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SEVENTH ITEM ON THE AGENDA

Reports of the Committee on Freedom of Association

344th Report of the Committee on Freedom of Association

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Introduction

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 8, 9 and 16 March 2007, under the chairmanship of Professor Paul van der Heijden.

2. The members of American, Argentinian, Chilean and Guatemalan nationality were not present during the examination of the cases relating to the United States (Case No. 2460), Argentina (Cases Nos. 2373, 2456, 2458 and 2461), Chile (Cases Nos. 2462 and 2465) and Guatemala (Case No. 2241), respectively. The Worker member from the United States also was not present during the examination of the case relating to the United Kingdom (Case No. 2437) given that his union was complainant in the case.

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3. Currently, there are 132 cases before the Committee, in which complaints have been submitted to the governments concerned for their observations. At its present meeting, the Committee examined 34 cases on the merits, reaching definitive conclusions in 25 cases and interim conclusions in nine 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. 2365 (Zimbabwe) and 2471 (Djibouti) 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. 2529 (Belgium), 2530 (Uruguay), 2531 (Argentina), 2532 (Peru), 2533 (Peru), 2534 (Cape Verde), 2535 (Argentina), 2536 (Mexico), 2539 (Peru), 2541 (Mexico), 2542 (Costa Rica), 2543 (Estonia), 2544 (Nicaragua), 2545 (Norway), 2546 (Philippines), 2547 (United States), 2548 (Burundi), 2549 (Argentina) and 2550 (Guatemala) 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), 2248 (Peru), 2265 (Switzerland), 2355 (Colombia), 2362 (Colombia), 2384 (Colombia), 2392 (Chile), 2445 (Guatemala), 2449 (Eritrea), 2450 (Djibouti), 2497 (Colombia), 2499 (Argentina), 2501 (Uruguay), 2512 (India), 2515 (Argentina), 2517 (Honduras), 2520 (Pakistan), 2522 (Colombia), 2524 (United States), 2526 (Paraguay) and 2527 (Peru).

Observations requested from complainants

7. The Committee is still awaiting observations or information from the complainant in the following cases: Nos. 2268 (Myanmar) and 2513 (Argentina).

Partial information received from governments

8. In Cases Nos. 2203 (Guatemala), 2262 (Cambodia), 2295 (Guatemala), 2317 (Republic of Moldova), 2341 (Guatemala), 2361 (Guatemala), 2409 (Costa Rica), 2457 (France), 2465 (Chile), 2469 (Colombia), 2472 (Indonesia), 2478 (Mexico), 2480 (Colombia), 2483 (Dominican Republic) 2489 (Colombia), 2490 (Costa Rica), 2494 (Indonesia), 2498 (Colombia), 2510 (Panama), 2516 (Ethiopia), 2519 (Sri Lanka), 2538 (Ecuador) and 2540 (Guatemala), 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. 1865 (Republic of Korea), 2177 (Japan), 2183 (Japan) 2254 (Bolivarian Republic of Venezuela), 2323 (Islamic Republic of Iran), 2356 (Colombia), 2372 (Panama), 2400 (Peru), 2435 (El Salvador), 2475 (France), 2482 (Guatemala), 2485 (Argentina), 2487 (El Salvador), 2488 (Philippines), 2492 (Luxembourg), 2500 (Botswana), 2503 (Mexico), 2504 (Colombia), 2508 (Islamic Republic of Iran), 2511 (Costa Rica), 2514 (El Salvador), 2518 (Costa Rica), 2521 (Gabon), 2525 (Montenegro) 2523 (Brazil), 2528 (Philippines) and 2537 (Turkey), 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. 2318 (Cambodia), 2422 (Bolivarian Republic of Venezuela) and 2477 (Argentina), the Committee observes that, despite the time which has elapsed since the submission of the complaints, it has not received the observations of the governments. The Committee draws the attention of the governments in question to the fact that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report, approved by the Governing Body, it may present a report on the substance of these cases if their observations or information have not been received in due time. The Committee accordingly requests these governments to transmit or complete their observations or information as a matter of urgency.

Article 26 complaints

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

Withdrawal of complaints

Argentina (Case No. 2463)

12. In a communication, dated December 2006, the Central of Argentinean Workers (CTA) and the Association of State Workers (ATE) inform the Committee that they wished to withdraw the complaint as all the matters had been resolved in favour of the union. *The Committee takes note of this information with satisfaction and decides to withdraw the complaint.*

Estonia (Case No. 2507)

13. In a communication dated 19 February 2007, the Confederation of Estonian Trade Unions (EAKL) informs the Committee of its desire to withdraw the complaint relating to the Employer Representatives Bill as, following the assistance provided by the ILO, the final text adopted by the Parliament no longer contains the disputed provisions. *The Committee notes this information with satisfaction and decides to withdraw the complaint.*

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: Canada (Case No. 2467), Pakistan (Case No. 2399), Poland (Case No. 2395), Romania (Case No. 2509, Sri Lanka (Case No. 2380) and Zimbabwe (Cases Nos. 1937, 2027 and 2365).

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

Case No. 2153 (Algeria)

15. This case was last examined by the Committee at its March 2006 session and concerns allegations of obstacles to the establishment of trade union organizations and a trade union confederation and to the exercise of trade union rights, anti-union dismissals, anti-union harassment by the public authorities, and the arbitrary arrest and detention of union members [see 340th Report, paras 15–20]. On that occasion, the Committee requested the Government: (a) to indicate whether appellate proceedings had been filed against the judgement of the Algiers Court of Appeal of 5 February 2006 concerning the internal dispute between the two factions of the SNAPAP and, if so, to provide it with a copy of the relevant decision as soon as it was issued; (b) to provide its observations on the complainant's allegations concerning the payment of subsidies aimed at financing complaints against one of the SNAPAP factions; and (c) to keep it informed regarding the decision reached on the matter of the seven workers dismissed from the Prefecture of Oran. It noted also that several of its recommendations had yet to be implemented, and once again urged the Government to take the necessary steps to ensure that decisions to determine the representativeness of a particular organization could be taken without the identities of members being revealed. The Committee also urged the Government to take the necessary steps without delay to amend the legal provisions preventing workers' organizations from forming federations and confederations of their own choosing, irrespective of the sector to which they belong, and to keep it informed of the measures taken in that regard [see 340th Report, paras 18 and 19].

16. In a communication of 2 April 2006, the complainant recalls certain alleged facts (concerning the SNAPAP Congress which took place on 7 and 8 April 2005, the alleged diversion of the SNAPAP subsidy, and the failure to follow up the Committee's recommendations) and denounces the contradictory and inaccurate allegations contained in the Government's communications of 23 December and 6 March 2006. The complainant alleges that: (1) with regard to the judgements concerning the SNAPAP headquarters, justice is not independent and the judges are subjected to pressure from politicians; the complainant also refers to procedural errors (the case should have been referred to the land rights magistrate before referral to the criminal court judge for examination of the substance of the case); the SNAPAP decided to appeal to the Supreme Court and to international tribunals; (2) the Government still refuses to recognize the representativeness of the SNAPAP unless this is backed up with a list of members' names, and has extended that condition to all autonomous unions; (3) the SNAPAP comprises more than ten sectoral federations constituted in accordance with the law and, contrary to the Government's claims, requiring no certificate of registration; (4) the Government refuses to register the CASA, although its constituent documents conform to legal requirements; (5) the seven workers from the Prefecture of Oran were not dismissed by a decision of the disciplinary committee, which has never been convened; the decision was taken by the Prefect of the Oran Prefecture. The Government maintains that it will communicate the judicial decisions taken on the matter, although the workers concerned have never sought recourse to the courts. A decision to reinstate the workers was taken following a decision by a commission established by the general directorate of the civil service following a three-year campaign by the SNAPAP; and (6) Mr Rabah Mebarki, President of the National Union of Civil Protection (UNPC), and Mr Khaled Mokhtari are still suspended without pay. They have sought refuge abroad in view of the various forms of pressure brought to bear on them, despite the judgement given with regard to Mr Khaled Mokhtari.

17. In a communication of 30 August 2006 (which summarizes the communications of 11, 15 and 30 July and 2 August), the complainant indicated that (1) Mr Nassereddine Chibane a member of UNPC–SNAPAP) had been reinstated following his suspension for trade union activities, but with a transfer, by decision of the National Appeals Commission; (2) Ms Fatima Zohra Khaled (President of the trade union section of the SNAPAP at the *Ecole nationale supérieure d'enseignement technique* in Oran) had been subjected to intimidation and harassment following the national strike of 9 May 2006; (3) Mr Mourad Tchiko (Vice-President of UNPC–SNAPAP), who had been suspended and transferred by a decision of the disciplinary committee for his trade union activities, lodged an appeal with the National Appeals Commission, but the General Directorate of the civil protection authority blocked the appeal by filing a complaint against him; Mr Tchiko is now suspended, although he received no summons from the court; and (4) Mr Mohamed Hadjdjilani (National Secretary for Information), after suffering numerous attempts at intimidation and administrative harassment, has been relieved of his duties, transferred, and had his salary stopped for one month. The hospital administration has withdrawn recognition of his trade union status.

18. The Committee notes that in a communication of 19 June 2006, Public Services International (PSI) expressed a wish to support the complaint, in view of the seriousness of the situation and the continuing and systematic violations of the principles of freedom of association and collective bargaining suffered by the SNAPAP, which is affiliated to PSI.

19. In a communication dated 17 March 2006, the Government responds to the allegations made by the SNAPAP. It maintains that the SNAPAP has been prone to internal disputes since 2003, disputes which have led to three general congresses within a period of two years. Settlement of these disputes is a matter for the competent courts, and the Minister of Labour cannot express a view on the matter until the courts have given their

ruling on the dispute between the parties. The dispute between the three factions concerning the union's premises has been referred to the courts.

20. The ruling handed down by the El Harrach court on 13 June 2005, ordering the evacuation of the SNAPAP premises to the benefit of the executive body headed by Mr Felfoul, was upheld on appeal by a ruling given on 5 February 2006 by the Algiers Court. Both the Ministry of Labour and Social Security and the ILO were informed of the ruling. The Government is anxious to ensure that the law is strictly applied and to honour its international obligations in this area. In a communication dated 19 June 2006, the Government informs the Committee that it will communicate any decision handed down in this case.

21. In the above communication, the Government also indicates that: (1) as regards the allegations concerning the granting of the subsidy to the SNAPAP, financial incentives provided by the authorities to trade union organizations are granted without regard to any internal disputes or factions; (2) as regards the representativeness of trade union organizations, the criteria set out under Act No. 90-14 of 2 June 1990 have hitherto posed no problem; and (3) the constitution of federations and confederations is not prohibited by the terms of Act No. 90-14 but is subject to the same principles as apply to trade union organizations.

22. *The Committee notes this information. The Committee notes with concern that the complainant reports further violations of freedom of association in Algeria. The Committee requests the Government to provide its observations on the allegations concerning Nassereddine Chibane, Fatima Zohra Khaled, Mourad Tchiko and Mohamed Hadjdjilani.*

23. *As regards the judgements concerning the SNAPAP premises, the Committee requests the Government to keep it informed of the outcome of the appeal to the Supreme Court and to provide a copy of the ruling as soon as it is handed down. In addition, the Committee notes once again that a number of its recommendations have still not been implemented. It recalls that the requirement imposed by the authorities, that a list be provided of a given organization's members as well as copies of their membership cards, is not consistent with the criteria of representativeness established by the Committee. The Committee can only refer back to its previous conclusions regarding the danger of reprisals and anti-union discrimination inherent in a requirement of this type. It once again urges the Government to take the necessary steps to ensure that decisions regarding the representativeness of a particular organization can be taken without the identities of members being revealed.*

24. *The Committee once again urges the Government to take the necessary steps to amend the legal provisions preventing workers' organizations from forming federations and confederations of their own choosing, irrespective of the sector to which they belong, and to keep it informed of the measures taken in this regard.*

Case No. 2256 (Argentina)

25. The Committee last examined this case at its meeting in November 2005 [see 338th Report, paras 16–18] and on that occasion requested the Government to keep it informed of the final decision handed down by the judicial authorities with respect to the participation by a new trade union organization, the Union of Argentine Teachers (UDA), in the renegotiation of Joint Accord No. 1 of 1999, concluded between the United Union of Education Workers of Mendoza (SUTE) and the Directorate General of Schools (DGE).

26. In a communication of 31 August 2006, the Government indicates that it is awaiting the ruling of the Appeals Court with regard to the *amparo* action presented by the UDA to the First District Third Civil Court of the Province of Mendoza.

27. *The Committee requests the Government to keep it informed of the final outcome of the* amparo *action presented by the UDA.*

Case No. 2344 (Argentina)

28. The Committee last examined this case relating to alleged acts of anti-union harassment of the complainant organization's assistant secretary at its meeting in June 2006 [see 342nd Report, paras 18–20]. On that occasion the Committee requested the Government to keep it informed of the outcome of the extraordinary appeal before the Supreme Court of Justice concerning the lifting of trade union privileges and authorization for dismissal of the trade union official, Praino Raúl (in second instance, the Appeals Court upheld the ruling of the Court of First Instance rejecting the request for the lifting of his trade union privileges filed by the National Institute of Social Services).

29. In a communication dated 13 October 2006, the Government informs the Committee that the judicial authority has ruled that the extraordinary appeal has lapsed (in the absence of any further developments in the proceedings) and that the case is therefore closed.

30. *The Committee notes this information.*

Case No. 2371 (Bangladesh)

31. 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 May–June 2006 meeting [see 340th Report, paras 35–41]. On this occasion, the Committee once again urged the Government to take steps immediately for the prompt registration of the Immaculate (Pvt.) Ltd Sramik Union, and further urged the Government to rapidly convene an independent inquiry into the serious allegations that seven members of the union were dismissed by the company upon it learning that a union was being established and to keep it informed of the progress made in this regard.

32. In its communication of 7 September 2006, the Government indicates that Case No. 1 of 2004 filed by the complainant union before the First Labour Court, Dhaka, regarding the refusal of registration, is still pending. The last hearing date was on 23 August 2006 and the next hearing date was fixed for 27 September 2006. Without the decision of the Court on the matter, the Government cannot take any steps regarding the registration. Furthermore, the Government indicates that the national legislation of Bangladesh relative to labour matters gives sufficient protection against anti-union discrimination. Workers dismissed for trade union activities under section 17/18 of the Employment of Labour (Standing Order) Act, 1965, are guaranteed the right to submit grievance petitions to the employer. If the employer fails to give a decision or if the worker is dissatisfied with such decision, a complaint may be made to the Labour Court for legal protection under section 25(b) of the Employment of Labour (Standing Order) Act, 1965. As workers may avail themselves of the legal protection from a Labour Court when aggrieved for any action of the employer due to trade union activities, it is not necessary to convene an independent inquiry on the matter.

33. *The Committee observes with deep regret that the Government has failed to give any follow-up action to its recommendations. It 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 national courts, a fact which unavoidably has an impact on the prospect of resolving this case. The Committee recalls that justice delayed is justice denied and once again urges the Government to take steps immediately for the prompt registration of the Immaculate (Pvt.) Ltd Sramik Union.

34. *The Committee also notes with deep regret the Government's statement that there is no need to implement the Committee's recommendation for an independent inquiry into the allegations of anti-union discrimination in this case, given that any aggrieved party has the possibility to avail itself of the legal protection of the Labour Court. The Committee understands from the facts of this case that the workers who have been allegedly discriminated might not be able to avail themselves of national legal procedures so long as the issue of registration of their trade union is still pending. The Committee therefore 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 it learning that a union was being established and to ensure that appropriate measures are taken in response to any conclusions reached in relation to these allegations of anti-union discrimination. The Committee requests the Government to ensure that, if it appears in the independent inquiry that the dismissals did occur as a result of involvement by the workers concerned in the establishment of a union, those workers will be reinstated in their jobs, without loss of pay. If the independent inquiry finds that reinstatement is not possible, the Committee requests the Government to ensure that adequate compensation so as to constitute sufficiently dissuasive sanctions is paid to the workers.*

Case No. 2407 (Benin)

35. The Committee last examined this case concerning the dismissal of some 40 workers, union officials and staff representatives, following a strike at the Financial Bank Benin, at its June 2006 meeting [see 342nd Report, paras 25–27]. The Committee requested the Government to swiftly conduct an independent and impartial inquiry in order to determine whether anti-union discrimination was indeed behind the dismissals carried out by the bank in August 2004 and whether national legislation giving effect to the Workers' Representatives Convention, 1971 (No. 135), had been properly applied in that case and to inform it of the outcome. The Committee also requested the Government to send it the text of the ruling of the court of first instance concerning the legality of the strike organized in August 2004 by the Union of Workers of Financial Bank Benin (SYN.TRA.F.I.B).

36. In a communication of 17 July 2006, the Confederation of Autonomous Trade Unions of Benin (CSA–Benin) sent the Committee an extract from ruling No. 14/06 of 15 May 2006, adding that the workers had immediately lodged an appeal against the ruling. CSA–Benin sent the Committee a number of documents which, it claims, illustrate the selective and discriminatory nature of the collective dismissal, as well as the contradictions surrounding the dismissal and the ruling of the court of first instance.

37. In a communication of 5 September 2006, the Government states that, in its opinion, CSA–Benin bases its claim regarding the selective and discriminatory nature of the collective dismissal of 38 workers on three issues: the maintenance in their posts of some of the workers who signed the petition; the dismissal of an employee on assignment at the time the strike took place; the hiring by Financial Bank Benin, on behalf of Financial Bank Togo, of an employee it had dismissed. The Government informs the Committee that an inquiry has been conducted among the bank's management in order to verify the information contained in the new complaints of CSA–Benin. The inquiry looked into the following points:

(1) *The maintenance in their posts of some of the workers who signed the strike petition.* The management of Financial Bank explained that dismissal was not based on signature of the petition, since some of the workers who signed it did not play any part whatsoever in the strike. Others took part in it for one day, and others again for two days. As to the sanctions, the management of the bank stated that all those who participated in the strike movement were sanctioned but that the degree of participation in the strike and the bank's interests were taken into consideration. In support of this last argument, the management of the bank referred to Case Law No. 89-42270 (*Official Gazette*, Social Appeals Court, 15 May 1991), which allowed dismissals to be decided in the light of the enterprise's interests.

