not process the appeal or submit it to the hierarchical superior. The complainant organization alleges that this decision by the institution violates the terms of ILO Conventions Nos 87, 98 and 151, and constitutes an act of interference designed to impair its functioning and administration, as well as violating internal regulations which guarantee that the trade unions can hold their general assemblies on the government department premises.*
- 1168.** *In this respect, the Committee notes the Government's statement to the effect that: (1) there is a lack of understanding between the parties as regards the application of the regulations mentioned by the complainant organization concerning the use of the premises for union activities and there is constant disagreement in this respect between the institution and the workers; (2) the purpose of the regulations on this matter is to guarantee the appropriate use of public authority premises, ensuring the provision and continuity of public services and the efficient functioning of the administration; (3) the use of the public authority premises by the trade unions must be subject to the hours which do not interrupt the performance of the institution's own activities; and (4) the Minister of Labour and Promotion of Employment has sent a communication to the President of EsSalud requesting information on the measures taken by the said institution to give effect to the requirements of Conventions Nos 87, 98 and 151 with regard to the premises where trade union meetings will be held at EsSalud.*

**1169.** *The Committee recalls that, when examining similar allegations, it emphasized that the right to hold meetings is essential for workers' organizations to be able to pursue their activities and that it is for employers and workers' organizations to agree on the modalities for exercising this right, and that the Labour Relations (Public Service) Convention, 1978 (No. 151), lays down in Article 6 that "such facilities shall be afforded to the representatives of recognized public employees' organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work" and that "the granting of such facilities shall not impair the efficient operation of the administration or service concerned" [see 332nd Report, Case No. 2223, Argentina, para. 246]. The Committee therefore requests the Government to ensure that the legal provisions relating to the use of premises for union activities are observed, and also invites the parties to conduct negotiations with a view to reaching an agreement on arrangements for exercising the right to hold meetings, including deciding the venue for trade union meetings. The Committee requests the Government to keep it informed in this respect.*

### **The Committee's recommendation**

**1170.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*Recalling that the right to hold meetings is essential for workers' organizations to be able to pursue their activities and that it is for employers and workers' organizations to agree on the modalities for exercising this right and that the Labour Relations (Public Service) Convention, 1978 (No. 151) – ratified by Peru – lays down in Article 6 that "such facilities shall be afforded to the representatives of recognized public employees' organizations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work" and that "the granting of such facilities shall not impair the efficient operation of the administration or service concerned", the Committee requests the Government to ensure that the legal provisions relating to the use of premises for union activities are observed, and also invites SINACUT EsSalud and the health social security authorities to conduct negotiations with a view to reaching an agreement on arrangements for exercising the right to hold meetings, including deciding the venue for trade union meetings. The Committee requests the Government to keep it informed in this respect.*

CASE NO. 2559

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

**Complaint against the Government of Peru  
presented by  
the Union of Agricultural Public Sector Workers (SUTSA)**

***Allegations: The complainant alleges the anti-union dismissal of a union official from the Donoso Experimental Facility of the National Institute for Agricultural Research (INIA)***

- 1171.** The complaint is contained in a communication from the Union of Agricultural Public Sector Workers (SUTSA) dated 26 March 2007. The SUTSA sent additional information in communications dated 27 May, 19 June, 17 July, 2 August, 13 September, 31 October 2007 and 16 January 2008.
- 1172.** The Government sent its observations in a communication dated 26 October 2007 and 3 March 2008.
- 1173.** Peru has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

**A. The complainant's allegations**

- 1174.** In its communications of 26 March, 27 May, 19 June, 17 July, 2 August, 13 September and 31 October 2007, the SUTSA alleges the arbitrary and anti-union dismissal of Mr Roger Augusto Rivera Gamarra, General Secretary of the SUTSA at the time of his dismissal and currently one of its national officials, on 29 December 2003, from the Donoso Experimental Facility of the Kiyotada Miyagua Centre for Horticultural Research and Training of the National Institute for Agricultural Research (INIA). The complainant indicates that the union official concerned appealed to the judicial authority against his dismissal, and that in 2005 the First Civil Court of Huaral upheld the claim on the nullity of the dismissal lodged by Mr Roger Augusto Rivera Gamarra and ordered that he be reinstated in his job and paid outstanding wages. The complainant also points out that, on 23 March 2006, the Civil Chamber of the High Court of Justice of Huaral concluded that the real reason for the plaintiff's dismissal was his position as a union official and confirmed the ruling ordering his reinstatement and payment of outstanding wages. An appeal for judicial review was lodged against this ruling, and the Interim Constitutional and Social Law Chamber of the Supreme Court of Justice declared the appeal to be unfounded.
- 1175.** The complainant states that, bearing in mind the rulings ordering the reinstatement of the official concerned, it demanded, without success, that these rulings be implemented. On 27 July 2007, the judicial authority renewed its demand that the reinstatement order be implemented, warning that it would otherwise be carried out by the representative of the law; nevertheless, the reinstatement order was not implemented. In its communication of 16 January 2008, the complainant organization indicates that by decision of 22 November 2007, the judicial authority ordered the Director of the Donoso Experimental Facility to reintegrate Mr Rivera Gamarra, and issued a warning that the corresponding penal proceedings would be initiated if reinstatement did not take place.



## B. The Government's reply

1176. In its communication of 26 October 2007, the Government states that, with regard to this case, it has followed the required procedures of the various bodies of the Ministry of Agriculture and the judiciary. In this regard, the Supreme Court of Justice of the Republic, through official letter No. 6917-2007-SG-CS-PJ of 13 September 2007, states that the appeal for judicial review No. 1216-2006, lodged by the attorney of the Ministry of Agriculture under the proceedings for the nullification of the dismissal initiated by Mr Roger Augusto Rivera Gamarra against the Donoso Experimental Facility of the INIA, was declared unfounded. Accordingly, the reinstatement of the dismissed worker in his job was justified, as had been declared in the rulings of first and second instance. The Government adds that, on 12 October 2007, the attorney of the Ministry of Agriculture indicated that the ministerial office for agriculture has been informed that the Legal Adviser's Office of the INIA will take steps with the Ministry of Economics and Finance (MEF) concerning the budgetary resources required to re-establish the position held by the plaintiff and the payment of outstanding wages dating from his dismissal (29 December 2003). In a communication of 3 March 2008, the Government indicates that in October 2007 the Ministry of Agriculture informed the Ministry of Labour that it was making budgetary arrangements for the creation of a post in which the complainant would be reintegrated. Through official letter No. 107-2008-INIA-OGAJ/DG, dated 27 February 2008, the Ministry of Labour was informed that on 18 January 2008, the First Civil Court of Huaral carried out the reinstatement of Roger Augusto Rivera Gamarra in the post he occupied in the Donoso Experimental Facility (Huaral), under the provisions of Legislative Decree No. 276. This measure has been made possible by the INIA through the transfer of a vacant post from the San Roque-Iquitos Experimental Facility to the Donoso Experimental Facility, since the Economic and Financial Office had refused the request for budgetary increases in this facility during the fiscal year 2007-08.

## C. The Committee's conclusions

1177. *The Committee observes that, in the present case, the complainant alleges the anti-union dismissal of union official Mr Roger Augusto Rivera Gamarra, General Secretary of the SUTSA at the time of his dismissal and currently one of its national officials, on 29 December 2003, from the Donoso Experimental Facility of the Kiyotada Miyagua Centre for Horticultural Research and Training of the INIA, and that, although the judicial authority ordered his reinstatement on many occasions, including under warning of initiating penal proceedings, and the payment of outstanding wages, these measures have not been adopted.*

1178. *In this regard, the Committee notes that the Government states that: (1) on 13 September 2007, the Supreme Court of Justice of the Republic declared as unfounded the appeal for judicial review lodged by the attorney of the Ministry of Agriculture under the proceedings for nullification of the dismissal initiated by Mr Roger Augusto Rivera Gamarra and that, accordingly, the reinstatement of the dismissed worker in his job was justified, as had been declared in the rulings of first and second instance; and (2) that on 12 October 2007, the attorney of the Ministry of Agriculture indicated that the ministerial office for agriculture has been informed that the Legal Adviser's Office of the INIA will take steps with the Ministry of Economics and Finance concerning the budgetary resources required to re-establish the position held by the plaintiff and the payment of outstanding wages dating from his dismissal (29 December 2003). Finally, the Committee notes with interest that the Government indicates that Mr Roger Augusto Rivera Gamarra has been reinstated in his previous post.*

**1179.** *The Committee deplores the considerable time taken to implement the rulings to reinstate the union official concerned and recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective [see **Digest of decisions and principles of the Freedom of Association Committee**, 2006, fifth edition, para. 826]. In these circumstances, the Committee requests the Government to ensure the payment of the corresponding outstanding wages and other benefits to union official Mr Roger Augusto Rivera Gamarra, and to keep it informed in this regard.*

### **The Committee's recommendation**

**1180.** *In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:*

*The Committee requests the Government to ensure the payment of the corresponding outstanding wages and other benefits to union official Mr Roger Augusto Rivera Gamarra, and to keep it informed in this regard.*

CASE No. 2546

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

**Complaint against the Government of the Philippines  
presented by  
the Public Services Labor Independent Confederation (PSLINK)  
supported by  
Public Services International (PSI)**

***Allegations: The complainant alleges that the director of the Technical Education and Skills Development Authority (TESDA) committed several discriminatory acts against trade union members in retaliation for having participated in anti-corruption proceedings and protests targeting the TESDA. The said acts include attempts to curtail freedom of expression, suspension without pay, work transfers, termination of employment, withholding of financial incentives and filing a libel lawsuit against a trade union leader***

**1181.** The complaint is contained in a communication of 12 February 2007. The complainant transmitted additional information in support of its complaint in communications of 7 March, 5 April and 11 September 2007. Public Services International (PSI) affiliated itself with the complaint via a communication of 19 March 2007.

**1182.** The Government submitted its observations in communications of 5 March, 28 May and 4 September 2007.

- 1183.** The Philippines has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

#### **A. The complainant's allegations**

- 1184.** In its communication of 12 February 2007, the complainant Public Services Labor Independent Confederation (PSLINK) – an umbrella organization of 338 public sector rank-and-file unions with 63,000 members – states that Annie Enriquez Geron, the President of its affiliate the Samahang Malaya at Nagkakaisang Kawani ng TESDA (SAMAKA–TESDA), filed a complaint for misuse of public funds against the Technical Education and Skills Development Authority (TESDA) Director-General Augusto L. Syjuco Jr before the Presidential Ant-Graft Commission (PAGC) and the Office of the Ombudsman. The complaint was filed as part of a union advocacy and community rights campaign and in keeping with the Oath of Government Employees obliging all oath-takers to speak out against “anomaly and abuse”. A copy of the complaint is attached to the communication.
- 1185.** The complainant indicates that the SAMAKA–TESDA had spearheaded the filing of corruption cases against the former TESDA Director-General, Dante Liban, before the PAGC and the Office of the Ombudsman in 2002 and 2003; upon the PAGC’s recommendation, Mr Liban was dismissed by the President in March 2003. SAMAKA–TESDA had also sought the Commission on Audit (COA) to conduct an audit on transactions that were the subject of its complaints regarding Mr Liban. On 10 November 2005, the COA submitted to Mr Syjuco a report confirming eight irregularities out of ten cited by the union in its complaint against Mr Liban.
- 1186.** The complainant states that the case before the PAGC against Mr Syjuco was filed on the basis of Republic Act No. 3019, the Anti-Graft and Corrupt Practices Act, as well as Republic Act No. 6713 concerning the code of conduct and ethical standards for public officials and employees. The complainant indicates that the union submitted evidence and documents in support of its complaint to the PAGC on 16 October 2006, but the processing of the complaint experienced delays as Mr Syjuco had requested extensions for the date of submission of documents subpoenaed by the PAGC.
- 1187.** The complainant alleges that, after he was made aware of the filing of the complaint, which had generated media attention on TESDA, on 15 September 2006 Mr Syjuco issued two memoranda – one reminding employees of the ban on participating in demonstrations and affixing union-related posters and materials in the workplace, the other establishing guidelines for obtaining access to official documents. The former memorandum, a copy of which is attached to the complainant’s communication, states that Memorandum Circular No. 6 series of 1987 prohibits government officials and employees from resorting to “strikes, demonstrations, mass leaves, walk-outs and other forms of mass action resulting in temporary stoppage or disruption of public service”; it further states that strikes and other forms of mass action shall only be allowable in areas where the delivery of the public service shall not be prejudiced or undermined, such as TESDA’s basketball court. The complainant adds that the first memorandum was intended to discourage employees from joining mass actions in support of an anti-corruption campaign, while the latter, by restricting access to official documents, violated article 7 of the Bill of Rights of the 1987 Constitution.
- 1188.** The complainant states that Mr Syjuco also issued transfer orders in respect of the following trade union members: Annie Geron, Mitzi Barreda, Rafael Saus, Luz Galang, and Conrado Maraan Jr. The complainant adds that the context of and the motivation behind Mr Syjuco’s transfer orders were highly suspect, irregular and unprecedented, as

Mr Syjuco does not directly supervise the above employees and has no direct knowledge of their work and competencies; moreover, the transfer orders were neither recommended by their immediate supervisors nor requested by the directors of the offices to which they were transferred.

- 1189.** The complainant attaches a copy of a report, issued by the Envisage Security Agency and addressed to Mr Syjuco, indicating that at 12.30 p.m. of 30 October 2006 several TESDA employees assembled for a demonstration in the central building's lobby area. The report indicates that the purpose of the demonstration was to criticize Mr Syjuco's performance and that several participants held placards accusing Mr Syjuco of corruption; it also names the following union members among the participants: Annie Geron, Mitzi Barreda, Rafael Sauz, Luz Galang and Conrado Maraan Jr The complainant also attaches copies of memoranda dated 30 October 2006 and addressed to all of the above-named individuals. The memoranda refer to the 30 October 2006 report of the security agency and request their recipients to explain, within a 72-hour period, why administrative charges for grave misconduct should not be filed against them.
- 1190.** According to the complainant, on 10 November 2006 orders of preventive suspension for a period of 90 days were handed to union president Annie Geron and union members Mitzi Barreda and Rafael Sauz; the said orders also barred the trade unionists from entering TESDA premises.
- 1191.** The complainant alleges that Mr Syjuco had also ordered the TESDA Women's Center Alumnae Association (TWCAA), an affiliate of PSLINK that had openly supported the campaign of the TESDA employees unions, to immediately vacate their room on the floor of the TESDA Women's Center. The complainant adds that the TWCAA is a support group for poor and marginalized women who have received training at the Center; it provides assistance through job placements, gender and development advocacy, and micro-loans to assist women in starting businesses. After its eviction, the TWCAA has had difficulty finding a new office and its programmes have been disrupted.
- 1192.** The complainant indicates that, on 17 November 2006, Mr Syjuco issued TESDA Order No. 294, which transferred Luz Galang, former union president and one of the complainants in the proceeding against Mr Syjuco, from the TESDA Training Center's Taguig City campus to the TESDA Pasay-Makati District Office, National Capital Region.
- 1193.** On 29 November 2006, a TESDA order was issued by Mr Syjuco authorizing Teodoro Gatchalian to replace Ramon Geron, spouse of SAMAKA-TESDA president Annie Geron, as officer-in-charge in the TESDA Region IV office in Quezon. A copy of the order is attached to the complainant's communication.
- 1194.** The complainant alleges that on 7 December 2006, a letter signed by Mr Syjuco was received by Ramon Geron, the husband of Annie Geron, terminating his services as provincial director of the TESDA Quezon office due to non-renewal of his appointment, thus ending nearly 30 years of public service without valid cause. (A copy of the letter is attached to the complainant's communication.) The complainants add that Mr Geron had yet to be reinstated in spite of the 9 January 2007 letter of the Civil Service Commission indicating that Geron's appointment was permanent.
- 1195.** According to the complainant, on 4 December 2006 two civilian men, introducing themselves as policemen from San Pedro, visited Annie Geron's residence to serve a court subpoena, which is normally sent by registered mail. The subpoena concerned the libel charges filed by Mr Syjuco against Annie Geron for a 10 October 2006 radio interview she had given to Bombo Radyo Iloilo, and required her to travel to Iloilo City. The

complainants add that the charges against Ms Geron were intended to harass, and that travelling to Iloilo City entailed expenses and risks for her safety.