(2) *The dismissal of an employee on assignment at the time the strike took place.* The management of the bank explained that the assignment lasted only one day and that his presence at work was not recorded in the days that followed. The bailiffs' report, attached to the complaint submitted by CSA–Benin and also produced by the bank at the time of the inquiry, do not refer to the individual concerned as being present at the workplace during the strike.

(3) *The hiring by Financial Bank Benin, on behalf of Financial Bank Togo, of an employee it had dismissed.* The management of Financial Bank Benin explained that they were not involved in the hiring of this worker by Financial Bank Togo. The two banks, although they belong to the same group, are separate, autonomous legal entities, governed respectively by Beninese and Togolese law.

38. The Government states that this case was ruled upon by the court of first instance, which noted that the dismissal had been carried out according to the law, that the workers had lodged an appeal against the ruling and that the case was proceeding normally.

39. *The Committee notes this information, in particular the information regarding the inquiry conducted by the Government. Noting that the court of first instance declared the strike to be illegal but that an appeal has been lodged against this decision, the Committee requests the Government to send it the ruling of the Appeals Court as soon as possible.*

Case No. 2046 (Colombia)

40. The Committee last examined this case at its June 2006 meeting [see 342nd Report, paras 48–63]. On that occasion the Committee made the following recommendations regarding the matters that remained pending.

41. The Committee requested the Government to keep it informed of the final outcome of the pending appeals of Mr Rodas and Mr Ruiz against the legal action taken by Cervecería Unión SA to have their trade union immunity suspended. The Committee notes with interest that a communication from Bavaria SA sent to it by the Government states that on 23 June 2006 the High Court of Medellín ordered the reinstatement of Luis Alberto Ruiz Acevedo in his job and that Cervecería Unión SA complied with the ruling on 17 July 2006. *The Committee requests the Government to keep it informed of the final outcome of the legal action taken by Mr Rodas.*

42. As to the alleged unjustified dismissal for gross misconduct of officials of the Colombian Union of Beverage Industry Workers (SINALTRAINBEC) and founders of the Trade Union of Workers of the Beverages and Foodstuffs Industry (USTIBEA), including William de Jésus Puerta Cano, Luis Fernando Viana Patiño, Edgar Dario Castrillón Munera and Alberto de Jésus Bedoya Riós, the Committee notes that in December 2005 the Government requested the Coordinator of the Prevention, Inspection, Supervision and Monitoring Group of the Territorial Directorate of Antioquia to begin an administrative

labour inquiry into the company. The Committee notes that the communication from Bavaria SA sent to it by the Government states that the Territorial Directorate of Antioquia summoned the enterprise and the other parties involved to a mediation hearing on 27 April 2006, but that the complainants failed to attend and, consequently, after two months the matter was closed. *The Committee notes this information.*

43. As regards the closure of the Colenvases plant, which led to the dismissal of 42 workers and seven union members in violation of their trade union immunity and of the labour ministry ruling authorizing the closure but only after implementing clauses 14 and 51 of the collective agreement, the Committee notes that Bavaria SA states in the communication sent by the Government that no ruling has yet been handed down in the case currently before the administrative disputes courts, which is being examined by the Council of State. *The Committee recalls the importance it attaches to the swift processing of legal cases and requests the Government to send a copy of the ruling as soon as it has been handed down.*

44. As to the allegations presented by the National Union of Workers of Bavaria SA (SINALTRABAVARIA) regarding pressure on workers to resign from the union, the Committee takes note of the new communications sent by the trade union organization on 24 April 2006, which refer to the incidents that have already been examined. The Committee notes that the Bavaria SA states in the communication sent to it by the Government that the matter was resolved by the Ministry of Social Security in resolution No. 00015 of 2003, in which it was decided not to take measures against the enterprise, and that the trade union organization did not lodge any legal appeal against this decision. *The Committee takes note of this information.*

45. With regard to the communication of the Single Confederation of Workers of Colombia (CUT), dated 15 February 2006, referring to the closure of a number of Bavaria SA plants and the consequent drastic fall in the number of union members, the Committee takes note of the Government's reply to the effect that the workers' employment contracts were terminated by mutual agreement through a process of conciliation as part of a voluntary retirement plan in which the workers were offered financial benefits worth more than four times the bonuses to which they would be entitled under Colombian law. As to the liquidation of the trade union organization, the Government states that the Territorial Directorate of Cundinamarca, Inspectorate No. 10, initiated an administrative inquiry into the matters raised in the complaint. *The Committee requests the Government to keep it informed of the final outcome of the inquiry.*

Case No. 2068 (Colombia)

46. The Committee last examined this case at its meeting in June 2006 [see 342nd Report, paras 64–73], when it requested the Government to: (a) keep it informed of the final outcome of the pending court case relating to the dismissal of union leaders of the ASEINPEC in violation of trade union immunity; and (b) provide a copy of decision No. 8333625-005, of 2 August 2002, relating to the dismissal of union leaders and members in the municipality of Puerto Berrío so that the Committee could examine whether or not there was anti-union discrimination in the restructuring process in full possession of the facts.

47. The Committee notes the Government's communication dated 1 September 2006. It observes that the Government has not provided its observations on the pending court case relating to the dismissal of union leaders of the ASEINPEC. The Committee notes the communication from ASEINPEC dated 24 May 2006, in which it refers to matters already raised and indicates that the members of the National Executive Board are the victims of death threats. *The Committee recalls the importance of legal proceedings being concluded*

expeditiously and it requests the Government to supply a copy of the judgement as soon as it is delivered. It also requests the Government to take the necessary measures to guarantee the safety of the trade union leaders who are under threat, to undertake the appropriate investigations to identify and punish those responsible and to keep it informed on this matter.

48. The Committee notes the copy of decision No. 8333625-005 of 2 August 2002, issued by the Labour Inspectorate of Puerto Barrío. The Committee notes that, in its introductory paragraphs, which set out the reasons for imposing a fine on the municipality for the dismissal of 57 members of the Union of Puerto Barrío Municipal Workers, the labour inspector indicated that "the inspectorate considers that, in objective terms, based on the findings of the investigation, the right of association of the unionized workers was disregarded in their collective dismissal, which also placed under threat the right of the respective trade union organization". The inspector then adds that "it has been found that, between the months of July and December 1999, 57 members of the Union of Puerto Barrío Municipal Workers were unilaterally dismissed by the municipal administration of Puerto Barrío, represented by the mayor of the municipality …". "The coincidence observed, not only in the number of workers affected, but also the fact that their dismissals occurred at the same time, and not least that they were all, without exception, members of the trade union organization, and that all the dismissals were unjustified, clearly demonstrates the unity of purpose, or in other words the clear intention to remove unionized workers from the administration, regardless of their length of service." *Under these conditions, taking into account the conclusions reached by the labour inspector of Puerto Barrío, the Committee requests the Government to take the necessary measures for the reinstatement without delay of the 57 dismissed workers without loss of wages and, if reinstatement is not possible in view of the time that has elapsed, for their full compensation.*

49. The Committee notes the communication from the Single Confederation of Workers, dated 8 August 2006, concerning the mass dismissal in 1992 of SOFASA workers who were members of SINTRAUTO, Envigado subcommittee, in relation to which the Committee requested the Government in a previous examination of the case [see 338th Report, para. 711] to ensure that the workers concerned were fully compensated. The Committee notes that, according to the complainant organization, the workers have been compensated in accordance with the requirements established in the Substantive Labour Code for cases of unjustified dismissal. The Committee notes the request made to it by the complainant organization to determine whether this compensation may be considered full. In the first place, the Committee is bound to recall that, when examining the allegations in question, it considered that they concerned matters which went far back in the past and that it did not examine the substance of the allegations. It nevertheless requested that the workers be compensated fully. The Committee considers that compensation is full when it is in conformity with the pertinent national legislative provisions and that, where the parties are not in agreement, they must turn to the judicial authorities to determine the issue.

50. The Committee notes the additional information provided by the Regional Federation of Workers in the Eastern Andean Area of Colombia (FETRANDES) in a communication of 23 October 2006, in which it refers to the dismissal of Jorge Eliécer Miranda Téllez, member of the Executive Board of FETRANDES, in the context of the restructuring of the Bogotá Traffic and Transport Department, without complying with the requirement for his trade union immunity to be lifted. *The Committee observes that the Government has not sent its observations on this matter and requests it to do so without delay.*

Case No. 2151 (Colombia)

51. The Committee last examined this case at its meeting in June 2006 [see 342nd Report, paras 78–82]. On that occasion the Committee made the following recommendations on the matters that were still pending, to which the Government replied in communications of 1 and 19 September and 25 October 2006.

52. With regard to the allegations relating to the dismissal of SINTRABENEFICENCIAS officials for having formed a trade union in the Cundinamarca district, the Committee noted the information provided by the Government that, for the officials to be reinstated, there has to be a court decision, and asked the Government whether the workers still have access to the appropriate judicial channels to seek reinstatement. In its communication of 1 September 2006, the Government states that article 48 of Act No. 712 of 2001 provides that complaints pertaining to trade union immunity have a time limit of two months from the date of the dismissal, transfer or decline in working conditions. The action brought by the workers in the present case is therefore time-barred. *The Committee requests the complainant organization to state whether it applied to the appropriate courts within the prescribed time limits.*

53. The Committee asked the Government to provide information on the outcome of the proceedings pending before the Council of State concerning the legality of Decree No. 1919, which suspended certain advantages in respect of wages and benefits that were provided for in collective agreements. In its communication of 1 September 2006, the Government stated that it was enclosing a copy of the Council of State's ruling on the legality of the abovementioned Decree. *Since there was no such enclosure, the Committee requests the Government to send a copy of the ruling handed down by the Council of State on the legality of Decree No. 1919.*

54. With regard to the dismissal of Jorge Eliécer Carrillo Espinosa, President of the Union of Workers of the Social Welfare Fund of Cundinamarca (SINDECAPRECUNDI), the Committee notes the communications of 26 July and 29 August 2006 from the General Confederation of Labour (CGT) referring to this matter and alleging that, in addition to Mr Carrillo Espinosa, other trade union leaders were dismissed without waiver of their trade union immunity. In its communication of 1 September 2006, the Government cites a ruling of 20 November 1998 by the Administrative Court of Cundinamarca, which states that "the established procedure for the dismissal of a public employee was fully observed, so it cannot be claimed that any rules or regulations were violated or ignored; however, it should be emphasized that, whilst the rules set out in the Substantive Labour Code do not apply to public employees, and there being no requirement to seek the jurisdictional authority's permission for the separation of the complainant, the appropriate administrative decision should have been issued, giving the reasons why he could not be kept on." The ruling later states that the separation was due to the decree dismissing the staff of the Social Welfare Fund of Cundinamarca. The Committee notes this information and points out to the Government, as it has already done previously, that, in the event of workforce reduction, it is necessary to take into account the principle contained in the Workers' Representatives Recommendation, 1971 (No. 143), which mentions, among the specific measures of protection, that "recognition of a priority should be given to workers' representatives with regard to their retention in employment in case of reduction of the workforce" [see *Digest of decisions and principles of the Freedom of Association Committee*, para. 832]. *The Committee expresses the firm hope that the Government will keep this principle in mind in the future, including with regard to workers in the public sector.*

55. With regard to the dismissal of members of the executive board of the Union of Official Workers of Cundinamarca (SINTRACUNDI) without waiver of their trade union

immunity, the Government indicates that the workers were not dismissed unilaterally; rather, the employment relationship was terminated by mutual agreement, in accordance with the provisions of article 47(D) of Decree No. 2127 of 1945, the corresponding conciliation report having been duly signed. *The Committee notes this information.*

56. The Committee notes the communication of 5 June 2006 in which the CGT indicates that, in the case of the Tolima Department (involving restructuring and collective dismissals and covered in a previous examination of this case) [see 330th Report of the Committee], the immunity of the trade union leaders was not waived and complaints lodged with the judicial authorities have not achieved their reinstatement. *The Committee observes that the Government has not sent observations on this matter and requests it to do so without delay.*

Case No. 2363 (Colombia)

57. The Committee last examined this case at its June 2006 meeting [see 342nd Report, paras 87–92]. On that occasion, the Committee requested the Government: (a) to take the necessary measures to ensure that the Constitution, the list of executive board members and the statutes of the Union of Employees and Workers in the Ministry of External Relations (UNISEMREX) was registered without delay; and (b) to send a copy of the appeal lodged against the decision to suspend union official Ms Luz Marina Hache Contreras for two months.

58. The Committee takes note of the Government's communication of 1 September 2006. The Committee notes that, with regard to the allegations relating to UNISEMREX, the Government states that the decision of the Ministry of Social Welfare to refuse to register the Constitution, the list of executive board members and the statutes of the trade union organization was based on the fact that the statutes of that organization contain articles that are contrary to Colombian legislation. Article 12, paragraph 17, refers to the right to strike, whereas union members are public employees for whom this right is prohibited; article 18 refers to the need to be of Colombian nationality and not to have been sentenced for a common crime for the past ten years; article 23, paragraph 4, refers to collective bargaining, whereas public employees do not enjoy that right; article 23, paragraph 13, refers to the designation of the Complaints Committee, whereas the Committee is not restricted to the members of one trade union organization but covers all trade unions operating in an enterprise; and article 42 stipulates that imprisonment for crimes which are not of a political nature is grounds for expulsion, which is contrary to the right to organize.

59. In general terms, the Committee recalls that Article 3 of Convention No. 87 establishes that workers' organizations shall have the right to draw up their constitutions and rules and to elect their representatives in full freedom. Furthermore, the Committee recalls that the mere existence of legislation concerning trade unions in itself does not constitute a violation of trade union rights, since the State may legitimately take measures to ensure that the constitutions and rules of trade unions are drawn up in accordance with the law. On the other hand, any legislation adopted in this area should not undermine the rights of the workers as defined by the principles of freedom of association [see *Digest of decisions and principles of the Freedom of Association Committee*, fifth edition, 2006, para. 370]. In this respect, the Committee observes that the refusal to register the statutes of the trade union organization is based on the fact that certain articles are contrary to the legislation in force in Colombia. The Committee observes, however, that some of the legislative provisions on which the administrative authority based its refusal are contrary to the provisions of the Conventions ratified by Colombia. The Committee recalls that, by virtue of Conventions Nos. 151 and 154, public employees should enjoy the right to collective bargaining and that the right to strike may be limited and even prohibited in the case of public officials who exercise authority on behalf of the State. *In these circumstances, the*

Committee requests the Government to proceed with the registration of the statutes of the trade union organization, as well as the Constitution and the list of executive board members, as soon as the organization has addressed the objections raised regarding the articles of its statutes, in so far as the objections are in accordance with the principles referred to.

60. As to the copy of the ruling on the appeal lodged against the two-month suspension of union official Ms Luz Marina Hache Contreras, the Committee notes the Government's statement that it sent a copy in a communication to the Committee dated 24 January 2006. The Committee observes however, that, although the communication refers to the copy, it was not enclosed. *In these circumstances, the Committee requests the Government to send a copy of the aforementioned ruling on appeal.*

Case No. 2214 (El Salvador)

61. At its session in March 2006 the Committee was still awaiting: (1) the ruling of the judicial authority on the refusal by the Salvadoran Social Security Institute (ISSS) to accept the coalition of the STISSS and SIMETRISSS trade unions with regard to reviewing the arbitration award; and (2) the decision of the Office of the Attorney General of the Republic concerning the alleged eviction of the trade union from its premises [see 340th Report, para. 86].

62. In a communication dated 21 July 2006, the Government states that the judicial authority has not yet handed down its ruling on the refusal of the ISSS to accept the coalition of the STISSS and SIMETRISSS trade unions with regard to reviewing the arbitration award. With regard to the decision of the Office of the Attorney General concerning the alleged eviction of the trade union from its premises, the Government states that the Office of the Attorney General has informed it that it has no record of any such complaint currently under investigation and therefore requests the complainant to supply the exact date, time and place of the incident and, if possible, the name of the authority or police unit responsible for the eviction, so that it can take a decision on the subject.

63. *The Committee continues to await the ruling on the refusal by the ISSS to accept the coalition of the STISS 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.*

Case No. 2299 (El Salvador)

64. The Committee made the following recommendations at its meeting in March 2006 [see 340th Report, para. 89]:

> With regard to the denial of legal personality to the Private Security Services Industry Workers' Trade Union of El Salvador (SITRASEPRIES), the Committee recalls that it had already pointed out that, in accordance with the principles of freedom of association, only the armed forces and the police can be excluded from the right to establish trade unions and all other workers, including private security agents, should freely be able to establish trade union organizations of their own choosing. Consequently, as it did at its March 2004 and June 2005 meetings, the Committee urges the Government to take the measures necessary to ensure that legal personality is granted to SITRASEPRIES without delay. Finally, the Committee requests the Government again to transmit the observations of 17 May 2004 regarding the alleged

death threats against five officials of the Union of Textile and Related Industry Workers of El Salvador (STITAS), as these observations have not been received.

65. In its communication of 21 June 2006, with regard to the Committee's request that the Government take the measures necessary to ensure that legal personality is granted to SITRASEPRIES without delay, the Government states that, until the Constitution of the Republic is amended, it will not be possible in the short term to grant legal personality to SITRASEPRIES. Furthermore, with regard to the alleged death threats against five officials of STITAS, the Government states that, as this is not an offence for which charges are brought automatically, those concerned were invited to file charges with the Office of the Attorney General of the Republic or the competent courts.

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, 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.*

Case No. 2418 (El Salvador)

67. On last examining this case at its March 2006 meeting, the Committee reached the following conclusions [see 340th Report, paras 810–811]:

– In view of all the preceding points, the Committee can only conclude that the expulsion of the trade union adviser Mr. Banchón Rivera is essentially linked to the exercise of his duties as trade union adviser and to the exercise of trade union rights, rather than to the exercise of political activities, it being understood that the exercise of trade union rights might at times entail criticisms of the authorities of public employer institutions and/or of socio-economic conditions of concern to trade unions and their members. The Committee notes with regret that a number of violent actions mentioned (although they refer in a very general way to Mr. Banchón Rivera "with other trade unionists" or strikers), such as the exploding of mortar bombs or blocking the entrance to doctors, do constitute an abuse of trade union rights. The Committee points out that: the resolution of the Ministry of the Interior ordering Mr. Banchón Rivera's expulsion states that only three days were given to him to exercise his right of defence, although the facts dated back to 2002 and 2003; that Mr. Banchón Rivera has been married for years to a Salvadoran national and his expulsion would contravene the principle of family regrouping; that the resolution of the Ministry of the Interior does not provide evidence but refers to reports from the migration authorities and articles in the press; and, as may be ascertained from the resolution itself, that Mr. Banchón Rivera is primarily reproached for a number of activities that are clearly of a trade union rather than a political nature. In these circumstances, the Committee expresses the hope that the Constitutional Court of the Supreme Court of Justice will take all these factors into account when it examines the appeal concerning the expulsion order against the trade union adviser Mr. Banchón Rivera and that it keeps it informed in this respect. The Committee also requests the Government to communicate to it the text of the judgement handed down by the Constitutional Court of the Supreme Court of Justice on this matter.

– Finally, the Committee draws the Government's attention to the principle that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities [see *Digest of decisions and principles of the Freedom of Association Committee*, 4th edition, 1996, para. 696].

68. In its communication of 21 July 2006, the Government transmits the ruling of the Constitutional Court on an appeal for constitutional protection *(recurso de amparo)*, lodged by the wife of Pedro Enrique Banchón Rivera Gallardo, declaring the appeal to be inadmissible on procedural grounds and informing the claimant that she could lodge a new appeal once the procedural errors had been corrected.

69. *The Committee takes note of the information provided by the Government. The Committee brings to the attention of the complainant organization (the Union of Doctors Employed by the Salvadoran Social Security Institute (SIMETRISSS)) the importance of lodging a new constitutional appeal with the Constitutional Court after having corrected the procedural errors pointed out by the Court.*

Case No. 2233 (France)

70. The Committee examined this case for the first time at its November 2003 session [see 332nd Report, paras 614–646, approved by the Governing Body at its 288th Session], then at its March 2005 session [see 336th Report, paras 59–61, approved by the Governing Body at its 292nd Session].

71. This case concerns restrictions on the right of bailiffs, as employers, to establish and join organizations of their own choosing, and on their right to engage in collective bargaining, by virtue of their compulsory membership of the National Chamber of Bailiffs *(Chambre nationale des huissiers de justice)* and the latter's exclusive competency in the area of collective bargaining. Litigation proceedings had been initiated before the national administrative courts and were under way in parallel with the Committee's examination of the case. Following its first examination, the Committee requested the Government to amend Order No. 45-2592 of 2 November 1945 on the status of bailiffs in order, on the one hand, that the right of bailiffs to organize be an express part of their status and, on the other, that bailiffs be able to choose freely the organizations representing their interests in the collective bargaining process, and that the organizations in question be exclusively employers' organizations which can be considered to be independent of the public authorities in that their membership, organization and functioning are freely chosen by the bailiffs themselves. At the time of the second examination, noting that, according to the information provided by the Government, the Council of State *(Conseil d'Etat)* had still not issued a ruling, the Committee requested the Government to transmit the order of the Council of State as soon as it had been issued.

72. In a communication dated 16 September 2006, the Government transmitted a copy of the Council of State Order of 16 December 2005 in which it ruled on the case. The Government stated that the Order responded in part to the Committee's recommendation, in that it announced the repeal of the contentious provisions of the Order of 2 November 1945, and that it was currently studying means by which it could comply with that decision as well as with the Committee's recommendations.

73. *The Committee notes with interest that the Council of State considers that the entry into force of the Preamble to the Constitution of 27 October 1946, the sixth indent of which implies that all regularly constituted trade unions have the right to participate in collective bargaining processes (depending on their representativeness), implicitly but necessarily repealed the provisions of article 10 of the Order of 2 November 1945, as they included in the monopoly granted to the National Chamber of Bailiffs matters pertaining to the recognized rights of occupational unions of employers or workers. The Committee notes that the repeal of article 10 of the Order of 2 November 1945, as stated in a non-appealable court ruling, guarantees the right of bailiffs, as employers, to organize and the right of their occupational organizations to engage in collective bargaining.*

Case No. 2298 (Guatemala)

74. The Committee last examined this case at its meeting in June 2006. 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 342nd Report, paras 539–550].

75. *The Committee notes that in its communication dated 28 June 2006, the Government sent it a communication from the Public Prosecutor stating that the complaint was rejected. However, it did not attach a copy of the decision rejecting the appeal, so that it is impossible to ascertain the reasons for the decision. Consequently, the Committee once again requests the Government to provide a copy of the text of the decision of the Public Prosecutor of 3 August 2004, to reject the complaint lodged by Mr Sandoval Gómez.*

Case No. 2339 (Guatemala)

76. The Committee last examined this case at its March 2006 meeting [see 340th Report, paras 862–877]. On that occasion, the Committee requested the Government to take measures to reinstate union member, Mari Cruz Herrera, to her post, in accordance with the agreement made with the employer's representative before the labour inspectorate, especially given that the current system does not allow that worker, a union member, any right to freedom of association. The Committee requests the Government to keep it informed in this respect. The Committee also requested the Government and the Union of Workers in the Ministry of Agriculture, Cattle-raising and Food (SITRAMAGA) to send the text of all rulings regarding the dismissal of union members Mr Emilio Francisco Merck Cos and Mr Gregorio Ayala Sandoval.

77. The Committee takes note of the Government's communications dated 4 August and 22 November 2006, as well as the communications of the Trade Union of Workers in Civil Aviation (USTAC) of 7 July 2006 and of SITRAMAGA of 26 June 2006, which refer to the issues already raised. As to the reinstatement of Mrs Mari Cruz Herrera to her post, the Committee notes the communication of the General Directorate of Civil Aviation (enclosed by the Government), in which it states that the cancellation of said union member's contract was endorsed by the Ministry of Labour and Social Security. *Taking into account the fact that a commitment exists which was made by the representative of the employer before the labour inspectorate to reinstate Mrs Mari Cruz Herrera, the Committee requests the Government to ensure that said commitment is respected.*

78. As to the dismissal of union members Emilio Francisco Merck Cos and Gregorio Ayala Sandoval, the Committee takes note of the ruling of the Supreme Court of Justice regarding the *amparo* (appeal for the protection of constitutional rights) presented and that of the Constitutional Court, of 4 July 2000 and 2 April 2001 respectively, in which the *amparo* was denied because it was held that the dismissal of the union members was justified because they had been absent from their posts without the permission of their employer. *In this context the Committee recalls that the dismissal of trade unionists for absence from work without the employer's permission does not appear in itself to constitute an infringement of freedom of association [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, para. 805].*

Case No. 2390 (Guatemala)

79. The Committee last examined this case at its June 2006 meeting [see 342nd Report, paras 551–556]. On that occasion, the Committee made the following recommendation:

"As to the allegations concerning the dismissal of 52 workers at Horticultura de Salamá in 1997, following the formation of the Trade Union of Horticultural Workers of Salamá (SINTRAHORTICULTURA), and all the legal proceedings in which the reinstatement of the workers had been ordered, the Committee … requests the Government and the complainant organization to inform it as to whether the complainant organization has withdrawn the legal proceedings it had initiated." In this respect, the Committee takes note of the Government's communications of 4 August and 11 October 2006, in which it states that, according to the Second Labour Court, most of the parties who brought the case have withdrawn the legal proceedings they had initiated and that two workers remain to be reinstated in their jobs but have not been because the home address is unknown. *The Committee takes note of this information and requests the Government to do everything in its power to see that the said workers are reinstated.*

80. As to the allegations regarding the dismissal of four workers shortly after the formation of the trade union, the pressure exerted on them, the persecution and constant harassment of union members and the act of anti-union discrimination against members and leaders of the Union of Workers of NB Guatemala (SITRANB) in the NB Guatemala Company, the Committee requested the Government to take measures to ensure that an independent inquiry was carried out and, if it was determined that the dismissals were linked to the formation of the trade union organization and the other anti-union acts, to ensure that the workers were immediately reinstated and paid wages owed and that sufficiently dissuasive sanctions were imposed on the enterprise for the anti-union acts committed. *The Committee notes with regret that the Government has not sent its observations in this respect and requests it to do so without delay.*

81. As to the allegations presented by the Union of Workers of the Technical Institute for Training and Productivity (STINTECAP) concerning acts of interference, pressure and threats against the workers to force them to leave the trade union, the Committee requested the Government to take the necessary measures to ensure that an independent inquiry was carried out into the alleged facts and to keep it informed in that regard, as well as to inform it of the result of the Tripartite Committee's attempts at conciliation. *The Committee notes with regret that the Government has not sent its observations in this regard and requests it to do so without delay.*

Case No. 2421 (Guatemala)

82. The Committee last examined this case at its November 2006 meeting [see 343rd Report, paras 92–95], when it requested the Government to keep it informed on the implementation of the collective agreement applicable to the SNTSG, in particular as regards the granting of trade union leave and the deduction of union dues.

83. The Committee notes the communications of the Government dated 6 November 2006 and 2 January 2007, according to which the Joint Board was set up in November 2004, comprising three delegates and three substitutes from the Ministry of Public Health and Social Welfare and three delegates and three substitutes from the SNTSG. The purpose of the Board is to settle labour disputes and, in that context, on 19 May and 21 October 2005, the Board examined the question of the deduction of trade union dues referred to in this complaint and decided that such deductions were not possible unless legal requirements were met in respect of identifying the union's members.

84. *The Committee notes this information, and hopes that the question of union leave will also be examined in the framework of this Board.*

Case No. 2330 (Honduras)

85. At its meeting in June 2004, the Committee: (i) noted with interest that the authorities had abandoned the lawsuit intended to suspend the legal personality of the complainant organizations and requested the Government to keep it informed of any new decision in relation to this case; and (ii) invited the Government and the trade union organizations to find a negotiated solution to the unresolved issues before the judicial authority and to keep it informed in this respect [see 342nd Report, para. 107].

86. In its communication of 3 November 2006, the Government states that, following the acquittal of Nelson Edgardo Cálix, former president of the Association of Secondary Teachers of Honduras (COPEMH), Mr Avila lodged an appeal in cassation with the Supreme Court of Justice, which in its ruling of 30 May 2005 on the appeal annulled the judgement and hearing and ordered the case to be retried with different judges. In view of this ruling, Mr Carlos Avila Molina, not wishing to maintain the action, dropped the case. With regard to the action brought by the teachers' organizations, COPEMH and the Professional Association of School Teachers of Honduras (COPRUMH), before the Administrative Disputes Court relating to the imposition of fines (500 lempiras), the procedure is following its course and the ruling is awaited. It should be recalled, with regard to the latter case, that the Office of the Attorney General of the Republic made an offer to the teachers' organizations to suspend the fines, but the organizations did not accept the offer and decided to proceed with the case.

87. *The Committee notes the Government's statement that the case against trade union official Mr Nelson Edgardo Cálix has been dropped. The Committee requests the Government to inform it of the outcome of the action relating to the fine of 500 lempiras imposed on the teachers' organizations COPEMH and COPRUMH.*

Case No. 2364 (India)

88. The Committee examined this case at its June 2006 meeting [see 342nd Report, paras 110–115]. On that occasion, it requested the Government: (1) to amend the Tamil Nadu Government Servants Conduct Rules and the Tamil Nadu Essential Services Maintenance Act (TNESMA) so as to ensure that public servants, other than those engaged in the administration of the State, enjoy collective bargaining rights, that priority is given to collective bargaining as the means of settling disputes arising in connection with the determination of terms and conditions of employment of public service, and that teachers are able to exercise the right to strike; (2) to return the office building to the Tamil Nadu Secretariat Association; (3) to provide information on the complainant's request concerning monetary compensation to the families of the 42 employees who had lost their lives and urges the Government to transmit this information without delay; and (4) to indicate whether thorough consultations with trade unions have been held in respect of the unsettled issues related to the terms and conditions of employment of government employees and teachers.

89. In its communication dated 26 June 2006, the Trade Unions International of Public and Allied Employees states that more than 10 million government employees are still deprived of trade union rights, including the right to strike.

90. In its communication dated 21 September 2006, the Government indicates that while, in general, Indian workers enjoy the protection provided by Conventions Nos. 87 and 98, government servants are treated as a separate category of workers and reasonable restrictions are imposed upon their fundamental rights. In particular, civil servants have not been given the right to collective bargaining and the right to strike. Nevertheless, civil servants are provided with alternative negotiation machinery in the form of Joint

Consultative Machinery. They can approach the administrative tribunals and seek redress of their specific service-related grievances.

91. *With regard to the ongoing question in this case of the rights of government employees and teachers and the Government's statement in this regard, the Committee refers to its previous examination of this case [see 338th Report, paras 974–975] where it recalled to the Government that public servants, other than those engaged in the administration of the State, should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means of settling disputes arising in connection with the determination of terms and conditions of employment of public service. Furthermore, teachers should be able to exercise the right to strike. The Committee is deeply concerned with the Government's unwillingness to take the necessary measures to amend its legislation so as to bring it into conformity with the freedom of association principles. The Committee recalls that the membership of a State in the International Labour Organization carries with it the obligation to respect in national legislation freedom of association principles and the Conventions, which the State has freely ratified [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fourth edition, 2006, para. 16]. The Committee therefore once again requests the Government to ensure the application of the above principles and to amend the Tamil Nadu Government Servants Conduct Rules and the TNESMA.*

92. *The Committee regrets that no information was provided by the Government with regard to its previous request to return the office building to the Tamil Nadu Secretariat Association, nor with respect to the complainant's request concerning monetary compensation to the families of the 42 employees who had lost their lives and once again urges the Government to transmit this information without delay. The Committee further urges the Government to indicate whether thorough consultations have been held with trade unions in respect of pension benefits (the Government's unilateral suspension of which previously resulted in strike action) and whether any final agreement has been reached in this regard.*

Case No. 2114 (Japan)

93. The Committee last examined this case, which concerns restrictions on the right to bargain collectively of public employees and the absence of adequate, impartial and speedy conciliation and arbitration proceedings in case of breakdowns in negotiation, at its March 2006 session [see 340th Report, paras 120–123]. On that occasion, the Committee noted the additional information submitted by the complainant, the Okayama Prefectural High School Teachers' Association Union (OHTU), which recounted several instances of the Government's continued refusal to engage in meaningful negotiations. The Committee requested the Government to submit its observations on the complainant's additional information and keep it informed of the measures taken to implement its previous recommendations to promote the development and utilization of collective bargaining machinery, with a view to the regulation of terms and conditions of employment by means of collective agreements for public school teachers [see 329th Report, paras 67–72].

New allegations concerning remuneration negotiations

94. The complainant submitted additional allegations of the denial of collective bargaining rights in a communication dated 23 August 2006. The complainant states that, in 2005, the National Personnel Authority and the Okayama Prefectural Personnel Commission (OPPC) issued a report recommending the "revision of the payroll in 2005" to reduce annual wages by an average of 0.1 per cent or approximately 4,000 yen. The said bodies also recommended a review of the remuneration structured, centred on a reduction in wages by an average of 4.8 per cent, or 19,000 yen per month, as well as the introduction of a

discriminatory pay raise system. This change would imply a radical change in the wage determination principle, which is based on a comparison between public and private sectors and that had been in operation for about 50 years in Japan. In the report containing these recommendations, the OPPC also mentioned reductions in other types of compensation, including the Educational Allowance for Part-time and Correspondence Courses (EAPCC), the Allowance for Industrial Education (AIE) and compensation for workers on leave.

95. On 21 October 2005, the Okayama Prefectural Education Commission (OPEC) offered the OHTU a proposal that they extend the ongoing independent measure of Okayama Prefecture to reduce wages (a 2.8 per cent reduction in monthly wages and seasonal bonuses for 2004–06, due to financial difficulties) for another three years.

96. At a negotiation session held on 4 November 2005, OPEC seconded the implementation of the recommendations in the OPPC report to reduce the EAPCC, the AIE and compensation for workers on leave. The complainant claimed that OPEC's "reply" did not comply with the pre-established negotiation rule, but OPEC again proposed these recommendations on 8 November 2005.

97. The complainant indicates that three negotiations took place between OHTU and OPEC on 4, 14 and 21 November 2005, respectively. Over the course of the negotiations, OPEC proposed a wage cut with regard to the revision of the 2005 wage rate, as was recommended by OPPC, and the proposed continuation of the Okayama Prefecture's independent measure to reduce wages was set aside, though discussions on this matter would continue in the following year. OHTU requested that the OPPC's wage reduction recommendations not be implemented, and that the time frame and number of meetings for negotiations be expanded; although OPEC extended the time frame slightly it refused to hold more than three meetings. OHTU decided to compromise on this issue as some progress had been made in the discussion of working conditions, and as OPEC had agreed to continue discussion of the most important matter – the review of the remuneration structure – in future negotiations.

98. On 7 February 2006, OPEC made another proposal to the complainant in respect of the review of the remuneration structure. The said proposal was comprised of two main elements: (1) the reduction of wages by an average of 4.8 per cent, or 19,000 yen per month, as recommended by the OPPC; and (2) the introduction of a discriminatory pay raise system which, according to the complainant, is tantamount to a freeze on salaries for aged employees and a wage cut for employees in their twenties, who stand to lose 15 million yen of their lifetime earnings though the wage level as of March 2006 would be secured in the immediate future. The complainant adds that OPEC also proposed to cut the retirement allowance by an average of 7 per cent, or about 1 million yen, in line with the recommendation put forth by the National Personnel Authority and OPPC.