- 1196.** The complainant states that on 18 December 2006 Mr Syjuco issued a memorandum on guidelines (a copy of which is attached to the communication) for the granting of the collective agreement incentive in the amount of 10,000 pesos. The said document states, inter alia, that the TESDA management and the TESDA–ACE union have agreed to “promote a working environment that is conducive to a harmonious relationship”, and that those deemed to be in violation of this agreement shall not be entitled to the 10,000 peso incentive. According to the complainant, the incentive was granted to all employees, including TESDA officials and board members who are not part of the collective bargaining unit, but was denied to the following union members: Annie Geron, Conrado Maraan Jr, Luz Galang, Patricia Bacolod, Rafael Saus, Mitzi Barreda, Renato Silverio, Eduardo Casco, Joyce Elizabeth Meneses, and Bayquen Tolentino. The complainant contends that the above-named individuals were denied the incentive for having participated in mass actions protesting Mr Syjuco’s corrupt practices.
- 1197.** The complainant states that OIC director Francisco Jugar Jr of the TESDA Region IV-A (CALABARZON) office issued a memorandum on 3 January 2007 to all the OIC provincial directors of Rizal, Batangas and Quezon to take appropriate action to cause the refund of the 10,000 peso incentive granted to Irene Mendoza, SAMAKA–TESDA treasurer, and union members Ronald Golfo, Ronaldo Salvador, Zorayda Amper, Arnold Maasigan, Doreen Alim and Arlene Antonio – all of whom were named in a TESDA Security Commander report as having participated in an 8 November 2006 mass action.
- 1198.** The complainant indicates that on 5 January 2007 Mr Syjuco filed an administrative action with the Office of the Ombudsman against Annie Geron, for violation of Republic Act No. 6713 and gross violation of the Civil Service Commission’s Amended Rules and Regulations Governing the Exercise of the Right of Government Employees to Organize. The complainant also attaches a copy of a 12 November 2006 letter, from Mr Syjuco’s letter to the Ombudsman, indicating that Mr Syjuco had also initiated criminal charges against Annie Geron for gross violation of Republic Act No. 3019 for causing undue injury to the Government and the recipients of TESDA’s Ladderized Education Program. The letter further states that Ms Geron had systematically distorted privileged and confidential information about the campaign on the said programme, thus damaging the country’s educational and human resource development programme and thwarting TESDA’s manpower development objectives.
- 1199.** The complainant contends that the orders, memoranda and guidelines described above were intended to harass, intimidate and stifle legitimate dissent. It further alleges that as a result of Mr Syjuco’s retaliatory actions widespread fear of victimization has been sown amongst union members and it has not been possible for the two unions in TESDA – SAMAKA–TESDA and TESDA–ACE – to conduct their normal activities or for union leaders and activists to fulfil their mandates.
- 1200.** In its communication of 7 March 2007 the complainant attaches several documents in support of its complaint, including:
- A copy of a 20 February 2007 subpoena requesting the respondents Annie Geron, Lyn de Guzman and Joyce Meneses to appear before the court in a libel action initiated by Mr Syjuco.

- A 27 February 2007 memorandum, issued by Mr Syjuco to Annie Geron, indicating that she had been dropped from the rolls for refusing to report to work at the TESDA Laguna Provincial Office and thus failing to comply with a return-to-work order issued on 12 February 2007.
- A 12 February 2007 memorandum, issued by Mr Syjuco to Mitzi Barreda, indicating that she had been dropped from the rolls for failing to report to work at the TESDA Romblon Provincial Office since 25 October 2006.
- A 5 March 2007 memorandum, issued by Mr Syjuco to Rafael Saus, indicating that he had been dropped from the rolls for refusing to report to work at the TESDA Pasay-Makati District Office, National Capital Region, and thus failing to comply with a return-to-work order issued on 23 February 2007.

**1201.** In its communication of 5 April 2007 the complainant attaches a copy of an 8 March 2007 order of the PAGC in support of its complaint. The said order indicates that a sufficient basis exists to commence an administrative investigation against Mr Syjuco and other TESDA officials, and requests the respondents to submit a counter-affidavit to the allegations of misuse of public funds.

**1202.** In its 11 September 2007 communication, the complainant indicates that on 28 August 2007 the Civil Service Commission issued resolution No. 071697, which found the 16 October 2006 orders transferring Annie Geron, Mitzi Barreda, Rafael Saus, Conrado Maraan Jr, and Luz Galang from the TESDA main office in Taguig, Manila, to different provincial offices to be invalid. (A copy of the resolution is attached to the communication.) In resolution No. 071697, the Civil Service Commission took note of the following facts:

- On 16 October 2006, TESDA Director-General Syjuco issued orders transferring Annie Geron, Mitzi Barreda, and Rafael Saus from the TESDA main office in Taguig, Manila, to different provincial offices.
- In a letter of 23 October 2006, Geron, Barreda and Saus informed their respective Regional Directors that they would not report to their new places of assignment as the TESDA transfer orders were not issued in the interest of the service but were meant to harass, intimidate, coerce and discriminate against them.
- On 26 October 2006, Syjuco issued separate memoranda directing Geron, Barreda and Saus to explain in writing within 72 hours why they should not be charged with gross insubordination for not reporting to their new places of assignment. On the same day Syjuco also issued an order transferring Conrado Maraan Jr from the TESDA main office in Taguig, Manila, to the Abra provincial office.
- In a letter of 30 October 2006, Geron, Barreda, and Saus replied that the reassignment orders were unlawful, issued whimsically and capriciously and not in the interest of the service. They further avowed that their reassignment was a form of retaliation for having spoken out against Syjuco's alleged abuses and their filing of corruption charges against the latter.
- On 31 October 2006, the names of Geron, Barreda and Saus were removed from the TESDA – Central Office payroll.
- On 6 November 2006, a formal charge for gross insubordination was issued against Geron, Barreda and Saus.

- In a memorandum dated 10 November 2006, Syjuco placed Geron, Barreda and Saus under preventive suspension for 90 days.
- On 17 November 2006 Syjuco issued an order transferring Luz Galang from the TESDA Training Center, Taguig Campus Enterprise to the Pasay-Makati District Office, TESDA-NCR.
- On 29 November 2006 Syjuco lifted the preventive suspension order but directed Geron, Barreda and Saus to report to their places of assignment indicated in the previous TESDA orders. Syjuco was subsequently informed by the three trade unionists' regional directors that they had not reported to their respective places of assignment and issued, on 12 February 2007, a memorandum dropping Barreda from the rolls for failure to report for work since 25 October 2006. In memoranda dated 27 February and 5 March 2007, respectively, Geron and Saus were likewise dropped from the rolls for failure to report for work.
- On 13 March 2007 Geron, Barreda, and Saus submitted a joint appeal before the Civil Service Commission challenging their reassignment orders; their appeal was consolidated with that of Galang and Maraan Jr on 21 March 2007.
- On 10 April 2007, Geron, Barreda and Saus also appealed Syjuco's memoranda dropping them from the rolls before the Civil Service Commission.

**1203.** In finding the transfer orders to be invalid, the Civil Service Commission noted, inter alia, that Syjuco had failed to show reason for the reassignment of the union members concerned, that the orders transferring the union members concerned were issued one month after the SAMAKA-TESDA filed complaints against Syjuco before the PAGC and the Office of the Ombudsman for alleged graft and corruption. The Civil Service Commission also stated that the foregoing circumstances would even indicate that there was an attempt on Syjuco's part to bust the union.

## **B. The Government's reply**

**1204.** In its communication of 5 March 2007, the Government states that on 16 October 2006 Ms Geron and two other employees were reassigned from the central office to regional and district offices. Ms Geron and her co-workers were formally charged with gross insubordination and grave misconduct after failing to report to their new assignments, and their case was going through a formal hearing. At the same time, Ms Geron had initiated an administrative action appealing the transfer order. The Government adds that in light of this action, which was pending before the Civil Service Commission, the filing of a complaint before the Committee on Freedom of Association was premature.

**1205.** In its 28 May and 4 September 2007 communications, the Government provides a chronology of events respecting the cases of Annie Geron, Mitzi Barreda and Rafael Saus that corroborates the facts taken note of by the Civil Service Commission in resolution No. 071697. The factual background supplied by the Government includes the following elements:

- On 16 October 2006, TESDA Director-General Syjuco issued orders transferring Annie Geron, Mitzi Barreda and Rafael Saus from the TESDA main office in Taguig, Manila, to different provincial offices.