99. Negotiations between the OHTU and OPEC continued on 10 February 2006. On said date the complainant set forth its problems with OPEC's proposals and strongly requested that they be withdrawn; eventually a compromise was reached, after confirming that OPEC would not immediately introduce an "assessment-based pay raise system" in 2006 and would negotiate with the complainant in respect of that issue.

100. On 17 February 2006 OPEC proposed a review of the remuneration structure for non-clerical workers, such as school affairs technicians. According to the complainant, the proposal aimed to revise the old wage systems, so as to reduce wages by an average of 15,000 yen per month for workers aged 40 years old, and to restrict the "current wage guarantee" to only four years, thus discriminating between teachers and general administrative personnel. On 27 February 2006 the complainant requested, with regard to

these employees, that OPEC take measures similar to those for teachers. OPEC refused this request and unilaterally discontinued the negotiation.

101. On 28 March 2006, in response to a proposal made by OPEC six days earlier, the complainant opened negotiations on the "adjustment amount" for the retirement allowance – an issue on which negotiations had been postponed on 10 February 2006. The complainant insisted that OPEC abolish any hasty systematic reforms and hold full discussions on these matters, requesting them to continue negotiations, but OPEC unilaterally ended the negotiation. The complainant states that OPEC had been postponing discussion of the review of the remuneration structure as it was waiting for the policy and notice given by the National Personnel Authority.

New allegations concerning an employee assessment system

102. In April 2005, the complainant states that OPEC commenced a trial period of the school personnel assessment system, intended for the staff members in 19 schools in Okayama Prefecture. Over this period OPEC only held "dialogues" with the complainant in which it simply listened to the OHTU's opinions and ideas. OPEC maintained that the system's main purpose was to enhance the qualifications and abilities of school staff members and to stimulate school systems. The issue of the assessment results on staff wages would be discussed in the future.

103. Over this same period the complainant asked OPEC to participate in negotiations in accordance with ILO Convention No. 98, the UNESCO recommendations concerning the status of teachers, and section 55 of the Japanese Local Public Service Law. In November 2005 OHTU requested that the assessment system be fully reconsidered so as to take into account its input, to which OPEC stated that it did not deny that the assessment system is a negotiation issue, if its results reflect on wages. Furthermore, OPEC did not deny that they had been practising the special pay raise system, through the "outstanding teacher recommendation", without negotiating with OHTU. OPEC nevertheless replied that this system would continue to be used. The complainant holds that OPEC has not fundamentally changed this system but merely accepted its requests relating to insignificant details of the system, and has implemented it in all schools since April 2006. On a more general note, the complainant maintains that the Government has shown a disregard for the complainant's requests throughout their negotiations, thus violating its right to collective bargaining.

New allegations respecting the independence of the personnel commissions

104. The complainant states that, on 13 December 2005, it sent an "open letter" to the OPPC, inquiring about the position of the "compensatory organization for the constraint of the basic rights in labour", a neutral organization that is expected to be fair, impartial and independent. The complainants adds that it had done so because the recommendations and reports issued by OPPC in 2005 had served as the basis for OPEC's series of proposals for cutbacks in working conditions, contrary to the complainant's requests. OPPC orally replied to the complainant's letter on 17 January 2005 by reiterating the principles of "adjustment to social situations" and "equilibrium" to justify the Government's stance.

105. In a communication of 19 January 2007, the Government reiterates its previous position [see 328th Report, para. 383] on the rights of public school teachers under Convention No. 98, namely that public school teachers are obliged to attend to their duties in the public interest as servants of the whole community, and that, since their salaries and other working conditions are stipulated by by-laws established by the local assembly, which is

directly elected by local residents, the law protects the working conditions of public school teachers.

106. The Government also repeats its earlier assertion that the question of whether a certain category of public servant may be excluded from the rights enshrined in Convention No. 98, under Article 6 of the same Convention, should be decided by determining whether they benefit from statutory terms and conditions of service. It adds that this assertion finds support in the conclusions of the Committee themselves, and cites excerpts from previous cases of the Committee to which the Government was a party. For example, as regards Case No. 60, the Government recalls that the Committee found:

> With regard to the Government's obligations in the light of its ratification of Convention No. 98, the Committee considers that, by providing in its legislation, first, for negotiation machinery and, second, for the conclusion of collective agreements in respect of government-employed persons other than those benefiting from statutory terms and conditions, the Government appears to have acted in a manner consistent with the stipulations contained in Article 4 of Convention No. 98 cited above. *With regard to the persons who do enjoy statutory terms and conditions, that is, persons engaged in the administration and with whom Convention No. 98 does deal specifically, although it is not to be construed as prejudicing their rights or status in any way*, the Government, by enabling them to present grievances and representations through their organizations with a view to their being taken into consideration by those responsible for laying down or making recommendations concerning the contents of their statutory terms and conditions, has adopted the principle most usually accepted in other countries with respect to civil servants of this category, whose situation under the law admits of negotiation but not of the conclusion of collective agreements. The Committee considers, therefore, that the Government appears to have acted in a manner consistent with the provisions of Convention No. 98 with respect to the collective bargaining rights of persons employed by the Government and local public bodies [Case No. 60, 12th Report, para. 43, italics added by the Government].

The Government also referred to similar arguments and considerations can be found in respect of Cases Nos. 179 [54th Report, para. 179] and 738 [139th Report, para. 174].

107. The Government indicates that sincere negotiations are being carried out with employees' organizations, including the complainant. In response to the additional information previously submitted by the complainant on several instances demonstrating the Government's ongoing refusal to bargain collectively [see 340th Report, para. 121] the Government states, with respect to the special retirement pay raise, which the complainant earlier alleged was abolished after insufficient negotiations, that this issue was presented to the complainant on 23 August 2004, and thereafter negotiated on 4, 10, and 25 November, an agreement being reached on the last day.

108. As regards the system for special pay raises for especially outstanding employees, the Okayama Prefectural Education Commission (OPEC) has not established a new pay raise system, but has merely established a commendation system, which it does not consider to be a working condition subject to collective bargaining.

109. Regarding the "Research and Study Council relating to Teacher Evaluation," the said Council was only set up to prepare a "trial" manual. In the preparation of the "implementation" manual actually used, deliberations were held with the complainant on a total of six occasions and the opinions from these meetings were reflected in said implementation manual. The Government also refutes the complainant's claim that the teacher evaluation system itself can be considered a working condition subject to negotiation, as it evaluates and records the performance of employees who have worked for a specific length of service under specific working conditions.

110. With respect to the alleged failure of the OPPC to issue recommendations on wage improvement, the Government states that pay improvement recommendations were not issued as they would have concerned temporary pay control measures, whereas the purpose of the recommendations of the Personnel Commission are to indicate the proper salary levels that should be provided. The report by the Personnel Commission states that, "we strongly hope that the conventional level of pay for employees will be secured in accordance with the recommendations, once the conditions are improved".

111. The Government indicates that negotiations have also been carried out with the Okayama Prefectural Four-Party Joint Labour Council, a body comprised of public service trade unions representing the majority of public servants in Okayama Prefecture and of which the complainant is not a member. The Government additionally refers to an ongoing process of reform to the Civil Service, in the context of which the Special Examination Committee of the Headquarters for the Promotion of Administrative Reform is currently advancing the discussion of the prospective labour–employer relationship, which extends to the fundamental labour rights of public service employees, including local public employees. The members of this Special Examination Committee include persons from employees' organizations.

112. The Government states finally that, as regards the Committee's previous recommendations regarding the promotion and development of collective bargaining machinery for public school teachers, this matter has been disposed of by the fact that public school teachers fall within the scope of Article 6 of Convention No. 98, and may therefore be denied the right to bargain collectively.

113. *The Committee notes the information provided by the Government. As regards the Government's contention that the determination of those classes of public servant falling within the scope of Convention No. 98, Article 6 rests upon the question of whether the said public servants' terms and conditions of employment are provided for by statute, the Committee considers that this interpretation is erroneous. In Case No. 60 [see 12th Report, paras 10–83], paragraph 43 of which is cited above in support of the Government's claim, the Committee recalls that it had noted that the National Public Service Law (NPSL) applies to civil servants in the regular civil service, who are recruited by examination and whose terms and conditions of employment are prescribed by statute [see 12th Report, para. 39]. The NPSL grants to employees in the regular civil service the right to bargain, but not to conclude collective agreements, whereas all other classes of public servant, whose terms and conditions of employment are not set by statute, enjoy both the right to bargain and conclude collective agreements under the Public Corporation and National Enterprise Labour Relations Law. On that occasion, the Committee had concluded that the denial of the right to conclude collective agreements to employees in the regular civil service did not infringe upon the rights guaranteed under Convention No. 98, as those employees were considered to be public servants engaged in the administration of the State as stipulated by Article 6 of the same Convention [see 12th Report, paras 37–44].*

114. *The Committee wishes to clarify that its earlier reference in that case to "persons who do enjoy statutory terms and conditions, that is, persons engaged in the administration of the State", particularly when read in the context of its full conclusions in that case, was simply meant to acknowledge that, under Japanese law, the granting of collective bargaining rights to all public employees except the regular civil service – who are for the purposes of the Convention employees engaged in the administration of the State and, as is the case under Japanese legislation, also employees whose terms and conditions of employment are statutorily provided for – was consistent with Articles 4 and 6 of Convention No. 98. The Committee does not consider that this was meant to suggest that all employees whose terms of employment are provided for by statute qualify for the exemption under Article 6*

of Convention No. 98, as the Government contends, and this can be seen from a number of cases decided by it more recently.

115. *Indeed, as concerns the scope of Article 6 of the Convention the Committee recalls that it is imperative that the legislation contain specific provisions clearly and explicitly recognizing the right of organizations of public employees and officials who are not acting in the capacity of agents of the state administration to conclude collective agreements. From the point of view of the principles laid down by the supervisory bodies of the ILO in connection with Convention No. 98, this right could only be denied to officials working in ministries and other comparable government bodies, but not, for example, to persons working in public undertakings or autonomous public institutions [see* ***Digest of decisions and principles of the Committee on Freedom of Association****, fifth edition, 2006, para. 893]. On this point the Committee is bound to point out that, if any class of public employee could be denied the right to collective bargaining simply by legislating their terms and conditions of employment, Convention No. 98 would be deprived of all of its scope vis-à-vis public employees.*

116. *As concerns the specific case of public school teachers, the Committee recalls that in its previous treatment of this case it had clearly stated that public school teachers should have the right to bargain collectively [see 328th Report, para. 416]. The right of public school teachers to bargain collectively had in fact been unambiguously set forth by the Committee on other occasions, such as in its treatment of Cases Nos. 2177 and 2183 [see 329th Report, para. 645]. Finally, the Committee recalls that teachers do not carry out tasks specific to officials in the state administration; indeed, this type of activity is also carried out in the private sector. In these circumstances, it is important that teachers with civil servant status should enjoy the guarantees provided for under Convention No. 98 [see* ***Digest****, op. cit., para. 901].*

117. *The Committee notes that, according to the Government, it had in fact negotiated and reached agreement with the complainant on the issue of the special retirement pay raise. The Government also states that the other matters raised by the complainant in its 2005 allegations lie outside the proper scope of negotiations, and were therefore not pursued, whereas it had continued to negotiate with other workers' organizations over the terms of their constituents' employment. The Committee nevertheless notes that the Government has not responded to the complainant's most recent allegations, which, while indicating that proposals had been made and discussions held on a number of occasions between the OHTU and the OPEC, primarily concern the refusal to engage in meaningful negotiations. It further notes that the Government has not fully implemented its previous recommendations respecting the promotion of collective bargaining machinery and ensuring the impartiality of the personnel commissions [see 340th Report, para. 123]. In light of this, the Committee urges the Government to: (1) take appropriate measures to encourage and promote the full development and utilization of machinery for voluntary negotiation, with a view to the regulation of terms and conditions of employment by means of collective agreements for public school teachers; and (2) take the necessary steps to ensure that the members of personnel commissions are persons whose impartiality has the confidence of the parties concerned. The Committee requests to be kept informed of developments in this regard.*

Case No. 2301 (Malaysia)

118. 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: 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 2006 meeting [see 340th Report, paras 124–132].

119. In a communication dated 16 August 2006, the Government stated that it is not able to bring its law and practice into full conformity with freedom of association principles, as doing so would enable the formation of general trade unions and could lead to inter-trade union rivalry in the workplace, which is not conducive to industrial harmony and unproductive.

120. With regard to the 8,000 workers who claimed representational and collective bargaining rights in 23 companies, the Government indicated that the Director-General of Trade Unions (DGTU) had decided for each company that the petitioning trade union was not competent to represent the workers concerned, since the union represented workers in a different industry from the company and its employees. The Government attached an analytical table listing 21 companies, the nature of their respective businesses, the DGTU's decision with regard to each company and the reason for each decision. The Government adds that even though the above-noted workers could not be represented by the trade unions, they were free to join any trade union and in the absence of any union, could form an establishment, or "in-house" trade union to represent them vis-à-vis their respective employers.

121. With respect to the court challenges filed by several employers and affecting 2,000 workers, after the DGTU had ruled in favour of the unions in cases concerning collective bargaining rights, the Government attached an analytical table with the information on these cases (parties, year, subject, decision). It added that in the case involving the Metal Industry Employees Union in Top Thermo Manufacturing (Malaysia) Sdn. Bhd., the said union had appealed the judgement of the High Court quashing a decision to grant the union representative status; the appeal was still pending.

122. The Government also indicated that the discussion on the amendments to the Industrial Relations Act 1967 and the Trade Union Act 1959 was completed in March 2006; the bill is in the final stages of vetting by the Attorney-General's Office before being tabled in Parliament.

123. *As regards the 8,000 workers whose claims for representational and bargaining rights in 23 companies were denied, the Committee notes, from the information submitted by the Government, that in 21 of these company-specific claims the DGTU had deemed the petitioning union not competent as it possessed constituencies in industries different from those of the employees it sought representative status for.*

124. *While not calling into question the approach of setting up broad bands of classification relating to branches of activity for the purpose of clarifying the nature and scope of industrial-level unions, the Committee does consider the decisions of the DGTU to be rooted in the legislative framework's restrictions on trade union rights that it had extensively commented upon in its first examination of this case. Moreover, the Committee recalls once again that it has commented upon the extremely serious matters arising out of fundamental deficiencies in the legislation on several occasions, over a period spanning 15 years. In this regard the Committee must express its deep concern with the Government's statement that it is unable to bring its law and practice into conformity with freedom of association principles and recalls that questions of trade union structure and organization are matters for the workers themselves. Noting that the bill to amend the*

Industrial Relations and Trade Unions Acts was in the final stages of vetting before being tabled in Parliament, the Committee once again urges the Government to take fully into account 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.*

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.

125. *As regards the 8,000 workers themselves whose freedom of association rights were denied, the Committee urges the Government rapidly to 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.*

126. *As regards the nine court challenges filed by several employers and affecting 2,000 workers after the DGTU had ruled in favour of the unions in cases concerning collective bargaining rights, the Committee notes that the Metal Industry Employees Union (MIEU) was appealing the High Court's 2003 judgement quashing the decision to grant it representative status. As for the other eight decisions, the challenge of one company (Syarikat Marulee (M) Sdn. Bhd.) was quashed and is now being appealed; another company (Pacific Quest (M) Sdn. Bhd.) had its challenge dismissed and was ordered to pay costs. Noting that the other decisions, with one exception, were being appealed or are still pending before the High Court, the Committee recalls once again that justice delayed is justice denied [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 105] and once again requests the Government to continue to transmit information on these cases, including the grounds on which the judgements were made, and to take all necessary measures to ensure that the final decisions may be reached without further delay.*

Case No. 2234 (Mexico)

127. At its meeting in November 2005, 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 (General Secretary of the Metropolitan Rail Transport Workers' Union) and the other participants in the industrial action of 8 August 2002 in the metropolitan passenger train system.

128. In its communication of 12 September 2006, the Government reported that according to the Federal District Public Prosecutor's Office, on 16 August 2006, the head of its Fiftieth Investigative Office, which is responsible for the investigation under Case No. FACI/50T/1008/02-08 in relation to Mr Fernando Espino Arévalo and others for their probable involvement in the offence of "coalition of public servants" and "attacks on means of communication", had reported that once Mr Fernando Espino Arévalo finished his term of office as a legislator, the investigation would proceed in accordance with the law, as he currently enjoys constitutional immunity.

129. *The Committee notes this information and requests the Government, once Mr Fernando Espino Arévalo has completed his term of office as legislator, to communicate the final decision on the legal proceedings under way against this trade union leader and the other participants in the industrial action of 8 August 2002 in the metropolitan passenger train system.*

Case No. 2350 (Republic of Moldova)

130. The Committee last examined this case at its November 2005 session [see 338th Report, paras 1074–1085] and invited the Government to take the necessary measures to review the Fiscal Code in full consultation with the social partners concerned, with the aim of finding a mutually agreeable solution to the issue of fiscal treatment of membership fees paid by employers to their organizations, including considering the introduction of tax regulation that would enable the deductibility of these fees should there be any discrimination in fiscal treatment.

131. In a communication dated 2 October 2006, the Government informs that on 28 July 2006, the Parliament of the Republic of Moldova adopted Law No. 268 – XVI for the amendment of some legislative acts. This Law came into force on 8 September 2006. This Law amended, among others, the Fiscal Code of 24 April 1997. Section 24 of the Code, which sets out the deductibility cost for entrepreneurship activity, was completed by paragraph 15 that ascertains the permission for deductibility fees paid by the contributors during the fiscal year in form of adherence taxes and membership fees intended for the activity of employers' organizations. The deductibility ceiling is 0.5 per cent from the wage found. The Government therefore considers that the issue of the present complaint is entirely settled.

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

Case No. 2394 (Nicaragua)

133. At its meeting in March 2006 the Committee made the following recommendations [see 340th Report, para. 1178]:

(a) The Committee regrets that the Trade Union Associations Directorate of the Ministry of Labour has not enforced the appellate judgement against the General Labour Inspectorate decision of 7 February 2003, ordering the registration of the executive committee of the complainant trade union, and that the Trade Union Associations Directorate has not extended certification to that executive, thus preventing the complainant trade union from defending its members' interests, in particular through collective bargaining. The Committee regrets the administrative delays which occurred in this case, and requests the Government to execute the ruling of the judicial authority dated 25 August 2005, mentioned by the Government, which ordered the registration of the executive committee of Mr. Julio Noel Canales.

(b) The Committee expects the Government in future to guarantee fully the right of workers' organizations to elect their representatives in full freedom, in accordance with Article 3

of Convention No. 87, as well as the principle that "in order to avoid the danger of serious limitations on the right of workers to elect their representatives in full freedom, cases brought before the courts by the administrative authorities involving a challenge to the results of trade union elections should not – pending the final outcome of the proceedings – have the effect of paralysing the operations of trade unions".

134. In its communication dated 17 May 2006, the Trade Union of Employees in Higher Education "Ervin Abarac Jimenez" (SIPRES–UNI, ATD) denounces the Government's failure to comply with the Committee's recommendations despite the complainant organization's request to the President of the Republic and to the Rector of the National University of Engineering (the employer), with the result that the union's executive committee is still not registered, its members' monthly dues have still not been paid over to the union and collective bargaining is still suspended.

135. *The Committee notes the information supplied by the complainant organization while at the same time regretting the lack of information from the Government, and urges the Government to register the executive committee of the complainant trade union without delay, to ensure that the union dues are paid over to it and to promote collective bargaining. The Committee requests the Government to keep it informed in this respect.*

Case No. 2169 (Pakistan)

136. The Committee examined this case, which concerns allegations of illegal detention of trade union leaders and violations of the right to collective bargaining as well as acts of intimidation, harassment and anti-union dismissals in the Pearl Continental Hotels, at its meeting in June 2003 [331st Report, paras 624–642] and requested the Government to instruct the competent labour authorities to rapidly undertake an in-depth investigation of the anti-union dismissals at the Karachi Pearl Continental Hotel and, if it is found that there has been anti-union discrimination, to ensure that the workers concerned are reinstated in their posts, without loss of pay. It further requested the Government to rapidly carry out an inquiry into the alleged beatings of Messrs Aurangzeg and Hidayatullah on 6 July 2002 at the police station, to keep it informed of the results of that inquiry, and to give appropriate instructions to police forces, to prevent the repetition of such acts. Finally, the Committee requested the Government to provide a copy of the court decision concerning the unfair labour practice procedure related to the go-slow tactics in December 2001.

137. In a communication dated 24 June 2005, the Government recalled that the management of Pearl Continental Hotel, Karachi, has retrenched 318 employees due to restructuring. In this connection, a number of informal meetings were conducted to resolve the issue and the Labour Department was successful in bringing both the parties to the negotiation table. The Government assured that there would be no discrimination whatsoever against the trade unionists and due process of law would be fully guaranteed. Some workers were arrested for arson. As it was a criminal complaint, the Labour Department had no power to intervene. However, it was ensured that the status of the union would remain unaffected. Since the accused resisted at the time of arrest, the police authorities had to use force. However, later on no coercive action was taken during detention. The management of the Pearl Continental Hotel submitted an application to the Director, Labour Sindh/Registrar of Trade Unions, Sindh, on 28 December 2001, against the office bearers and members of the union. As per the contention of the management, the employees had started resorting to go-slow tactics. The case is still sub-judice. As soon as the decision is announced, it will be provided to the Committee. The Government concludes that it cannot be said that it is not fulfilling its due role in protecting the workers' rights or that the case relates to activities against freedom of association.

138. In a communication dated 6 October 2006, the Government adds that the case was taken up with the management of Pearl Continental Hotel, Karachi, which provided the following update: (a) the criminal complaint filed by the Registrar of Trade Unions, Government of Sindh, Karachi, before the Sindh Labour Court, Karachi, against the trade union for commission of various crimes included a request for cancellation of registration of the union. This case went before the Sindh High Court, Karachi, and was remanded back to the Trial Court for hearing in accordance with the provisions of the Code of Criminal Procedure 1898 of Pakistan. This case is pending before the Sindh Labour Court, Karachi; (b) criminal complaints have been filed by the complainant trade union against the hotel for non-payment of their office rent and not deducting the subscriptions from the wages of the workers under the check-off system. Neither did the complainant trade union enjoy the status of a collective bargaining agent under the law at the relevant time nor had any worker made a request for affecting the check-off system; these cases are sub-judice before the courts; (c) the management of the hotel lodged a complaint with the police against unknown persons, with regard to the fire incident in the hotel. After investigation, the police found that some of the office bearers of the complainant trade union were involved in this crime. The case is sub-judice before the District and Session Judge, Karachi, and accused persons are on bail; and (d) cases are pending before the courts for and against the trade union for breach of settlement. The fact is that the complainant trade union does not enjoy the status of representative union under the enabling provisions of the law, on the one hand, and, on the other hand, it has been involved in the violation of the various provisions of the law and has filed a false complaint with a view to getting rid of the consequential effects of their crimes. These cases are pending before the courts.

139. *The Committee notes that various cases between the parties in this case are pending before the courts (criminal complaint filed by the Registrar of Trade Unions before the Sindh Labour Court asking for the cancellation of the registration of the union; criminal complaints filed by the complainant against the hotel for non-payment of office rent and not deducting subscriptions under the check-off system; complaint lodged by the management with regard to the fire incident in the hotel; and cases for and against the trade union for breach of settlement). In that respect, the Committee notes that, although the Government provides assurances to the Committee that due process of law will be fully guaranteed to trade unionists in the framework of the various pending cases, it also states, prior to any final judicial decision, that the complainant trade union has been involved in violations of various provisions of the law and filed a false complaint with a view to getting rid of the consequences of its crimes. The Committee emphasizes 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 of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 117]. Noting that the Registrar has asked the courts to pronounce themselves on the cancellation of the trade union, the Committee emphasizes that to deprive many workers of their trade union organizations because of a judgement that illegal activities have been carried out by some leaders or members constitutes a clear violation of the principles of freedom of association [see* ***Digest****, op. cit., para. 692]. Recalling, moreover, that the facts of this case date as far back as 2001, it emphasizes that justice delayed is justice denied [see* ***Digest****, op. cit., para. 105]. The Committee requests the Government to keep it informed of the progress of all judicial proceedings (including on the unfair labour practice procedure related to the go-slow tactics in December 2001) and to transmit the judgements as soon as they are handed down. It expresses the firm hope that the relevant proceedings will be concluded without further delay and that guarantees of due process will be fully afforded to trade unionists, as any other person.*

140. *The Committee further notes that, according to the Government, some trade unionists were beaten by the police since they resisted arrest. However, later on no coercive action was taken during detention. The Committee notes with regret that the Government does not*

*indicate whether an investigation was carried out in this respect. 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 that it is for governments to ensure that this principle is respected [see **Digest**, op. cit., para. 44]. In cases of alleged 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 sanctioning those responsible, are taken to ensure that no detainee is subject to such treatment. The Committee therefore requests the Government to rapidly carry out an independent inquiry into the alleged beatings of Messrs Aurangzeg and Hidayatullah on 6 July 2002 at the police station, to keep it informed of the results of that inquiry, and to give appropriate instructions to police forces, to prevent the repetition of such acts.*

141. *The Committee finally notes with regret that the Government does not provide any information as to an in-depth investigation of the allegations of anti-union dismissals at the Karachi Pearl Continental Hotel. The Committee once again requests the Government to instruct the competent labour authorities to rapidly undertake an in-depth investigation of the anti-union dismissals at the Karachi Pearl Continental Hotel and, if it is found that there has been anti-union discrimination, to ensure that the workers concerned are reinstated in their posts, without loss of pay.*

Case No. 2242 (Pakistan)

142. The Committee last examined this case at its November 2005 meeting [see 338th Report, paras 288–291]. On that occasion, it deeply regretted that no measures had been taken by the Government to give effect to the recommendations of the Committee to ensure trade union rights at the Pakistan International Airlines Corporation (PIAC) and reiterated its previous recommendation to repeal Chief Executive Order No. 6 of 2001 and Administrative Orders Nos. 14, 17, 18 and 25.

143. In its communication dated 6 October 2006, the Government states that the Apex Court had dismissed the petition filed to the Supreme Court by the People's Unity of PIA Employees appealing the decision of 29 March 2002 of the High Court, which had dismissed the petition challenging Executive Order No. 6. As concerns the suit brought by the Pakistan International Airline Pilot's Association (PALPA) also challenging the Executive Order, the Government indicates that the High Court of Sindh in Karachi dismissed the suit by a judgment dated 10 May 2003. The PALPA has filed an intra-Court Appeal before the Division Bench of the said Court. The appeal is still pending.

144. *The Committee recalls that Chief Executive Order No. 6 and the subsequent administrative orders, which suspended trade unions and the existing collective agreements at the PIAC date back to 2001. The Committee is deeply concerned with the Government's unwillingness to take the necessary measures to repeal the above orders. The Committee recalls that the membership of a State in the International Labour Organization carries with it the obligation to respect in national legislation freedom of association principles and the Conventions, which the State has freely ratified. The Committee stresses that it is the responsibility of the Government to ensure the application of international labour Conventions concerning freedom of association which have been freely ratified and which must be respected by all state authorities, including the judicial authorities [see **Digest of decisions and principles of the Freedom of Association Committee**, fourth edition, 2006, paras 16 and 18]. The Committee recalls once again that Articles 2 and 3 of Convention No. 87 provide that workers without distinction whatsoever shall have the right to join organizations of their own choosing and that these organizations shall be able to exercise their activities in full freedom. It therefore urges the Government to repeal Chief Executive*

Order No. 6 of 2001 and Administrative Orders Nos. 14, 17, 18 and 25 so as to restore full trade union rights to PIAC workers without delay and to keep it informed in this respect.

Case No. 2273 (Pakistan)

145. The Committee last examined this case, concerning refusal to register the Army Welfare Sugar Mills Workers' Union (AWSMWU), at its November 2005 session [see 338th Report, paras 292–294]. On that occasion, the Committee regretted that, despite the court ruling dated 7 August 2004, the question of registration of the union was still pending before the Registrar and requested the Government to take the necessary measures to ensure the registration of the AWSMWU without delay.

146. In its communication of 6 October 2006, the Government provides the following information. The Honourable High Court of Sindh of Hyderabad Circuit had decided the case in favour of the Army Welfare Sugar Mills and directed the Regional Directorate of Labour in Hyderabad for de-registration of the trade union. However, on an appeal filed by the union, the Honourable Supreme Court has stayed operation of the High Court's Order and also granted leave for appeal. In view of the development in the matter, the union is authorized to perform its activities in conformity with the Industrial Relations Ordinance of 2002.

147. *While noting with interest that the AWSMWU can operate and perform its activities, the Committee recalls that the court of first instance had dismissed the Registrar's request for de-registration because the services of the Army Welfare Sugar Mills were not exclusively connected to the armed forces and that civilians working in the services of the army should have the right to form trade unions [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 229]. The Committee trusts that the Supreme Court will make a final ruling on this matter in the near future bearing in mind the above principle. The Committee requests the Government to indicate the progress made in this regard, to provide a copy of the Supreme Court judgement as soon as it handed down and to indicate whether the union has since been registered.*

Case No. 2399 (Pakistan)

148. The Committee last examined this case at its November 2005 session [see 338th Report, paras 1155–1174] and made the following recommendations:

(a) The Committee again requests the Government to amend sections 1(4) and 2(XVII) of the IRO of 2002 in line with Conventions Nos. 87 and 98 ratified by Pakistan so as to ensure that all workers without distinction whatsoever, including those working in charitable institutions, may freely establish organizations of their own choosing. The Committee reminds the Government that it may avail itself of the technical assistance of the Office, it so desires.

(b) The Committee requests the Government to take the necessary measures, including the amendment of the legislation, so as to ensure that workers at the Liaquat National Hospital may challenge their dismissals and suspensions before independent courts or tribunals. The Committee further requests the Government rapidly to investigate all 18 cases of dismissals and eight cases of suspension at the hospital and, if the dismissals and suspensions of workers resulted from their trade union activities, the Committee requests the Government to ensure that those workers are reinstated in their posts with back pay and, if reinstatement is not possible, that they are paid adequate compensation so as to constitute sufficiently dissuasive sanctions.

(c) As for the allegations of pressuring, harassment and moral and physical abuse of trade union members, in view of the seriousness of the allegations, the Committee requests the Government to conduct an independent inquiry into the allegations of torture and

harassment against trade union members ordered by the management of the Liaquat National Hospital, as well as into the allegations of abduction, beating and threats carried out against the LNHWU General Secretary, Mr Shahid Iqbal Ahmed, by the police and, if the allegations are confirmed, to punish the guilty parties and take all necessary measures in order to prevent the repetition of similar events.

(d) The Committee requests the Government to keep it informed of the measures taken or envisaged on the abovementioned matters.

149. In its communication dated 6 October 2006, the Government states that in accordance with the Committee's recommendations, the government of Sindh has been asked to conduct an inquiry into the matter of the Liaquat National Hospital in Karachi and to send a comprehensive report to the Ministry of Labour, Manpower and Overseas Pakistanis.

150. *The Committee notes the information provided by the Government. It regrets that no information was provided by the Government in respect of the measures taken or envisaged to amend the Industrial Relations Ordinance (IRO) of 2002 so as to ensure that all workers without distinction whatsoever, including those working in charitable institutions, may freely establish organizations of their own choosing. The Committee refers this aspect of the case to the Committee of Experts on the Application of Conventions and Recommendations.*

151. *With regard to the allegations of anti-union dismissals and suspensions and the pressuring, harassment and moral and physical abuse of trade union members at the Liaquat National Hospital by the management of the hospital and the police, while taking note of the Government's statement that the government of Sindh has been asked to conduct an enquiry into these matters, the Committee recalls that the alleged date back to 2002.*

152. *The Committee therefore trusts that the Government will be able to report on the concrete results of the inquires conducted at the Liaquat National Hospital in the very near future and requests the Government to keep it informed of the progress made in this regard.*

Case No. 2134 (Panama)

153. At its June 2005 Session, the Committee made the following recommendations regarding the issues pending (the dismissal of 60 trade unionists for party political reasons following the 1999 elections, and the trial of a trade union official) [see 337th Report, para. 109]:

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

154. In its communication dated 29 April 2006, the FENASEP states that the current Government or, where not the Government, the authorities governing the 15 institutions involved, have ignored the Committee's recommendations regarding the reinstatement of and payment of outstanding wages to the officials of the associations concerned, who were dismissed by the previous administration without grounds, simply for belonging to another political party, thereby breaking the law and infringing their trade union rights as public sector trade union officials. the FENASEP claims that the Ministry of Labour itself should

set the example by reinstating three officials, but has not done so. the FENASEP states that a group of trade union officials who were reinstated have still not been paid the wages outstanding since their dismissal.

155. In its communications of 7 August and 12 September 2006, the Government states that the Ministry of Labour and Social Development has continued to meet with the FENASEP in the joint committee set up to examine how to implement the recommendations of the Committee on Freedom of Association. Despite the economic and administrative difficulty for the government institutions to appoint the dismissed officials, the Government has, to the best of its abilities, managed to reinstate some of them, thanks to discussions in the joint committee. The Government cites the reinstatement of Jessica del Carmen Bloise, Mayre Bustamante and Melissa Fergunson. As to other officials, the Government states that only about 23 of the 60 officials dismissed by the former administration were still waiting to be reinstated. Since many of the governmental institutions do not have the vacancies necessary for the dismissed officials to be reinstated in their posts (such as José Alba, Carlos Chial and José Hurtado, whose reinstatement the Panama Maritime Authority (AMP) says is not possible at the moment), these will be taken into consideration when the possibility of a post arises. The Government concludes that it will continue to report on the reinstatement of the remaining workers as and when their situation is resolved.

156. *The Committee notes this information and expresses the hope that the 23 trade union officials not yet reinstated in their posts, will be reinstated in the near future and that the wages owed to them will be paid, and requests the Government to continue to take measures to this end. The Committee requests the Government to keep it informed in this respect.*

Case No. 2211 (Peru)

157. The Committee last examined this case at its March 2006 meeting [see 340th Report, paras 162–164]. On that occasion the Committee requested the Government to inform it as to whether the 574 workers dismissed from the telecommunications sector had been reinstated, as ordered by the Constitutional Court.

158. In its communication of 25 October 2006, the Government states that, by official letter No. 610-2006-MTPE/9.1 addressed to the Deputy Director for Individual and Collective Negotiations of Telefónica SAA, it requested information on the action taken by said enterprise to comply fully with the resolution issued by the Constitutional Court, which called for the reinstatement of the 574 workers in the telecommunications sector. In his reply, the chief of labour relations of Telefónica del Perú SAA stated that his company had complied by reinstating those workers in their posts in accordance with the order issued by the 50th Civil Affairs Court of Lima which is responsible for carrying out the order (file No. 50232-2002). However, the chief of labour relations also stated that to date the sixth Civil Division has yet to issue rulings on certain aspects of the implementation of the order, after which the procedure will be concluded. The Government states further that official letter No. 611-2006-MTPE/9.1 was sent to the General Confederation of Workers of Peru (CGTP), requesting the CGTP to inform the Government whether the reinstatement ordered by the Constitutional Court had been carried out, but no reply has yet been received.

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

Case No. 2279 (Peru)

160. The Committee last examined this case, concerning the alleged mass dismissal of workers at the Congress of the Republic and the repression of workers' demonstrations, detention of trade union members and raids on trade union headquarters during the state of emergency declared by the Government on 28 May 2003, at its meeting in June 2006 [see 342nd Report, paras 892–905], when it made the following recommendations:

(a) As regards the mass dismissal of 1,117 workers at the Congress of the Republic, of whom 257 have lodged a complaint with the Inter-American Commission on Human Rights, the Committee, while noting the report of the Commission published in October 2004, requests the Government to inform it whether the workers in question have availed themselves of the judicial remedies to which the Commission refers – and, if that is the case, to inform it of the final outcome of any such proceedings – or whether an amicable agreement has been reached by the parties.