- In a letter of 23 October 2006, the concerned parties informed their respective regional directors that they would not report to their new places of assignment as the TESDA transfer orders were not issued in the interest of the service but were meant to harass, intimidate, coerce and discriminate against them.
- On 26 October 2006, Syjuco issued separate memoranda directing Geron, Barreda, and Saus to explain in writing within 72 hours why they should not be charged with gross insubordination for not reporting to their new places of assignment.
- In a letter of 30 October 2006, Geron, Barreda and Saus replied that the reassignment orders were unlawful, issued whimsically and capriciously and not in the interest of the service. They further avowed that their reassignment was a form of retaliation for having spoken out against Syjuco's alleged abuses and their filing of corruption charges against the latter.
- In accordance with the Uniform Rules on Administrative Cases in the Civil Service and TESDA Order No. 158, Series of 2004, Director-General Syjuco referred the cases of the concerned parties to the Administrative Complaints Committee (ACC) for appropriate action.
- The ACC conducted preliminary investigations and subsequently recommended the filing of formal charges for gross insubordination and grave misconduct against the individuals concerned.
- On 2 January 2007, Annie Geron submitted two applications for leave of absence; however, the TESDA Laguna Provincial Office to which she had been assigned issued a memorandum denying the applications for leave unless Geron first reported to the provincial office.
- On 22 January 2007, Rafael Saus filed an application for vacation leave for the period 8 January to 16 February 2007, but did not report to work after the period had expired.
- Syjuco issued memoranda of 23 February and 5 March 2007 dropping Annie Geron and Rafael Saus respectively from the rolls; Mitzi Barreda was dropped from the roll effective 12 February 2007.

**1206.** In its 28 May 2007 communication, the Government states that the dropping of Geron, Barreda and Saus from the rolls cannot be acts of harassment since these actions are supported by factual and legal bases as they had been absent without approval for more than 30 days. The Government adds that Geron should have obeyed the reassignment order even if she did not agree with it. Furthermore, her place of reassignment was near her place of residence and hence would not give rise to financial objections brought about by the high cost of transportation expenses. As regards Mitzi Barreda, the Government indicates that she was merely returned to the Romblon office – her mother station – and that the Romblon office was the very same workplace Barreda had applied for. The Government adds that the employees concerned are bound to comply with their respective reassignment orders since a reassignment order is presumed to be valid until held otherwise by the Civil Service Commission.

**1207.** The Government indicates that the union members concerned had filed complaints respecting their reassignment before the Civil Service Commission and had also pressed criminal charges against Director-General Syjuco. Additionally, they continued to express their grievances before Congress and the Office of the President. The Government states that the ongoing pursuit of these courses of action suggests that the rights of the employees



concerned are ensured and that any ILO action on the present complaint would therefore be premature.

- 1208.** In its communication of 4 September 2007, the Government supplies information in respect of union members Luz Galang, Conrado Maraan Jr, and Ramon Geron. As regards Ms Galang, the Government indicates that she was transferred from TESDA Training Center's Taguig City campus to the TESDA Pasay-Makati District Office by an order of 17 November 2006. Ms Galang subsequently appealed her reassignment before the Civil Service Commission on 27 November 2006; however, on 5 December 2006 she assumed her duties at the Pasay-Makati District Office, as certified by District Director Carlos Flores on 13 December 2006.
- 1209.** As concerns Conrado Maraan Jr, the Government indicates that he was assigned to the Abra Provincial Office by an order dated 26 October 2006 and appealed the reassignment before the Civil Service Commission on 27 November 2006. However, Mr Maraan Jr, started reporting to the Cordillera Administrative Region, pursuant to TESDA Order No. 275, Series of 2006, as of 12 February 2007.
- 1210.** With respect to Ramon Geron, the Government states that Mr Syjuco issued a letter to Geron dated 30 November 2006 indicating that, since he lacked the appropriate eligibility as prescribed in the Civil Service Commission qualification standards, he did not have security of tenure and could therefore be separated from the service, with or without cause, and was not entitled to back wages or salaries. In view of Geron's lack of qualifications, Mr Syjuco decided not to renew Geron's appointment as Provincial Director of Quezon Province, effective 1 December 2006.
- 1211.** The Government adds that Luz Galang's and Conrado Maraan Jr's subsequent compliance with the transfer orders demonstrates their acknowledgement of the said orders' validity, so that the orders could not be construed as discriminatory acts. As regards Ramon Geron, the Government indicates that it is undisputed that Geron does not possess the required eligibility, thereby rendering the non-renewal of his appointment legitimate.

### C. The Committee's conclusions

- 1212.** *The Committee notes that the present case involves allegations of the discriminatory transfer of union members within TESDA, their suspension without pay and termination of employment for having refused to comply with the transfer orders, and such other discriminatory acts as the curtailment of freedom of expression, the withholding of financial incentive, and filing a libel lawsuit against a trade union leader.*
- 1213.** *The Committee notes that the Government raises a preliminary objection to the present case: the Government states that as some of the complainant's members had sought recourse to administrative and legal procedures in respect of several matters contained in the case, any ILO action would therefore be premature. In this regard, the Committee recalls that although the use of internal legal procedures, whatever the outcome, is undoubtedly a factor to be taken into consideration, it has always considered that, in view of its responsibilities, its competence to examine allegations is not subject to the exhaustion of national procedures [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, Annex I, para. 30]. The Committee shall therefore proceed with its examination of the present case.*
- 1214.** *The Committee notes that the union concerned, SAMAKA-TESDA, had undertaken a union advocacy and community rights campaign under which the union's president, Annie Geron, had filed complaints for misuse of public funds against TESDA Director-General Augusto Syjuco Jr before the PAGC and the Office of the Ombudsman. The Committee*

also notes that on 15 September 2006, TESDA issued a memorandum reminding its employees that, Memorandum Circular No. 6 series of 1987 prohibited government officials and employees from resorting to “strikes, demonstrations, mass leaves, walk-outs and other forms of mass action resulting in temporary stoppage or disruption of public service”; and indicating that strikes and other forms of mass action would only be allowable in areas where the delivery of the public service shall not be prejudiced or undermined, such as TESDA’s basketball court. Noting the complainant’s allegation that the abovementioned memorandum was intended to curtail the union’s freedom of expression, the Committee also observes that, on 30 October 2006, the union organized an anti-corruption demonstration targeting Mr Syjuco in the lobby of TESDA’s central building; a TESDA memorandum to several of the demonstration’s participants was issued on the same day that requested the recipients to explain, within a three-day period, why administrative charges for grave misconduct should not be filed against them.

**1215.** *With respect to the above allegations, the Committee recalls that freedom of opinion and expression constitutes one of the basic civil liberties essential for the normal expression of trade union rights. While recalling that trade unions must conform to the general provisions applicable to all public meetings and must respect the reasonable limits which may be fixed by the authorities to avoid disturbances in public places [see **Digest**, op. cit., para. 144]. The Committee also wishes to emphasize that the right to organize public meetings constitutes an essential element of freedom of association. The Committee accordingly requests the Government to transmit a copy of Memorandum Circular No. 6, series of 1987 regulating the right of government officials to engage in strikes and mass actions, so that it may assess the said regulation’s compliance with the above-cited principles.*

**1216.** *As regards allegations concerning the transfer of union members Annie Geron, Mitzi Barreda, Rafael Saus, Luz Galang and Conrado Maraaan Jr, the Committee observes that the information provided by the complainant and the Government establishes the following:*

- *On 16 October 2006, TESDA Director-General Syjuco issued orders transferring Annie Geron, Mitzi Barreda and Rafael Saus from the TESDA main office in Taguig, Manila, to different provincial offices.*
- *In a letter of 23 October 2006, the concerned parties informed their respective regional directors that they would not report to their new places of assignment as the TESDA transfer orders were not issued in the interest of the service but were meant to harass, intimidate, coerce and discriminate against them.*
- *On 26 October 2006, Syjuco issued separate memoranda directing Geron, Barreda and Saus to explain in writing within 72 hours why they should not be charged with gross insubordination for not reporting to their new places of assignment. On the same day Syjuco also issued an order transferring Conrado Maraaan Jr from the TESDA main office in Taguig, Manila, to the Abra provincial office.*
- *In a letter of 30 October 2006, Geron, Barreda, and Saus replied that the reassignment orders were unlawful, issued whimsically and capriciously and not in the interest of the service. They further avowed that their reassignment was a form of retaliation for having spoken out against Syjuco’s alleged abuses and their filing of corruption charges against the latter.*
- *On 31 October 2006, the names of Geron, Barreda and Saus were removed from the TESDA - Central Office payroll.*

- On 6 November 2006 a formal charge for gross insubordination was issued against Geron, Barreda and Saus.
- In a memorandum dated 10 November 2006, Syjuco placed Geron, Barreda and Saus under preventive suspension for 90 days.
- On 17 November 2006, Syjuco issued an order transferring Luz Galang from the TESDA Training Center, Taguig Campus Enterprise to the Pasay-Makati District Office, TESDA-NCR.
- On 29 November 2006, Syjuco lifted the preventive suspension order but directed Geron, Barreda and Saus to report to their places of assignment indicated in the previous TESDA orders. On 12 February 2007, a memorandum was issued dropping Barreda from the rolls for failure to report for work since 25 October 2006. In memoranda dated 27 February and 5 March 2007, respectively, Geron and Saus were likewise dropped from the rolls for failure to report to work.
- On 13 March 2007, Geron, Barreda, and Saus submitted a joint appeal before the Civil Service Commission challenging their reassignment orders; their appeal was consolidated with Galang and Maraan Jr's appeal against their reassignment orders on 21 March 2007.
- On 5 December 2006, Ms Galang assumed her duties at the Pasay-Makati District Office.
- Mr Maraan Jr, started reporting to his place of reassignment as of 12 February 2007.

**1217.** *In addition to the above information, the Committee notes the Government's indications that the reassignment of Geron and Barreda would not cause either of them any undue hardship, and that the fact that Galang and Maraan Jr – who had both initially appealed their reassignment orders – eventually assumed their duties in their places of reassignment proves the validity of the transfer orders. The Committee observes, nevertheless, that the Government does not provide any explanation for the union members' transfers. It notes moreover, that the Civil Service Commission in its resolution No. 071697 of 28 August 2007 found the transfers of the five union members, issued one month after the union had filed administrative complaints against Director-General Syjuco for alleged graft and corruption, to be invalid. The Civil Service Commission also stated that the circumstances surrounding the transfers would even indicate that there was an attempt on Syjuco's part to bust the union. From the information at its disposal, the Committee can only conclude that the transfers of the five above-named individuals were related to their membership in SAMAKA-TESDA. In this regard, the Committee recalls that no person shall be prejudiced in employment by reason of trade union membership or legitimate trade union activities, whether past or present, and that protection against anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker. The compensation for acts of discrimination, moreover, should be adequate, taking into account both the damage incurred and the need to prevent the repetition of such situations in the future [see **Digest**, op. cit., paras 770, 781 and 844]. In these circumstances, the Committee requests the Government to confirm that the transfer orders of Annie Geron, Mitzi Barreda and Rafael Saus have been effectively annulled and that they have been reinstated in their previous posts, in line with the decision of the Civil Service Commission, and ensure that they are fully compensated for both the 90-day period of suspension and the period during which they were dropped from the TESDA payroll, as well as any other damages incurred as a result of the invalidated transfer. With regard to Luz Galang and Conrado Maraan Jr, the Committee requests the Government to repeal their transfer orders and reinstate them in their previous posts, if they so wish, and*

*to compensate them for any wages lost in relation to the transfer. The Committee requests the Government to keep it informed of developments in this regard.*

- 1218.** *The Committee notes that, according to the complainant, a collective agreement incentive in the amount of 10,000 pesos was denied to several union members for having participated in mass actions protesting the alleged corruption and graft within TESDA and thus failing to maintain “a harmonious relationship”. The Committee recalls that protection against acts of anti-union discrimination should cover not only hiring and dismissal, but also any discriminatory measures during employment in particular transfers, downgrading and other acts that are prejudicial to the workers. It therefore requests the Government to institute an independent inquiry without delay in respect of these allegations and if it is found that union members were denied the 10,000 peso incentive because of their trade union membership or activities, to ensure that they are fully paid the same incentive bonuses as the other workers. It requests the Government to keep it informed of the outcome of the inquiry.*
- 1219.** *The Committee takes note of the criminal charges brought by Mr Syjuco against Annie Geron, for gross violation of Republic Act No. 3019 and in relation to statements critical of Syjuco’s leadership of TESDA that Geron had made to the press. In this regard the Committee, recalling that the right to express opinions through the press or otherwise is an essential aspect of trade union rights [see **Digest**, op. cit., para. 155], requests the Government to keep it informed of developments regarding the libel action and to transmit a copy of the Court’s judgement as soon as it is handed down.*
- 1220.** *The Committee takes note of the complainant’s allegation that on 7 December 2007 the contract of Ramon Geron, director of the TESDA Quezon office and the husband of Annie Geron, was not renewed, thus ending his career of 30 years in public service. The complainants add that Mr Geron has yet to be reinstated in spite of a 9 January 2007 letter of the Civil Service Commission indicating that his appointment was permanent. The Committee further notes that according to the Government, as Mr Geron lacked the appropriate eligibility in the Civil Service Commission qualification standards he did not have security of tenure and was not entitled to back wages or salaries. According to the Government, in view of Geron’s lack of qualifications Mr Syjuco decided not to renew his appointment, effective 1 December 2006. In light of the information available to it in this case and the above conclusions, the Committee is concerned that the termination of Mr Geron, may be related to the trade union activities of his wife. The Committee therefore requests the Government to institute an independent inquiry without delay into these allegations and to ensure that Mr Geron is reinstated in his post with full compensation for lost wages and benefits if it is found that he was dismissed unfairly. It requests the Government to keep it informed of the outcome of the inquiry.*

### **The Committee’s recommendations**

- 1221.** *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) Recalling that the right to organize public meetings constitutes an essential element of freedom of association, the Committee requests the Government to transmit a copy of Memorandum Circular No. 6, series of 1987 regulating the right of government officials to engage in strikes and mass actions.*
  - (b) The Committee requests the Government to confirm that the transfer orders of Annie Geron, Mitzi Barrera and Rafael Saus have been effectively annulled and that they have been reinstated in their previous posts, in line*

*with the decision of the Civil Service Commission, and to ensure that they are fully compensated for both the 90-day period of suspension and the period during which they were dropped from the TESDA payroll, as well as any other damages incurred as a result of the invalidated transfers. With regard to Luz Galang and Conrado Maraan Jr, the Committee requests the Government to repeal their transfer orders and reinstate them in their previous posts, if they so wish, and compensate them for any wages lost in relation to the transfer. The Committee requests the Government to keep it informed of developments in this regard.*

- (c) The Committee requests the Government to institute an independent inquiry without delay in respect of the allegations relating to the non-payment of the 10,000 peso incentive to several union members and, if it is found that they were denied the incentive because of their trade union membership or activities, to ensure that they are fully paid the same incentive bonus as other workers. It requests the Government to keep it informed of the outcome of the inquiry.*
- (d) The Committee requests the Government to keep it informed of developments regarding the libel action initiated by Mr Syjuco against Ms Annie Geron for statements made to the press, and to transmit a copy of the Court's judgement as soon as it is handed down.*
- (e) The Committee requests the Government to institute an independent inquiry without delay into the matter of the dismissal of Ramon Geron and, if it has been found that he was dismissed unfairly, to ensure that he is reinstated in his post with full compensation for lost wages and benefits. It requests the Government to keep it informed of the outcome of the inquiry.*

CASE NO. 2486

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

**Complaint against the Government of Romania  
presented by  
the National Trade Union Confederation MERIDIAN**

*Allegations: The complainant organization alleges that several trade union leaders were arrested on more than one occasion on suspicion of incitement to subvert the authority of the State and of disturbing public order, whereas they were in fact carrying out legitimate trade union activities regarding the defence of workers and strike action in response to mine closures. The trade union leaders in question were finally sentenced in September 2005, one to ten years in prison and the other five to five years in prison*

- 1222.** The Committee last examined this case at its March 2007 meeting and presented an interim report to the Governing Body [see 344th Report, paras 1159–1215, approved by the Governing Body at its 298th Session (March 2007)].
- 1223.** The Government sent its additional observations in communications dated 26 June and 24 September 2007.
- 1224.** Romania has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## **A. Previous examination of the case**

- 1225.** At its meeting in March 2007, the Committee made the following recommendations [see 344th Report, para. 1215]:
- (a) Given the discrepancies between the allegations made by the complainant and the Government's reply, the Committee requests the Government to provide further information concerning the charge relating to 1999, in order to allow it to form a clear picture of events. In particular, the Committee requests the Government to provide copies of any rulings handed down concerning the case, and any rulings concerning the suspension of Constantin Cretan's sentence on medical grounds.
  - (b) As to allegations of irregularities of judicial procedure, the Committee requests the Government to open an independent inquiry in order to determine whether correct procedure was followed regarding all the accused, and to review the prohibitions imposed upon Miron Cozma. If it is found that the sentencing has been based on anti-union grounds, the Committee requests the Government to take steps for their immediate release. The Committee requests the Government to keep it informed in this regard.
  - (c) As to the allegation concerning the four choices offered by the prosecutor to Ionel Ciontu, the Committee requests the Government to initiate an investigation into the veracity of this allegation and to keep it informed in this regard.
  - (d) The Committee requests the Government to ensure that the principles concerning the obligation to negotiate in good faith are respected in future.
  - (e) As to the allegation regarding a plot to murder Miron Cozma, the Committee requests the Government to open an inquiry into the veracity of this allegation and to keep it informed of the outcome.
  - (f) As to the death of Ionel Ciontu in Jilava prison hospital, in Bucharest, the Committee requests the Government to communicate the results of his autopsy as soon as possible.