(b) As regards the declaration of a state of emergency on 28 May 2003, which is claimed to have involved the suspension of the right to assemble, the brutal repression of demonstrations, the carrying out of investigations and searches of trade union headquarters without the authorization of trade union officials or judicial warrants, and the detention of more than 150 trade union officials and members of SUTEP, SIDESP, SUTASE, FENTASE and the National Board of Irrigation Users, the Committee firmly expects that all the detainees have been released, and once again urges the Government to carry out an independent investigation into all these allegations and to keep it informed of the outcome.

161. In its communication dated 25 October 2006, the Government states that, with regard to the alleged dismissal of workers at the Congress of the Republic, an official note No. 619-2006-MTPE/9.1 was sent to the executive secretary of the National Council of Human Rights of the Ministry of Justice with a request for information on the current status of the complaint submitted to the Inter-American Commission on Human Rights (CIDH) by the 257 former employees of the Congress of the Republic following their dismissal in 1992. In report No. 97-2006-JUS/CNDH-SE-SESAPI of 24 August 2006, the office of the executive secretary of the National Council of Human Rights states that, in response to the appeal lodged with the CIDH, the Peruvian State recognized that during the reorganization of the staff of the Congress some legal and administrative provisions were in force that contravened certain provisions of the American Convention on Human Rights. The State adds that, aware of the irregularities that occurred during this period, it had taken a number of steps to identify and compensate the workers who had been improperly dismissed and that Act No. 27803 provided for the implementation of the recommendations of the committees established under Acts Nos 27452 and 27586 to review the collective dismissals ordered by State enterprises engaged in the promotion of private sector investment and by public sector bodies and local governments. The Government adds further that the state had indicated its willingness to seek an amicable solution with the workers dismissed from the Congress, and specifically with those who had lodged a complaint with the CIDH; it was understood that such an agreement would reflect the principles embodied in the aforesaid Act No. 27803 (so far, no amicable agreement has been concluded with the 257 former Congress workers, but the State has signified its readiness to do so). The Government also adds that on 14 August 2006 it asked the Office of the Congress of the Republic to inform it whether legal proceedings had been brought against the Congress by any of its 257 former workers. The director of human resources of the Congress replied that no such legal proceedings had been brought against it. *The Committee notes this information and requests the Government to continue taking steps to bring the parties together in an amicable agreement on the dismissals and to keep it informed in this respect.*

162. With regard to the allegations concerning the declaration of a state of emergency on 28 May 2003 which is said to have involved the suspension of the right of assembly, the brutal repression of demonstrations, the carrying out of investigations and searches of trade union headquarters without the authorization of trade union officials or judicial warrants, and the detention of more than 150 trade union officials and members of SUTEP, the Peruvian Union of Higher Education Teachers (SIDESP), the Single Trade Union of Education Sector Administrative Workers (SUTASE), the National Federation of Education Administrative Workers (FENTASE) and the National Board of Irrigation Users (JNUDRP), the Government states that during the days preceding the declaration of the state of emergency there had been demonstrations, work stoppages, marches, strikes, street blockades and other disturbances that had caused serious difficulties in some parts of the country. The disturbances posed a threat to people's physical integrity, to public transport and therefore to food supplies in certain departments. Considering that these incidents constituted a "disturbance of the peace or of law and order", as defined in section 137, paragraph 1, of the Constitution, the Government decided to decree a state of emergency in the departments of Piura, Lambayeque, La Libertad, Ancash, Lima, Ica, Arequipa, Monquegua, Tacna, Huánco, Junín and Puno and in the Constitutional Province of Callao and called on the armed forces and the national police to restore law and order. The Government stationed a detachment of the army in front of the headquarters of the General Confederation of Workers of Peru (CGTP) and the CGTP planned and called a number of meetings and peaceful demonstrations, such as the day of protest that was held on 3 June 2003. The Legislative urged the unions involved in the dispute and the Government to pursue their talks in order to overcome the crisis facing the country and to restore a climate of industrial harmony. In a communiqué issued in the afternoon of 28 May 2003, the Ministry of Defence announced that the enforcement of law and order by the armed forces was limited to defending "law and order" as defined in the legislation, without otherwise interfering in the activities of local or regional governments. Secondly, the Ministry wished to make it clear that the purpose of the intervention of the armed forces was to maintain the constitutional and democratic state of law. The president of the JNUDRP thereupon announced the suspension of the indefinite national strike it had called, so as not to endanger the lives of its members. The social security workers (EsSalud) likewise agreed to suspend their strikes, declaring that the decision had been taken in order to contribute to democratic stability and to guarantee compliance with the agreements entered into with the highest authority of EsSalud. The same decision was taken by other organizations affiliated to the CGTP – the SIDESP, the SUTASE, the FENTASE and the Transporters Federation of Peru, among others. For his part, the director general of the national police stated on 30 May 2003 that, since the start of the state of emergency, a total of 248 people had been arrested for disturbing the peace and holding demonstrations; he added that most of the arrests had been in the departments of Lima, Chiclayo, Huancayo, Cajamarca, Ayacucho and in Puno. Under article 200 of the Constitution, persons arrested following the declaration of a state of emergency are entitled to present writs of habeas corpus and to seek constitutional protection of the four rights that were restricted by the state of emergency (personal freedom and safety, inviolability of the home, freedom of movement and freedom of assembly); under this provision, the judge is explicitly required to examine the reasonableness and proportionality of the restrictive act. The "right of defence" following the arrests – a right that is not restricted by a state of emergency – was thus respected; consequently anyone who had been arrested was entitled to the assistance of a lawyer from the very moment of his or her arrest, in accordance with article 139, paragraph 14, of the Constitution. A number of officials, including the representative of the Ombudsman's Office of Puno, the regional president and his advisers, the president of the Supreme Court and other authorities, as well as student leaders, sought a meeting with the commander general of the armed forces in Puno to request the release of the detainees. The authorities of the departments of Lima, Chiclayo, Huancayo and Cajamarca likewise called for their release. The Government, which obtained the release of most of the detainees in the various departments by 6 June 2003, was generally conceded to have acted wisely.

According to a communiqué, the Executive officially sought dialogue with the officials of the trade unions that were demonstrating from the moment the emergency was declared; eventually, on 26 June 2006, the President's press secretary stated that the Head of State had decided to lift the state of emergency and on the same day supreme decree No. 062-2003-PCM was published in the *Official Gazette* "El Peruano" "in view of the fact that a climate of normality has returned almost throughout the national territory". With law and order thus restored, the rights whose exercise had been suspended were accordingly re-established and the Ombudsman welcomed the ending of the state of emergency.

163. *The Committee notes this information and requests the Government to inform it whether trade union officials were arrested and charged and, if so, to indicate the nature of the charges brought against them and the judgements that were handed down.*

Case No. 2285 (Peru)

164. The Committee last examined this case at its session in November 2005, when it examined the allegation 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].

165. In a communication dated 16 August 2006, the FTFLP sent the Committee additional information on the taxes that are claimed from the organization from time to time and alleges that the National Public Records Office is hindering and preventing the inclusion of the national congresses of the FTFLP in the public records.

166. *The Committee requests the Government to send its observations on the matter without delay.*

Case No. 2289 (Peru)

167. At its meeting in November 2005, the Committee stated that it was awaiting the decision of the judicial authorities on the appeal by the Luz del Sur company against the decision of 25 October 2004, ordering the reinstatement of trade union official Mr Luís Martín del Río Reátegui [see 338th Report, para. 303].

168. In its communication dated 25 October 2006, the Government states that the Third Labour Court, in a ruling dated 2 June 2006, set aside decision No. 4 ordering the reinstatement of Mr Martín del Río Reátegui, as it had been overtaken in substance by the existence of an agreement concluded between the plaintiff and the defendant enterprise, in which the plaintiff agreed not to continue working owing to problems with his sight (right eye), in exchange for payment by the enterprise of the remuneration owed to him and the respective share in the profits for the 2005 financial year.

169. *The Committee notes this information.*

Case No. 2386 (Peru)

170. The Committee last examined this case at its meeting in November 2005 [see 338th Report, paras 1229–1257], when it made 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 SAA enterprise and to keep it informed of the result 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 SRL enterprise are affiliated to the SUTREL and this is the most representative trade union, to take measures in order to promote collective bargaining between this trade union and the Cam–Peru SRL enterprise. Moreover, the Committee requests the Government to keep it informed of the outcome of the proceedings for protection of constitutional rights initiated by the SUTREL against the decision of the administrative authority which found that the enterprise's refusal to engage in collective bargaining was well founded.

(c) The Committee requests the Government to ensure that the Cam–Peru SRL enterprise deducts trade union dues as ordered by the judicial authority. As regards the failure to deduct trade union dues by the Edelnor SAA enterprise, the Committee requests the Government to send it a copy of any judicial decision 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 membership of the 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 SAA to restrict the activity of the SUTREL trade union branch in 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 defined 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 ensure that these rights are guaranteed.

(f) Lastly, recalling that trade union leave should not be unreasonably withheld 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.

171. In a communication dated 21 September 2006, the SUTREL alleges that the 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 the SUTREL, recognition of its trade union leaders and respect for the right to bargain collectively; (2) comply with the subdirectoral decision of 14 July 2005, and the directoral decision No. 07-2006-MTPE/2/12.2, dated 9 January 2006, issued by the administrative labour authority, finding that Cam–Peru's opposition to the list of claims for the period 1 January to 31 December 2005 is 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 the 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 assembly of the SUTREL workers; and (7) receive and attend to communications sent by the SUTREL drawing its attention to labour, social, economic, cultural and/or safety issues as they arise, thereby obliging the SUTREL to send such communications through a notary.

172. In a communication dated 25 October 2006, the Government states that, with a view to obtaining further information on the legal action for protection of constitutional rights initiated by the SUTREL against the decision by the administrative authority upholding the position of the employer not to engage in collective bargaining, official letter No. 583-2006-MTPE/9.1 was sent to the 12th Civil Court of Lima seeking information on the outcome of the appeal. However, no reply has yet been received from the court. The Government undertakes to forward the relevant information as soon it is received.

173. *The Committee notes this information. The Committee regrets that despite the time that has elapsed, the Government has not sent the requested information, and asks it to provide this information without delay, including information on the additional matters raised by the SUTREL.*

Case No. 2291 (Poland)

174. 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) as well as partiality by the Public Prosecutor's Office, lengthy proceedings and non-execution of judicial decisions, at its March 2006 meeting [see 340th Report, paras 165–172]. On that occasion the Committee: (1) once again requested the Government to intercede with the parties, either directly or in the framework of the Regional Social Dialogue Commission, with a view to improving the industrial relations climate between the SIPMA SA enterprise and the NSZZ "Solidarnosc" Inter-Enterprise Organization in the Middle East Region so that the latter may exercise its activities with respect to this enterprise without any interference or discrimination by the employer against its members or delegates; (2) requested the Government to take all necessary measures so as to ensure that Zenon Mazus is reinstated in his post without loss of pay, in accordance with the decision of the Court of Appeal, without further delay; (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) requested the Government to provide information with regard to the disputes in the Hetman Limited enterprise as well as any developments in the Regional Social Dialogue Commission on this matter.

175. In a communication dated 10 October 2006, the Government indicates, with regard to the proceedings concerning the Hetman Limited enterprise (point (4) above), that on 29 October 2003 charges were brought against Jan Przezpolewski before the Elblag District Court for offences under section 218(1) of the Penal Code and section 35(1)(2-4) of the Act of 23 May 1991 on trade unions. The proceedings before the court are pending. Actions in the case are carried out in the form of interviewing witnesses by means of judicial assistance in different regions of the country.

176. Concerning the SIPMA SA enterprise (point (3) above), the Government indicates that on 14 October 2003 accusations were brought against 19 senior managers charged with offences under section 26(1)(2) of the Act of 23 May 1991 on the settlement of collective disputes, section 218(1) of the Penal Code, section 35(1)(2-3) of the Act of 23 May 1991 on trade unions. The suit is 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 14, 17 and 19 July 2006. According to the Government, the lengthy proceedings were the result in part of the fact that the case relates to complicated legal matters and the fact that there are several defendants who need to participate in the proceedings. Consecutive adjournments of the hearings have been based on motions of the defendants and their counsels, which were justified on medical grounds and confirmed by medical certificates.

177. With regard to the proceedings brought by Zenon Mazus against SIPMA SA in Lublin (point (2) above), the Government indicates that a judgement was handed down. The Ordinary Courts Department of the Ministry of Justice, which exercises administrative supervision of the cases, does not hold any information on whether the defendant complied with the judgement which adjudicated to the plaintiff compensation for time off work.

178. With regard to the proceedings initiated by Marek Kozak against SIPMA SA in Lublin, the Government indicates that they were concluded and that, in a judgement of 6 October 2005, the District Court in Lublin dismissed the defendant's appeal against the judgement of the court of first instance which had ordered the reinstatement of the plaintiff to his post and compensation for the time off work. Moreover, the appeals court adjudicated to Marek Kozak remuneration for the subsequent time off work, that is, for the period from 12 October 2004 to 6 October 2006, bringing the total amount to PLN13,104.71, under the condition of reinstatement. The appeal of the defendant against the judgement of the court of appeal was dismissed by the Supreme Court on 6 April 2006.

179. *With regard to point (2) of its recommendations, the Committee notes that a judgement was handed down in the case brought by Zenon Mazus before the courts but the Ordinary Courts Department of the Ministry of Justice, which exercises administrative supervision of the cases, does not have information on whether the defendant complied with the judgement which adjudicated compensation to the plaintiff. The Committee recalls that the court of first instance and the court of appeal had ordered the reinstatement of Zenon Mazus, who was the leader of the NSZZ "Solidarnosc" trade union in the SIPMA SA enterprise. Observing that the Government does not provide any information with regard to the final judgement on the issue of reinstatement, and only refers to the question of compensation, the Committee requests 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 and to keep it informed in this regard.*

180. *The Committee further notes with interest that the proceedings initiated by Marek Kozak (who was chairman of the union before Zenon Mazus) against SIPMA SA in Lublin [see 333rd Report, paras 885, 887 and 899] were concluded and the court ordered his reinstatement to his post and payment of compensation for time off work. The Committee requests the Government to verify that the judgement has been executed and to keep it informed in this regard.*

181. *With regard to point (3) of its recommendations, the Committee notes from the Government's report 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 14, 17 and 19 July 2006. Consecutive adjournments of the hearings have been based on motions of the defendants and their counsels, which were justified on medical grounds and confirmed by medical certificates. 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 [340th Report, para. 171]. 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.*

182. *With regard to point (4) of its recommendations concerning the disputes in the Hetman Limited enterprise, the Committee notes that on 29 October 2003 charges were brought against Jan Przezpolewski before the Elblag District Court for offences under section 218(1) of the Penal Code and section 35(1)(2-4) of the Act of 23 May 1991 on trade unions. The proceedings before the court are pending. The Committee requests the Government to specify the relationship of Jan Przezpolewski to the Hetman Limited*

enterprise, and to clarify the substance of the offences with which Jan Przezpolewski is accused. The Committee expresses the firm hope that the proceedings will move forward at a swift pace and requests the Government to keep it informed of progress made and to transmit a copy of the judgement once handed down.

183. *The Committee notes with regret that the Government does not provide any information on point (1) of its recommendations. In light of the various violations brought before it by the complainant, the Committee 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 "Solidarnosc" 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)

184. 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 "Solidarnosc" 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 2006 meeting [see 340th Report, paras 173–180]. The Committee urged the Government: (a) to intercede with the parties with a view to re-establishing the previously available check-off facility; (b) to keep it informed of the progress of the proceedings instituted by the dismissed trade union leaders Henryk Kwiatkowski and Sylwester Fastyn; (c) to intercede rapidly with the parties with a view to enabling Sylwester Fastyn to exercise his trade union activities without any interference by the employer; (d) to take all necessary measures as soon as possible with a view to establishing procedures which are prompt, impartial and considered as such by the parties concerned, in order to ensure that trade union officials and members have the right to an effective remedy by the competent national tribunals for acts of anti-union discrimination.

185. In its communication dated 10 October 2006, the Government indicates, with regard to the proceedings initiated by Henryk Kwiatkowski, that the Warsaw–Praga District Court reinstated, by means of a sentence of 28 July 2005, the plaintiff to work at his previous post and adjudicated compensation for the time off work under the condition of his resuming work within seven days after the sentence had become valid. After examination of the defendant's appeal, the Warsaw–Praga District Court reversed the appealed sentence by means of a judgement dated 26 January 2006 and dismissed the case. On 9 May 2006, the plaintiff lodged a revocation claim against the sentence of the appeals court. The files of the case will be submitted to the Supreme Court for examination.

186. With regard to the proceedings initiated by Sylwester Fastyn, the Government indicates that they are pending before the court of first instance. The Government provides detailed information on the successive adjournments of the case and adds that, although the judicial proceedings have been lengthy, this situation is not caused by tardiness of the litigation bodies but from the need to hear vast amounts of evidence. At present, the dates of hearings are set at short intervals. The Government adds that it seemed that progress in the case would allow the trial to be terminated and a judgement to be handed down on a hearing set for 31 August 2006.

187. With regard to the re-establishment of the check-off facility at the Hydrobudowa–6 SA company in favour of the NSZZ "Solidarnosc" trade union, the Government reiterates that the Warsaw–Praga North District Prosecutor found that there was no violation of the law

and decided to discontinue the investigation. This decision was confirmed by the Warsaw–Praga District Court and the Warsaw Appellate Prosecutor. The present complaint was considered as a subsequent application for renewal of the discontinued proceedings. The files of the case have been examined once again in the District Public Prosecutor's Office in Warsaw with particular attention paid to issues raised in the complaint. On the basis of this analysis, the Public Prosecutor in Warsaw acknowledged that the complaint did not contain any new circumstances, which would have provided grounds to resume the discontinued proceedings. The trade union was informed of the outcome by letter on 24 February 2005.