## **B. The Government's reply**

- 1226.** The Government sent its observations in communications dated 26 June and 24 September 2007.
- 1227.** *Paragraph (a) of the recommendations in the 344th Report.* The Government produced an extract from the judgement (handed down by the Bucharest Court of Appeal on 12 December 2003) against Miron Cozma, Romeo Beja, Dorin Lois, Vasile Lupu, Ionel Ciontu and Constantin Cretan, in relation to events between 18 and 22 January 1999, when the miners marched to Bucharest following a strike in the mining sector.

**1228.** The ruling states that:

- The violent clashes between groups of civilians, miners, the gendarmerie, the police and other law enforcement services of the Ministry of the Interior, resulted in material damage which posed a threat to Romania's national security, as laid down in Act No. 51/1991.
- Not all of the miners from the Jiu Valley participated in the protests which took place in January 1999. Only 46.9 per cent of employees approved the march to Bucharest, while 25 per cent did not support the strike. There is evidence that, in some cases, support for the strike was obtained because Miron Cozma threatened to dismiss or evict those who did not agree with the strike.
- The election of Miron Cozma as leader of the League of Miners' Unions of Jiu Valley (LSMVJ) was illegal because, according to section 2(1) of Act No. 54/1991, only employees have the right to organize. Miron Cozma's contract had been terminated on 11 March 1997, in accordance with section 130(j) of the Labour Code.
- In order to resolve the conflict, the Minister and the Prime Minister met the leaders of the miners' trade union LSMVJ, including Miron Cozma. However, at each meeting, the union leaders, led by Cozma, issued further demands, including political demands that lay beyond the scope of trade union activities.
- On 16 December 1998, the Minister announced on television that he recommended the closure of the Dalja and Barbateni mines, as part of a programme to restructure the mining sector. The following day, around 1,000 miners from the two mines met. At this point, Miron Cozma was in Bucharest as leader of one of the delegations sent to negotiate with the Minister, who refused to see him because he was unwilling to discuss the matter with an offender.
- On 28 December 1998, a meeting was held in Sacelu (Gorj) between the leaders of the Trade Union Federation of Mines and Energy (CNCSMR), led by Marin Condescu and those from the Jiu Valley, led by Victor Badarca. At this meeting, they decided to call on the Government to request a meeting with the Prime Minister. They also decided that, if their union demands were not met, a general strike would be called on 11 January 1999.
- Also on 28 December 1998, while the main leaders were in Sacelu, Miron Cozma chaired a meeting with other leaders. At this meeting, they adopted a motion to support and ensure that the demands of the trade union organizations were met, and to organize protest marches and meetings in Bucharest between 5 and 10 January 1999. They also adopted a document, signed by Miron Cozma, containing 30 demands including: the resignation of Minister Radu Berceanu, compensation amounting to US\$10,000 for each dismissed employee, loans at concessional rates of interest, 2 hectares of land and wages for the miners equivalent to US\$500.
- On 30 December 1998, the General Inspectorate of the Police and the gendarmerie commanders adopted a range of measures to prevent and counteract the negative impact of demonstrations and protests involving social groups from the mining areas. In the meantime, in view of the fact that, in 1990–91, violence had erupted during the miners' demonstrations in Bucharest, Bucharest city hall issued a communiqué confirming that the march/meeting organized by Miron Cozma on behalf of the LSMVJ was banned, as the necessary legal guarantees that it would be peaceful and orderly had not been provided.
- The general strike in the Jiu Valley began on 4 January 1999 and lasted until 18 January 1999, when the miners began their march on Bucharest. Following the speeches given by Miron Cozma, Romeo Beja and other trade union leaders, the tone of the protest became increasingly political, degenerating into the proclamation of anti-government and anti-presidential slogans.
- On 4 January 1999, the Government issued a communiqué stating that conditions were not favourable for talks. It also stressed that responsibility for non-payment of the miners' wages for the days of the strike lay with the trade union leaders. Their wage demands could be assessed from a technical point of view by a competent committee at

the headquarters of the Ministry of Industry and Commerce, in accordance with the legislation on labour disputes.

- Certain trade union leaders, such as Vasile Lupu and Romeo Beja, misinformed the heads of the mining units by saying that the strike was legal and that the presence of the miners was required. They thus caused many people to be present who did not wish to take part in the strike and who were taken by bus to Petrosani.
- On 14 January, before the meeting of the Coordinating Council, Miron Cozma issued “instructions” on how to use tear gas grenades and protection measures when doing so. Tear gas grenades had already been used in Costesti against law enforcement agents.
- On 15 January 1999, the civil court in Petrosani ruled that the general strike was illegal.
- On 18 January 1999, Miron Cozma decided the itinerary of the march to Bucharest and Romeo Beja, Ionel Ciontu and Vasile Lupu, as well as the leader, Luka Gheiza, coordinated the start of the Jiu miners’ march.
- During the strike, and on the day of departure for Bucharest, the Government stated that it was open to dialogue in order to defuse the situation but that the conditions imposed by Miron Cozma were unacceptable.
- On the morning of 19 January 1999, after 7 a.m., the miners attacked the military facilities at Bumbesti, throwing stones and rocks, some of a considerable size, at the army and the gendarmes. The soldiers withdrew, responding with tear gas, and the miners were able to move on towards Targu Jiu. Nine soldiers were injured as a result of the miners’ violence and serious material damage was caused, including damage to vehicles which belonged to the gendarmerie and police.
- On the morning of 20 January 1999, another confrontation took place at Costesti. A total of 15,000 protestors converged on the square outside the prefecture of Targu Jiu and around 4,500 protestors headed for Rm. Valcea, either on foot or by bus, accompanied by around 150 cars. A force of 2,137 officials and soldiers, 400 police officers and 1,700 gendarmes was deployed. Local people and other citizens at the scene of action booed and hurled insults at the police. They also spat and threw stones at them. Under these circumstances, the attack launched at the rear of the unit commanded by Miron Cozma, at the same time as those launched on the two flanks, was devastating. The security forces were attacked by thousands of people armed with clubs, poles, stones, chains, pitchforks, poleaxes and various blunt instruments, as well as tear gas and equipment belonging to the Ministry of the Interior.
- Witnesses and 87 victims stated that around 3 p.m. a group of nearly 30 miners, all armed and led by Miron Cozma, appeared on the hill near the commune of Nefulesti. The soldiers were viciously attacked, beaten on the head, the feet and the hands. Some were thrown into the Mzeul Tronantilor ravines and many were brutally stripped of all their weapons. It was Romeo Beja who ordered the soldiers to be disarmed, issued death threats and used the hostages as a human shield at the head of the column of miners. Members of the security forces at the roadblock and those on the flanks were forced to withdraw and gather in a barn where, having been completely disarmed, they were told that they were prisoners. The police officers were beaten and forced to board the buses. They were held captive for a number of hours until the road was empty and the column of miners had moved on towards Rm. Valcea. During this confrontation, a large number of officials and soldiers suffered personal injuries. The prefecture windows were smashed with stones and a number of security guards were attacked. At around 7 p.m. the electricity was cut off twice across the whole town and, during this time, the protesters became increasingly violent.
- A total of 23 miners were injured, either through self-inflicted injuries or as a result of inhaling tear gas, or through means other than the actions of the security forces (chilblains, atrocities, etc.). When questioned, they all stated that they neither claimed nor had any proof that they had been attacked by the security forces.
- On the afternoon of 21 January 1999, after the security forces had been defeated at Costesti, Constantin Dudu Ionescu was nominated Minister of the Interior. That evening, a meeting of the leaders of the parliamentary parties took place at Cotroceni Palace and a joint declaration was adopted to defend the institutions of the state of law and ensure



public order. That same evening, at the request of the Supreme Council of National Defence, the Government issued an urgent decree, declaring a state of emergency and martial law. The decision was implemented during the night, with a number of tanks and peacekeeping forces deployed in the region.

- On 22 January 1999, an extraordinary session of Parliament was called. The same day, a government team led by the Prime Minister met the trade union leaders, led by Miron Cozma, at Cozia monastery. During this meeting, the union's demands were discussed and a three-part protocol was signed. All three agreements stated that the Government would not impose sanctions against the participants or the union leaders present at the protests between 4 and 22 January 1999.
- Following the violent actions of the miners between 18 and 22 January 1999, the Ministry of the Interior recorded losses amounting to 21,943,737,000 lei, in addition to the 99,290,000 lei spent on medical assistance to the injured. Of the 321 officials and soldiers deployed, 68 brought civil cases while the others sought to press criminal charges.
- The actions of the miners and the other participants in the events of January 1999, led by the accused – Miron Cozma, Romeo Beja, Dorin Lois, Ionel Ciontu, Vasile Lupu and Constantin Cretan – should be viewed together, rather than as separate acts or independent offences, as they were part of a complex crime aimed at subverting the powers of the State, as laid down in section 31(2), taken in conjunction with section 162(2) of the Penal Code.
- The strike was called, even though the prerequisites imposed by the legislation on the resolution of collective labour disputes and by the terms of the employment contract covering the period 1998–99 had not been met. These stipulated that the strike should have been called within the unit and only after the signatures of at least half of the members had been received and all attempts to resolve the conflict by conciliation had failed.
- The action of the miners endangered the State as a political entity, as well as its role within the context of social relations. The violent actions of the miners, led by the accused, Miron Cozma, and five other trade unionists, impeded the work of the security forces by holding them prisoner at Costesti, and also undermined the power of the State through calls for the Government to be toppled, for the President to resign and for early elections to be called. Under these circumstances, Article 2 of the Convention on the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), ratified by Romania in 1993, provides for the possibility of lawful action to quell a riot or insurrection.
- For these reasons and according to section 31(2) and section 162 of the Penal Code, Miron Cozma is sentenced to ten years' imprisonment for incitement to undermine the authority of the State. Under section 65 of the Penal Code, his rights laid down in section 64(a), (b) and (c) are revoked for a period of five years. The accessory penalty laid down in sections 71 and 64 of the Penal Code also applies. Furthermore, as an additional penalty in compliance with section 67 of the Penal Code, he is stripped of his military rank. In line with the provisions of section 116 of the Penal Code and as a security measure, he is banned from staying in or passing through Bucharest for a period of five years after the primary sentence has been served.
- Ionel Ciontu and Constantin Cretan are sentenced to five years' imprisonment for aiding and abetting incitement to undermine the authority of the State.
- A criminal indemnity action is admissible. The accused, Miron Cozma, Romeo Beja, Dorin Lois, Vasile Lupu and Ionel Ciontu are jointly liable, together with the League of Mining Trade Unions, for the following damages: 3,432,277,697.8 lei plus interest for the period between the court's ruling and the payment of the debt to the Ministry of the Interior; 4,080,056 lei plus interest for the period between the ruling and the payment of the debt to Horezu village hospital in the county of Valcea; and 27,749,701 lei plus interest for the period between the ruling and the payment of the debt to Valcea county hospital.

- 1229.** *Paragraphs (b) and (c) of the recommendations.* In a communication dated 24 September 2007, the Government relates to the conclusions of the Supreme Council of Justice which, by means of a judicial review, carried out the inquiry requested by the Committee.
- 1230.** In this context, the provisions of the Romanian Penal Code provide for a judicial review of all acts and measures implemented by the prosecutor during the criminal trial. The monitoring consists of checks on observance of the guarantees of a fair trial according to Article 6 of the European Convention on Human Rights as well as the fundamental principles of a criminal trial, such as equal treatment, disclosure of the truth, presumption of innocence, individual freedom, respect for human dignity, right to a fair defence, and equal weight of arms between the defence and the prosecution.
- 1231.** The Government points out that the review of the case found no procedural irregularities or violations of procedural guarantees. The parties involved did not allege any violations of procedural guarantees as provided by law, either during the criminal proceedings or when the verdict was handed down. In statements made in court, the accused did not file any protest concerning non-compliance with procedural rules. Their allegations solely concerned the manner in which the persons conducting the inquiry and the court interpreted the documents provided as evidence in this case and the judicial handling of the case, these being the points against which an appeal was lodged.
- 1232.** As regards the comments made by prosecutor Viorel Siserman to Ionel Ciontu during the court proceedings, the Government maintains that Ionel Ciontu was interviewed by the prosecutor in the presence of his defence lawyer. During the criminal proceedings, the accused did not file any complaint concerning the methods used by the prosecutor. During the trial, neither Ionel Ciontu nor his co-defendants alleged that, during the investigation, the prosecutor Viorel Siserman had violated the procedural framework laid down by law. Section 266 of the Penal Code prohibits any prosecutor from obtaining a statement by means of promises, threats or violence towards the person being questioned. None of the parties filed a criminal complaint against prosecutor Viorel Siserman for any misconduct during questioning.
- 1233.** Thus, all procedural guarantees imposed in order to guarantee a fair trial, according to the provisions of article 21, paragraph 3, of the Romanian Constitution and Articles 10 and 11, paragraph 2, of the Universal Declaration on Human Rights, as well as Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, were respected.
- 1234.** *Paragraph (f) of the recommendations.* The Government states that, on 29 September 2005, Ionel Ciontu was placed in custody in Deva prison. During his detention, he received medical treatment at the prison medical centre for cardiovascular, digestive and respiratory conditions. On a number of occasions, he was admitted to the medical unit of the National Prisons Service, as well as public health-care centres, for cardiological, pneumological and gastroenterological assessments. He received medication, a low sodium diet and measures to protect his stomach lining, as prescribed by specialist doctors. Following acute respiratory problems diagnosed on 3 January 2007, Ionel Ciontu's general condition deteriorated. This situation led to special cardiology tests on 5 and 9 January 2007, gastroenterological tests on 9 January 2007, and abdominal ultrasound and laboratory tests on 8 January 2007. On 9 January 2007, the cardiologists and gastroenterologists diagnosed "decompensated cirrhosis of the liver, of unknown etiology, affecting the parenchymatous and vascular tissue" and recommended that the patient be admitted to the prison hospital at Bucuresti Jilava. On 10 January 2007, due to severe dyspnoea, a dry cough and a general deterioration of his condition, emergency tests were carried out (echocardiogram, Doppler ultrasound examination). The diagnosis was a thromboembolism, deep vein thrombosis in the lower extremities and severe pulmonary hypertension. An anti-coagulant treatment was

prescribed and it was decided to transport the patient to the emergency clinic at Bagdasar Arseni to monitor the anti-coagulant treatment. At this hospital, the diagnosis made at Bucuresti Jilava prison hospital was confirmed. The patient was admitted to the intensive-care unit, where his condition deteriorated and he went into cardiac arrest. Attempts to resuscitate the patient were unsuccessful. Time of death was registered as 2.40 a.m. on 11 January 2007. According to the death certificate issued by the forensic surgeon performing the autopsy, Ionel Ciontu died of cardiorespiratory insufficiency, a pulmonary thromboembolism and a thrombosis of the right femoral vein.

- 1235.** Under section 80(3) of Act No. 275/2006 on the enforcement of sentences and the measures applied by the judicial bodies during a criminal trial and section 219(2) of the corresponding implementing regulations, in the event of the death of a person in custody, family members (spouse or up to fourth degree relatives) or another designated person can, on request, obtain access to the personal file of the deceased or to any other documents concerning the death.