188. With regard to the establishment of procedures ensuring an effective remedy against anti-union discrimination, the Government indicates that it maintains its earlier position that the legislation in force contains the instruments sufficiently protecting the interests of the trade union members, including trade union militants, inter alia against unjustified termination of employment and discrimination on account of trade union membership.

189. *With regard to the Committee's recommendation to intercede with the parties with a view to re-establishing the previously available check-off facility, the Committee notes that, according to the Government, the files of the case were examined once again by the Warsaw District Public Prosecutor's Office pursuant to the present complaint. The Public Prosecutor did not find any new circumstances which would justify a resumption of the discontinued proceedings and the trade union was informed of this decision by letter on 24 February 2005. The Committee takes note of this information. It also observes with regret, however, as it did in the previous examination of this case, that the Government has not indicated the exact grounds justifying the unilateral termination of this facility. The Committee requests the Government to provide information in this respect and to transmit the text of the decision of the Warsaw District Public Prosecutor's Office.*

190. *With regard to the Committee's request to be kept informed of the progress of the proceedings instituted by the dismissed trade union leaders Henryk Kwiatkowski and Sylwester Fastyn, the Committee notes with regret from the Government's report that these proceedings, which have been pending since 2002, have still not been concluded. The Committee notes, moreover, that whereas the court of first instance ordered the reinstatement of Henryk Kwiatkowski, the Court of Appeal reversed this judgement and the case is currently pending before the Supreme Court. With regard to Sylwester Fastyn, the case is still pending at the first instance due to the need, according to the Government, to hear vast amounts of evidence. 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 and 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 Henryk Kwiatkowski.*

191. *With regard to the Committee's request for the establishment of prompt procedures against anti-union discrimination, the Committee notes with regret that the Government merely reiterates its previous position according to which the legislation in force sufficiently protects the interests of trade union members and leaders against unjustified termination of employment and discrimination on account of trade union membership. The Committee once again recalls that the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by speedy procedures to ensure that effective protection against such acts is guaranteed. The Government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 818 and 817]. The*

Committee observes that in the particular circumstances of this case, although the possibility to have recourse to penal procedures against those responsible for acts of anti-union discrimination would appear at first sight as a guarantee of protection, in the absence of appropriate institutional measures, the penal procedures might prove to be overly lengthy and complicated, precisely because of their penal nature; in such a case, the effective protection of workers is obstructed in practice. The Committee therefore once again requests the Government 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. The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case.

Case No. 2380 (Sri Lanka)

192. The Committee examined this case at its March 2006 meeting [see 340th Report, paras 1262–1275]. On that occasion, it made the following recommendations:

(a) With regard to the allegation of anti-union dismissals, suspensions or termination of services, the Committee:

- regrets that no information was provided by the Government on the alleged termination of services of about 100 workers following their participation in the strike;
- trusts that the five appeals lodged before the Labour Tribunal by the dismissed workers will be examined rapidly so that the necessary remedies can be applied effectively and requests the Government to keep it informed of the decisions reached by the tribunal. It requests the Government to transmit copies of the decisions as soon as they are handed down by the Tribunal, as well as to provide information on the grounds on which an application to the Tribunal by one worker was dismissed;
- in respect of the remaining aggrieved workers, the Committee once again urges the Government to take the necessary steps without delay to ensure that a procedure on the allegations of anti-union discrimination be opened and be brought to a speedy conclusion in a fully impartial manner and to keep it informed in this respect. Furthermore, if the allegations are found to be true, the Committee requests the Government to ensure in cooperation with the employer concerned that: (i) the workers dismissed as a result of their legitimate trade union activities are reinstated without loss of wages and without delay or, if reinstatement in one form or another is not possible, that they are paid adequate compensation which would represent sufficiently dissuasive sanctions for such anti-trade union actions; (ii) the workers demoted as a result of their legitimate trade union activities are restored to their former posts without delay; and (iii) the workers under suspension because of their legitimate trade union activities are allowed to resume work without delay and are paid wages for the period when they were unjustly denied work. The Committee requests the Government to keep it informed in this regard.

(b) The Committee requests the Government to ensure and to amend the legislation, if needed, that if the branch of the Free Trade Zones and General Services Employees Union at the Workwear Lanka does not represent 40 per cent of the workers, this does not preclude this union from exercising its activities and that, if no other trade union at the enterprise represents more than 40 per cent, the union could bargain collectively at least on behalf of its members. The Committee requests the Government to keep it informed in this respect.

193. In its communication dated 31 August 2006, the Government contests that 100 workers had been dismissed and indicates that out of 100 workers who participated in the strike, only eight persons were dismissed. Out of the eight workers whose services were

terminated, two had resigned. With regard to the other six workers who applied to the labour tribunal, one case was dismissed by the tribunal, five others are still pending.

194. In this respect, the Government forwards the information from the Employers' Federation of Ceylon and the enterprise concerned. It follows from these communications that one worker was dismissed on the grounds of misconduct. According to the enterprise's communication, Mrs Chandrina Rupika, the secretary of the workers' council, had requested for the salary to be paid on 27 December 2003, instead of the last day of the month, as it was usually done. When it was explained to her that this was not possible, Mrs Rupika insulted and threatened the personnel assistant. When one of the managers reprimanded Mrs Rupika for disturbing peace and harmony at the workplace, the latter incited other employees to stop working. As a result, a disciplinary punishment was imposed on seven workers. However, instead of reporting to work, they filed a complaint before the labour tribunal. The enterprise denied that 100 workers were dismissed from the enterprise. While some 100 trainees were employed at the enterprise at that time, their services were not retained after the training period. The employer states that there is no dispute arising out of cessation of employment of the trainees. Furthermore, according to the employer, at the time of the alleged dispute, the workers involved were not trade union members, nor was there a union involved in the strike.

195. With regard to the question of amending legislation so as to remove the 40 per cent threshold for trade union recognition for collective bargaining purposes, the Government indicates that it was discussed at the National Labour Advisory Council (NLAC). Except for a few trade unions, the majority of the trade unions represented in the NLAC and the employers' organizations were not in favour of removal of the 40 per cent threshold. However, this issue had been referred to the subcommittee of the NLAC, which is currently in the process of examining the labour legislation to recommend labour law reforms. The Committee's recommendation will also be referred to the subcommittee. On the recommendation of the labour law reform subcommittee, measures would be taken to amend the legislation appropriately. It will be a part of the overall labour law reform exercise.

196. The Government further provides details on other developments which occurred since October 2005, which relate to the dispute in this case. The members of the Free Trade Zones and General Services Employees' Union went on strike when their branch president was banned and were later dismissed by the employer. A complaint was brought before the Commissioner General of Labour, who disagreed with the employer. This matter was referred for inquiry under the Termination of Employment of Workmen Act No. 45 of 1971. The applications under this Act were filed in respect of 205 workers on 8 November 2005. Three persons had withdrawn their applications. The inquiries in respect of the others are still pending. In the meantime, the company requested permission from the Board of Investments to recruit temporary workers until the termination inquiry was over. While the Board was considering this application, the company made an application to the Court of Appeal seeking writs of certiorari, mandamus and an interim order to recruit workers on a temporary basis. The Court of Appeal granted an interim order permitting employment of temporary labour operative until 13 December 2005. On 5 April 2006, the Board of Investment issued a directive to the company to terminate the services of all temporary workers recruited. The company filed an application to the Court of Appeal, which issued an interim order staying the directive until the final determination of applications for termination of employment filed with the Commissioner of Labour. The workers have now made an application to the Court of Appeal seeking relief by way of setting aside the interim order. The Department of Labour is awaiting the decisions of the labour tribunal and the inquiry of the Commissioner General of Labour to take suitable measures.

197. *The Committee notes the information provided by the Government, and the information from the employers' organization and the enterprise management transmitted by the Government. The Committee recalls from its previous examination of this case that the hearings of cases lodged before the labour tribunal in respect of five workers allegedly dismissed from the Workwear Lanka (Pvt.) Ltd in December 2003 were scheduled for 15 September 2005. The Committee further notes that 202 workers were dismissed following their participation in a subsequent strike and their case has been pending since November 2005. The Committee recalls that the use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to re-employ them, implies a serious risk of abuse and constitutes a violation of freedom of association [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 666]. The Committee further recalls, as it did in Case No. 2419 also concerning Sri Lanka, 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****, op. cit., 2006, paras 826 and 835]. The Committee expects that the competent authorities will process these cases without delay and that, if the allegations of anti-union discrimination are confirmed, will take suitable measures to remedy any effects of anti-union discrimination. The Committee requests the Government to keep it informed in this respect and to transmit copies of the decisions as soon as they are handed down by the labour tribunal. It further once again requests the Government to provide information on the grounds on which the tribunal dismissed the application of one worker fired in December 2003.*

198. *With regard to its previous recommendation to ensure and, if needed, to amend the legislation, that if the branch of the Free Trade Zones and General Services Employees' Union at the Workwear Lanka (PVT) Ltd does not represent 40 per cent of the workers, this does not preclude this union from exercising its activities and that, if no other trade union at the enterprise represents more than 40 per cent, the union could bargain collectively at least on behalf of its members, while noting with interest the legislative initiatives undertaken in this regard, the Committee requests the Government to indicate the measures taken to ensure the rights of the above union to exercise its activities. The Committee draws the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.*

Case No. 2419 (Sri Lanka)

199. The Committee last examined this case at its March 2006 meeting [see 340th Report, paras 1276–1296]. On that occasion, it made the following recommendations:

(a) The Committee requests the Government to carry out an inquiry into the exact number of workers who remain locked out of their employment and the circumstances of the lock-out and to take the necessary measures to ensure that they are able to return to their posts with full compensation for lost wages and to ensure the application of the corresponding legal sanctions against the enterprise concerned. It requests the Government to keep it informed of the measures taken in this regard.

(b) With regard to the allegation that, apparently, the enterprise would hire only non-unionized workers, the Committee recalls that such a policy constitutes a serious threat to the free exercise of trade union rights and requests the Government to take stringent measures to combat such practices if this allegation is confirmed following an independent inquiry. It requests the Government to keep it informed in this respect.

200. In its communication dated 31 August 2006, the Government indicates that the number of locked out workers was 179. Three workers were dismissed. The Government forwards a copy of the gazette notification of the arbitration involving the Free Trade Zones and General Services Employees' Union and the New Design Manufacturing (Pvt) Ltd. The Government indicates that the arbitration inquiry was held on nine occasions and that the next hearing was scheduled for 4 September 2006. The Ministry of Labour Relations and Foreign Employment was awaiting the order of the arbitrator for further action.

201. The Government further states that there is no proof that the company was hiring only non-unionized workers. Furthermore, the factory was closed down. Although the company expressed its intention to reopen, this information was not confirmed by the Assistant Commissioner of Labour of the Department of Labour. Finally, the Government states that any further development with regard to this case will be reported to the Committee.

202. *While taking due note of this information, the Committee recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination 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]. Recalling that the workers concerned were either dismissed or locked out in January 2005 and that the arbitration procedures were opened in June 2005, the Committee expects that the competent authorities will process this case without delay and that, if the allegations of anti-union discrimination are confirmed, will 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 requests the Government to keep it informed in this respect.*

Case No. 2171 (Sweden)

203. 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 2006 session (see 340th Report, paras 215–219). The Committee requested the Government to provide precise information on how many collective agreements contained provisions that were abrogated by the statutory amendment and how many of the concerned agreements had expired. Noting that the Government had indicated that it had not been possible to find a satisfactory solution during the meetings with the social partners, the Committee regretted that the Government had not provided any specific information on the measures taken in this regard (date and number of meetings held, social partners involved, views expressed, etc.). Recalling its previous recommendations and that more than four years had elapsed since the filing of this complaint, the Committee strongly urged the Government to take all the necessary measures in order to ensure that a negotiated solution with the social partners would be agreed in the very near future.

204. In a communication dated 30 August 2006, the Government indicates that, according to a recent survey, the great majority of the collective bargaining agreements in force, covering the majority of employees in Sweden, have been adapted to the right to remain employed until age 67 as provided for in the Employment Protection Act. However, the following agreements have not been amended and contain obligations on the employees to retire at 65: (1) the agreement on supplementary pension scheme between SAF (now Svenskt Näringsliv) and LO concerning workers in the private sector; (2) the agreements on

pensions for workers and for salaried employees within cooperative companies, non-profit associations and non-governmental organizations referred to by KFO; and (3) the agreement on pensions (PA91) for employees in the public sector born in 1943 or earlier and for military officers born in 1948 or earlier. Thus, there still exists collective agreements which restrict the employees' right to remain employed until the age of 67 and which therefore are invalid in accordance with the transitional provision in the Employment Protection Act. The Government adds that those organizations, covered by agreements containing an obligatory retirement at the age of 65, have emphasized that the organizations do not apply the agreements in practice since the mandatory rule in the Employment Protection Act provides for the right to remain employed until the age of 67. The reasoning seems to be that there is no practical need to amend the provision to retire at the age of 65.

205. With regard to the Committee's recommendation for negotiations with the social partners, the Government indicates that it has continuous consultations with the social partners in order to reach a solution. The latest meeting took place on 2 February 2005 and since then no official meeting has been held. Sporadic contacts have continued on an informal basis. However, the consultations with the social partners have so far not resulted in a negotiated solution.

206. *The Committee notes 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 has taken place on this subject since February 2005, that is to say, for more that two years. Recalling that more than five 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 still in force, 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. 2148 (Togo)

207. The Committee examined this case at its meeting in May–June 2006 [see 342nd Report, paras 158–160]. On that occasion, the Committee recalled that the events that had given rise to the complaint dated back to June 1999 in the context of a legal strike calling for the payment of arrears and unpaid wages, and once again urged the Government to rescind the decrees in question and to communicate swiftly the results of the social dialogue, which was due to be held in January 2006, as well as the decisions taken as a result regarding the teachers who were still affected by the application of the decrees.

208. In a communication dated 28 June 2006, the Government informed the Committee that it had undertaken, during the tripartite social dialogue held from 31 January to 11 May 2006, to regularize the situation of the auxiliary teachers concerned and that, to that end, a census had been conducted throughout the national territory and had made it possible to draw up a list of 406 teachers. By Decision No. 425/MTEFP of the Minister responsible for labour affairs, dated 23 August 2006, the teachers in question were called back to work as of September 2006.

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

Case No. 2192 (Togo)

210. The Committee last examined this case at its May–June 2006 meeting [see 342nd Report, paras 161–163]. The case involves allegations of anti-union discrimination and interference in trade union activities by the company New Seed Processing Industry Oil of Togo (NIOTO). At the time of meeting, the Committee requested the Government to keep it informed of the outcome of the legal proceedings concerning Mr Awity's dismissal. Should it emerge that the dismissal was indeed motivated by anti-union discrimination, the Committee requested the Government to take immediate action to ensure that Mr Awity was reinstated and to keep it informed of any measures taken.

211. The Committee notes that, in a communication of 28 June 2006, the Government states that, through Ruling No. 122/05 of 20 December 2005, the Labour Court of Lomé ruled that the dismissal of Mr Awity Boko by the company NIOTO was lawful and legitimate, and provides the Committee with a copy of this ruling.

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

Case No. 2351 (Turkey)

213. The Committee examined this case, which concerns allegations of employer interference and anti-union discrimination in two enterprises, at its meeting in March 2006 [340th Report, paras 1297–1352] and reached the following recommendations:

(a) With regard to the two pending court cases concerning the validity of the resignations of the workers from the complainant organization and the joining of the Turkish Metal Union as well as the recognition of the Turkish Metal Union's competence for collective bargaining purposes in the Colakoglu Metallurgy Enterprise, the Committee expresses the hope that the courts will reach decisions on these matters without further delay and requests the Government to keep it informed in this respect and to transmit a copy of the decisions as soon as they are handed down.

(b) With regard to the complainant's allegation that its representatives were prevented from performing their duties, the Committee requests the Government to take all necessary measures to ensure respect for the principle that minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and especially to speak on behalf of their members and to represent them in the case of an individual claim, and to keep it informed in this respect.

(c) The Committee requests the Government to take all necessary measures to ensure that any effects that the acts of anti-union discrimination which took place in Grammer AS in March 2004 may have on the membership of the complainant organization will be fully rectified, including in the framework of the voluntary steps taken by the management to this effect, and to keep it informed in this regard.

(d) The Committee requests the Government to keep it informed of the outcome of the legal proceedings under way concerning the recognition of the trade union with competence for collective bargaining purposes in Grammer AS.

214. In a communication dated 18 October 2006, the Government provided information on point (a) above, by transmitting the decision of the second Labour Tribunal of Kocaeli concerning the disagreement in the Colakoglu Metallurgy Enterprise. In particular, the court rejected the proceedings initiated by the complainant Birlesik Metal Is and its decision was approved on 15 February 2005 by the Appeals Court.

215. *The Committee notes that the second Labour Court rejected the proceedings initiated by the complainant Birlesik Metal Is on the validity of the resignations of its members and their joining of the Turkish Metal Union, as well as the recognition of the Turkish Metal*

Union's competence for collective bargaining purposes, essentially because of lack of sufficient evidence. It also observes that as a result of the court's decision, the complainant union Birlesik Metal Is is no longer recognized as the majority union in the Colakoglu Metallurgy Enterprise. In this respect, recalling that the complainant had alleged that its representatives were prevented from performing their duties, the Committee emphasizes once again that minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and especially to speak on behalf of their members and to represent them in the case of an individual claim. The Committee once again requests the Government to take all necessary measures to ensure respect for the above principle.