### **C. The Committee's conclusions**

- 1236.** *The Committee recalls the complainant organization's allegations to the effect that, following the announcement of the closure of two mines in the Jiu Valley in 1998, Miron Cozma was given a mandate to enter into negotiations with the Government. When the Government refused to negotiate with Miron Cozma, the Jiu Valley miners' trade unions voted to strike on 4 January 1999, their main demand being an increase in the mining budget. The strike lasted for 14 days, to no effect. On 18 January, the miners and their trade union representatives, including Miron Cozma, Constantin Creta, Romeo Beja, Dorin Lois and Ionel Ciontu, set off for Bucharest. As a result of their march, they eventually succeeded in opening negotiations at Cozia, and an agreement between the trade union representatives and the Government was reached on 22 January 1999. The complainant organization alleges that the terms of the agreement were not respected, especially those concerning the decision not to impose any sanctions on the trade union leaders present at the protests. It also refers to Miron Cozma's successive arrests (in 1997, 1999, 2004 and 2005), the amnesty covering the events of 1991 from which he benefited, and his arrest immediately after his release when his pardon was revoked, a decision that was later overturned by a court. During its previous examination of the case, the Committee was particularly concerned about the severity of the prison sentences of ten and five years handed down to the trade unionists and the fact that the Government had not provided any further explanations of the events described in the complaint. Furthermore, in order to form a clear picture of the acts for which the trade unionists were imprisoned in 1999, the Committee asked the Government to send it copies of any rulings handed down concerning the case and those concerning the suspension of Constantin Cretan's sentence on medical grounds, as well as any rulings concerning his parole applications.*
- 1237.** *The Committee takes note of the ruling of 12 December 2003, forwarded by the Government. The Committee regrets that the Government did not supply the High Court ruling of 28 September 2005 upholding the convictions of Miron Cozma, Romeo Beja, Dorin Lois, Vasile Lupu, Ionel Ciontu and Constantin Cretan in 2003, the judgement on the suspension of the latter's sentence on medical grounds, or the judgement on Miron Cozma's application for parole. It appears from the verdict handed down in 2003 that one of the reasons that charges were brought was because the right to strike was exercised. According to the court ruling, the events of January 1999 (the strike and the march on Bucharest) led by the trade union leaders "should be viewed together, rather than as separate acts or independent offences, as they were part of a complex crime aimed at subverting the powers of the State, as laid down in section 31(2), taken in conjunction with section 162(2), of the Penal Code". In this respect, the Committee recalls that the*

*principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike.*

- 1238.** *The Committee recalls that the complaint submitted by the complainant organization also raises the question of the need for good faith in negotiations and the need for the Government to honour its commitments. The Committee observes that the Minister refused to hold talks with Miron Cozma on 16 December 1998 because he considered him to be an offender, although he had been elected by the miners to negotiate with the Minister following the announcement of the closure of two mines in the Jiu Valley. On 22 January 1999, an agreement was signed at Cozia between the trade union representatives and the Government. This agreement included a commitment made by the Government to refrain from imposing sanctions on the participants and trade union leaders present at the protests between 4 and 22 January 1999, and this is confirmed in the court ruling. The Committee recalls that both employers and trade unions should bargain in good faith and make every effort to come to an agreement, and satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 936]. Acknowledging the complex nature of the present case and the general violence which the verdict addressed, the Committee is concerned at the proceedings instituted by the Government against the trade union leaders, which appear to infringe the terms of the Cozia agreement.*
- 1239.** *The Committee recalls that, during its previous examination of the case, having expressed its concern regarding the successive arrests of Miron Cozma (in 1997, 1999, 2004 and 2005) and the arrests of the other trade union leaders, it asked the Government to open an independent inquiry to establish whether legal procedures had been respected in relation to all the defendants and to review the bans imposed on Miron Cozma. The Committee notes that the Government approved the conclusions of the Supreme Council of the Judiciary, according to which no procedural irregularities or violations of procedural guarantees, as provided by law, were found. The Committee was also concerned by the fact that, having been released as part of an amnesty on 15 December 2004, Miron Cozma was immediately re-arrested, following a decision to revoke his pardon, a decision that was later overturned by a court. While the revocation of the pardon was in force, Miron Cozma was once again placed in custody. Furthermore, the Committee was concerned by the revocation of a certain number of his fundamental rights. The revocation of fundamental rights, such as the ban on entering or staying in Bucharest and Petrosani, a large mining town, for a period of 17 years and the ban on being elected to any trade union post or any public office, could be justified only on the basis of criminal charges unconnected with trade union activities and serious enough to impugn the personal integrity of the individual concerned. In this respect, the Committee recalls that the restriction of a person's movements to a limited area, accompanied by the prohibition of entry into the area in which his trade union operates and in which he normally carries on his trade union functions, is inconsistent with the normal enjoyment of the right of association and with the exercise of the right to carry out trade union activities and functions [see **Digest**, op. cit., para. 129].*
- 1240.** *The Committee notes that, on 2 December 2007, Miron Cozma was released. However, on his release, the ban on his entering Bucharest or Petrosani was not lifted. The Committee requests the Government to lift the prohibition on Miron Cozma staying in or passing through Bucharest and Petrosani. Also noting that Constantin Cretan, Dorin Lois and Vasile Lupu are still in prison, the Committee requests the Government to review the situation of these trade unionists and consider their immediate release, and to keep it informed in this regard.*

1241. *With regard to the Committee's request to open an inquiry to establish the truth of the allegation made by the complainant organization in relation to prosecutor Viorel Siserman's meeting with Ionel Ciontu, the Committee notes the Government's reply to the effect that the judicial inspectorate carried out the necessary investigation and that no violation of procedural regulations was found, and that the Penal Code prohibits any prosecutor from obtaining a statement by means of promises, threats or violence towards the person being questioned. In addition to this, none of the parties involved lodged a criminal complaint against prosecutor Viorel Siserman for misconduct during questioning, including under section 266 of the Penal Code.*
1242. *With respect to the complainants' allegations of a plot to murder Miron Cozma, the Committee recalls that, when it last examined the case, it asked the Government to provide information on this subject. The Committee notes with regret that the Government has not provided the relevant information. With reference to its previous examination of the case, the Committee recalls that the rights of workers' and employers' organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind against the leaders and members of these organizations, and it is for governments to ensure that this principle is respected [see **Digest**, op. cit., para. 44]. The Committee requests the Government to take all necessary measures to ensure the safety of Miron Cozma.*
1243. *With regard to the death of Ionel Ciontu, the Committee notes the information sent by the Government, stating that Ionel Ciontu's death was caused by cardio-respiratory insufficiency, a pulmonary thromboembolism and a thrombosis of the right femoral vein.*
1244. *The Committee also recalls that, at the time the complaint was lodged, the complainant organization alleged that Miron Cozma, Constantin Cretan, Dorin Lois, Vasile Lupu and Ionel Ciontu were imprisoned in conditions that, at times, were a threat to their health and safety. The Committee observes that the Government has remained silent on this point. The Committee is of the opinion that detained trade unionists, like all other persons, should enjoy the guarantees enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights according to which all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person [see **Digest**, op. cit., para. 54]. The Committee requests the Government to ensure that this principle is respected.*

### **The Committee's recommendations**

1245. *In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:*
- (a) *With regard to Miron Cozma, the Committee requests the Government to lift the ban on his staying in or passing through Bucharest and Petrosani.*
  - (b) *With regard to the trade unionists Constantin Cretan, Dorin Lois and Vasile Lupu, who are still in prison, the Committee requests the Government to review their situation and consider their immediate release, and to keep it informed in this regard.*

***(c) With regard to the allegations concerning a plot to murder Miron Cozma, the Committee requests the Government to take all necessary measures to ensure the safety of Miron Cozma.***

Geneva, 14 March 2008.

*(Signed)* Professor van der Heijden  
Chairperson

*Points for decision:*

Paragraph 330;	Paragraph 613;	Paragraph 958;
Paragraph 352;	Paragraph 671;	Paragraph 989;
Paragraph 369;	Paragraph 689;	Paragraph 1006;
Paragraph 382;	Paragraph 702;	Paragraph 1061;
Paragraph 407;	Paragraph 745;	Paragraph 1093;
Paragraph 424;	Paragraph 755;	Paragraph 1110;
Paragraph 498;	Paragraph 781;	Paragraph 1156;
Paragraph 513;	Paragraph 793;	Paragraph 1170;
Paragraph 545;	Paragraph 858;	Paragraph 1180;
Paragraph 562;	Paragraph 871;	Paragraph 1221;
Paragraph 583;	Paragraph 899;	Paragraph 1245.