216. *The Committee finally notes with regret that the Government does not provide any information on steps taken to rectify the effects of acts of anti-union discrimination in Grammer AS and the outcome of the legal proceedings concerning the recognition of the trade union with competence for collective bargaining purposes in Grammer AS. The Committee requests the Government to provide information in this regard as soon as possible.*

Case No. 2388 (Ukraine)

217. The Committee last examined this case, concerning allegations of interference by the Ukrainian authorities and employers of various enterprises in trade union internal affairs, dismissals, intimidation, harassment and physical assaults on trade union activists and members, denial of facilities for workers' representatives and attempts to dissolve trade unions, at its May–June 2006 meeting [see 342nd Report, paras 918–994]. On that occasion, it made the following recommendations:

(a) The Committee notes with interest the efforts made by the Government to provide information on many of the cases brought to its attention and the fact that several of these matters have now been resolved. The Committee encourages the Government to continue to review the outstanding matters and reminds the Government that it may avail itself of the technical assistance of the Office if it so wishes.

(b) The Committee notes the initiative taken to establish independent investigations into several of the allegations in this case which, using a tripartite model, have included representatives from the employers' and workers' organizations concerned, the National Mediation and Conciliation Service and the regional state labour inspectorates. The Committee encourages the Government to continue to review the outstanding matters where possible through the use of similar independent commissions.

(c) The Committee regrets that the Government provides no information on whether appropriate compensation was paid to those trade unions of the Western Donbass Association of the NPGU, which suffered material damage due to the illegal search and requests the Government to keep it informed in this respect.

(d) The Committee requests the Government to indicate whether all due amounts for cultural and recreational activities are now being paid to the NPGU primary trade union at the "Zolotoye" mine on a monthly basis, as stipulated by the collective agreement.

(e) The Committee once again requests the Government to provide a copy of the minutes of the meeting of 2 April 2004, during which, according to the Government, all problematic issues that had arisen at the "Krivorozhsky" plant were settled by the representatives of the provincial state administration, the management of the plant and trade unions.

(f) The Committee once again requests the Government to carry out an independent investigation into the allegations of an anti-union campaign carried out by the management of McDonald's and, if it is found that workers were indeed harassed and intimidated in an attempt to dissuade them from becoming members of a union, to take suitable measures to redress the situation and to ensure that workers may effectively

exercise their fundamental right to organize. It requests the Government to keep it informed in this respect.

(g) The Committee once again requests the Government to provide information on the outcome of the independent inquiries into the allegations of anti union dismissals at the "Knyagynskaya" mine, the "Tomashpilsakhar" and "Promproduct" enterprises. It further requests the Government to provide copies of the court decisions concerning dismissals of Ms. Polivoda from the Aleksandrovsk State Technical College of Agriculture and Mr. Dzyubko from the locomotive depot "Imeni Shevchenko".

(h) The Committee once again requests the Government to institute immediately an independent judicial inquiry into the allegations of physical assaults on Mr. Shtulman, Mr. Fomenko and Mr. Kalyuzhny with a view to fully clarifying facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. It requests the Government to keep it informed of any developments regarding these cases, as well as the criminal investigation regarding the abduction and physical assaults on Mr. Volynets' son.

(i) The Committee requests the Government to indicate whether the issue of suspension of check-off facilities at the "Tomashpilsakhar" enterprise has been settled.

(j) The Committee once again requests the Government to indicate whether trade union dues deducted from workers' wages during 2002–03 at the "Brodecke" and "Brodecke sugar refinery plant" enterprises were duly paid to the FPU-affiliated unions and, if not, to take the necessary measures to ensure the transfer of these dues.

(k) The Committee requests the Government to provide its observations on the complainants' allegation of revocation of registration of the primary trade union at the "Krasnolimanskaya" mine and to conduct an independent inquiry into this matter and to keep it informed of the outcome.

(l) The Committee once again requests the Government and the complainants to provide further information on the reasons for the dissolution of the All Ukrainian Union of Football Players, as well as any further developments in its status.

(m) The Committee requests the Government to take the necessary measures so as to ensure that the trade union at the "Azovstal" enterprise is re-registered.

(n) The Committee requests the Government to provide a copy of the judgement related to the registration of the Federation of Free Trade Unions of Lvov Railways.

(o) The Committee expresses its hope that all of the amount due to the trade union at the "Stakhanova" mine will be paid to the union without delay. It requests the Government to keep it informed in this respect.

(p) The Committee requests the Government to keep it informed of the developments regarding the adoption of a new collective agreement at the Ilyichevsk Maritime Commercial Port.

(q) The Committee requests the Government to conduct an independent investigation into the reasons for Mr. Suk's resignation from the "Krasnolimanskaya" coal company and if it is found that Mr. Suk was in any way forced to resign due to his union activities, to take suitable measures to remedy this situation, including the provision of sufficiently dissuasive sanctions so as to avoid any reoccurrence of such anti-union discrimination. It requests the Government to keep it informed in this respect.

(r) The Committee requests the Government to indicate whether the primary trade union "Defence of Justice" is recognized for collective bargaining purposes at the "Krasnoarmeyskiy dinasovy zavod" enterprise.

(s) The Committee regrets that the Government provides no information with regard to the allegations of violations of trade union rights at the "Ordzhonikidze" mine, the "Ilyich" metallurgical enterprise and the "Marganets ore mining and processing" enterprise and urges the Government to transmit its observations thereon without delay.

(t) The Committee requests the Government to indicate the measures it has taken in order to ensure the legalization of the free trade union "Oktan" established at the Oil Investment Company of Lysychansk city. It further requests the Government to provide its

observations on allegations of pressure put on trade union members, threats of dismissals, refusal to grant access to the enterprise's premises to the union chairperson and prohibition to hold trade union meetings which took place at the Oil Investment Company and the boarding school of Sosnytsia city.

218. By communications dated 14 March (received 14 June), 23 and 29 August, 5 September and 2 October 2006, the Confederation of Free Trade Unions of Ukraine (CFTUU) transmits the following information with regard to the Committee's recommendations and further allegations of violation of trade union rights.

– "Oktiabrskaya" mine in Krivoy Rog city: The management of the mine does not recognize the primary trade union organization of the Independent Trade Union of Miners (NPGU) and launched an anti-union campaign by threatening trade union members with reduction of wages.

– "Snejnoeatratsit" state enterprise: The enterprise management launched an anti-union campaign against the NPGU primary trade union. The chairperson of this organization was asked by the management to liquidate the union and to join the old "state" union. Moreover, a trade union member was fired without prior agreement of the NPGU primary trade union.

– Railway transport "Ukrzaliznucia" enterprise: The administration does not recognize the CFTUU primary trade unions established at the enterprise. The enterprise management does not provide these unions with office space and does not transfer money for cultural activities. Unlike old "state" trade union leaders, the leaders of CFTUU-affiliated unions are not invited to the meetings with administration. According to the CFTUU, old "state" trade unions active at this enterprise are also determined to get rid of the new independent trade unions.

– Mariupol and Herson Ports: The administration puts pressure on the primary trade unions affiliated to the All–Ukrainian Trade Union "Defence of Justice" using blackmail and threats.

– "Mariupol Ilyich Metallurgical Complex": The management puts pressure on trade union members of the primary union of the All–Ukrainian Trade Union "Defence of Justice". It refused to recognize the union and to bargain collectively with its representatives.

– Kiev Metro: Pressure was put on trade union members of the CFTUU-affiliated primary trade union. The union was not allowed to sign a collective agreement and the transport prosecutor refused to react to the appeals made by the union to institute criminal proceedings against the persons hampering trade union activities. The allegations of anti-union discrimination were also left without response.

– Kharkiv State University of Arts: The university administration does not recognize the primary free trade union of the All–Ukrainian Trade Union "Defence of Justice". The university administration puts pressure on trade union members, does not allow its representative to participate in collective bargaining and refuses to transfer trade union dues despite requests made by trade union members in this respect.

– Sosnitsa city boarding school: The director of the school puts pressure on trade union members. The chairperson of the primary trade union of the Free Trade Union of Education and Science of Ukraine was beaten by the director when she asked him to provide explanations concerning the refusal to allow her to participate in the round table on gender equality organized by the CFTUU.

– Oil Investment Company of Lysychansk ("Linnik"): The enterprise management transmitted the list of names of the free trade union members to the deputy-head of the Transportation of Oil and Oil Products and the Security Departments. The leader of the "traditional" trade union forged a collective agreement so as to stipulate that the management should work only with this union. All these acts are aimed at forcing the members of the free trade union "Oktan" to leave the union.

– "Krimsky Titan" enterprise: The chairperson of the NPGU's primary trade union was beaten by one of the managers following trade union leader's request addressed to the enterprise administration to ensure full respect of the collective agreement.

– "VK Dnepropetrovsk" enterprise: The enterprise management does not recognize the CFTUU primary trade union organization. The founder of the primary trade union organization was illegally dismissed.

– Office of Public Prosecutor and the Ministry of Internal Affairs of Chervonograd city: The premises of trade union committees at the "Lesnaya", "Zarechnaya" and "Viseyskaya" mines were searched by the police following a warrant issued by the Office of Public Prosecutor. The documents related to the activities of the unions were seized.

– Lviv Railroad: In March 2006, Mr Smereka was elected chairperson of the free trade union. On 12 April 2006, the administration was informed of his election and threatened Mr Smereka with a dismissal. On 20 March 2006, Mr Smereka was suspended from his post to be eventually dismissed on 31 August 2006.

– "Zvezda" State Plant: The management of the plant has launched an anti-union campaign to destroy the CFTUU-affiliated primary trade union. It has not provided the union with an office space, did not transfer funds for cultural activities, refused to bargain collectively with the union, threatened trade union members with dismissals. Trade union members are searched at the entrance of the plant. Finally, the plant management took administrative measures against two trade union leaders without prior approval by the trade union committee.

219. By communications dated 3, 24 and 26 July, 21 August and 22 September 2006, and 12 January 2007, the Government transmits the following information on the measures taken to implement the Committee's previous recommendations and observations on the complainants' further allegations:

– Recommendation (d) ("Zolotoye" mine): An inspection carried out by the Territorial State Inspectorate established that all due amounts for cultural and recreational activities were paid to the NPGU primary trade. This issue had been settled between the management of the mine and the enterprise trade union committees.

– Recommendation (f) (McDonald's Ukraine Ltd.): The Territorial State Labour Inspectorate did not find any evidence of existence of a trade union organization at the enterprise. However, a work council had been set up. Its members were elected by a general assembly of workers. No proposals from workers to establish a trade union had been submitted to the Council.

– Recommendations (g) and (i) ("Tomashpilsakhar"): Following the decision of the Vinnitsa Regional Economic Court dated 6 April 2004, which declared the bankruptcy of the enterprise, the plant was liquidated and removed from the State Register of Enterprises and Organizations. Therefore, it is no longer possible to conduct an investigation into the allegations of anti-union dismissals and non-payment of trade union dues.

– Recommendation (g) ("Knyagynskaya" mine): Mr Yushchenko, the NPGU member, was reinstated without loss of pay pursuant to court order dated 25 March 2005. He was also compensated for moral damages.

– Recommendation (h): (1) According to results of an inquiry conducted into the circumstances of the assault on Mr Volynets, it was ascertained that the crime was reported to the Darnitsky district police department in Kyiv on 8 March 2004. On 10 March 2004, criminal proceedings for malicious hooliganism were instituted by the office of public prosecutor (later reclassified as robbery). An investigation team considered different reasons behind this crime, including a possible connection between the crime and the professional activity of the victim's father, people's deputy Mr M. Volynets. However, the latter and other members of the victim's family refused to testify. The victim himself agreed to participate in the necessary inquiries only after obtaining his father's consent, which made it somewhat more difficult to ascertain the truth. Despite the fact that a number of investigative measures were carried out, the crime has remained unsolved. On 30 May 2006, the criminal proceedings were suspended under section 206(3) of the Code of Penal Procedure. (2) According to the findings of an inquiry into the circumstances of acts of hooliganism committed against Mr Kalyuzhny, the victim was assaulted in the entrance of an apartment building by unidentified persons who used a rubber mallet to inflict moderately serious bodily injuries on 21 July 2003. On the same day, the investigation department of the Alchevsk municipal police instituted criminal proceedings for malicious hooliganism and set up an investigation team to investigate the crime. The connection between the acts of hooliganism committed against Mr Kalyuzhny and his professional activity, as well as his public and political activism was considered in the course of investigation. Unfortunately, despite the measures taken, the perpetrators have not been found. On 5 July 2004, the criminal proceedings were suspended under section 206(3) of the Code of Penal Procedure. Investigations aimed at identifying the perpetrators of the abovementioned crimes are continuing under the supervision of the Ministry of Internal Affairs.

– Recommendations (k) and (q) ("Krasnolimanskaya" coal company): (1) The NPGU primary trade union was registered on 25 May 2005 and its registration has not been revoked. Currently, it has six members who are retired employees of the company. (2) With regard to the allegation of anti-union dismissal, the Territorial State Labour Inspectorate determined that Mr Suk resigned voluntarily in July 2005 in accordance with the labour legislation. On 29 July 2005, Mr Suk addressed a communication to the trade union committee stating that he had no complaints against the trade union committee and the mine management.

– Recommendation (o) ("Stakhanov" mine): An inspection carried out at this enterprise met with the chairperson of the NPGU primary trade union who explained that there have been no cases of interference by the management in the activity of the union. At the time of the inspection, the enterprise was in arrears with the payment of 1 per cent owed to the trade union for cultural and recreational activities. It was suggested to the union chairperson to file a complaint of an administrative offence under section 41(2) of the Code of Administrative Offences. However, the union chairperson explained to the inspector that he decided to waive this right as the arrears dated back to the term of the previous director of the mine and that since the appointment of a new director in March 2006, all payments had been made on time.

– Recommendation (p) (Ilyichevsk Maritime Commercial Port): An inspection carried out by the Territorial State Labour Inspectorate established that industrial, labour and social relations in the port are governed by a collective agreement for 2001–04, as amended. As regards the conclusion of a new collective agreement, according to the minutes of the meeting of a working group set up to draft a new collective agreement

(attended by the representatives of management and of all five trade unions active at the enterprise), the beginning of collective bargaining was postponed to 1 October 2006.

– Recommendation (r) ("Krasnoarmeyskiy dinasovy zavod"): The labour inspector of the Territorial State Labour Inspectorate conducted a meeting between the management of the enterprise and the chairperson of the NPGU primary trade union. The latter stated that while the instances of refusal to sign a collective agreement had taken place in 2005, the situation had since then improved and the new collective agreement was now signed.

– Recommendation (s): (1) According to information provided by the Dnepropetrovsk regional state administration and the chairperson of the trade union committee at the "Marganets ore mining and processing" enterprise, no violations of the rights of trade union committees at the "Ordzhonikidze" mine have been found. (2) According to information from the Labour and Social Protection Directorate of the Donetsk regional state administration, the Territorial Labour Inspectorate and the Office of Public Prosecutor conducted inspections at the "Ilyich" metallurgical enterprise. However, none of the inspections had found any violations of the rights of the primary trade union of the All–Ukrainian Trade Union "Defence of Justice" by the plant management. The trade union did not agree with the conclusions of the inspections and sought to have the management's actions declared illegal by the district court. However, the proceedings in these cases were closed by a court decision of 23 August 2006. The primary trade union has filed an appeal against this decision. (3) The Dnepropetrovsk regional state administration, together with the "Marganets ore mining and processing" enterprise, has examined the allegations of violation of trade union rights in the enterprise. The chairperson of the board of directors of the plant stated that in accordance with the legislation in force, the plant management does not interfere in the activity of trade union committees, including the activity of the NPGU. The NPGU enjoys the same rights as other enterprise trade union committees. Membership in one trade union or another does not entail restrictions of any rights or advantages in concluding or changing an employment contract. The enterprise employees and the NPGU members have not addressed any complaints to the management of the enterprise.

– Recommendation (t): (1) At the meeting between the representatives of the Lugansk regional state administration and the chairperson of the "Oktan" trade union it was ascertained that the trade union had been legalized on 13 June 2006. On 26 June 2006, the management of the Oil Investment Company of Lysychansk gave the chairperson of the union the permission to enter the enterprise and provided the union with an office. The management further undertook to provide the union with office equipment and telephone line. The union chairperson did not have any complaints against the enterprise management. (2) An investigation carried out by the Department of Education and Science of the Chernigov Regional Administration established that the director of the Sosnytsia city boarding school did not commit any acts violating the rights of the chairperson of the primary trade union of the Free Trade Union of Education and Science of Ukraine. To the contrary, the director of the school suggested to the union to delegate its representative to the working group set up to draw up a collective agreement. With regard to the participation of the trade union chairperson in the seminar, the Government indicates that while the school director agreed to release her from her duties so as to allow her to participate in the seminar, it was not possible to pay for the time off from work. The chairperson nevertheless participated in the seminar whilst on sick leave. The alleged instances of threats to dismiss the chairperson were not confirmed and the chairperson had not been able to provide specific evidence of violation of national legislation by the director of the school.

– "Oktiabrskaya" mine in Krivoy Rog city: The regional state labour inspectorate carried out an inspection to the allegations made by the NPGU and concluded that there had been no evidence of threats and blackmail against members of the NPGU primary trade union. The Krivoy Rog city public prosecutor has also examined the allegations and also concluded that there had been no violation of trade union rights. The Government also indicates that the NPGU primary trade union can also exercise its right to bring the legal action before the relevant courts if it considers that its rights had been violated.

– "Zvezda" plant: Workers, independently and free from any pressure, can join trade unions of their own choosing. The CFTUU-affiliated trade union has its office space at the enterprise. It was invited to participate in the collective bargaining process. While a joint representative body had never been created, before the collective agreement was signed, it was discussed at the workers' meetings. The CFTUU-affiliated union had fully participated in the discussions, the outcome of which was reflected in the collective agreement signed on 30 May 2006. However, an inspection carried out at the enterprise revealed that the employer failed to transfer trade union dues to the union's account, as well as the money for cultural and recreational activities. The employer was instructed to eliminate all violations of the legislation. The territorial state labour inspection of the Sumy region will follow up this matter.

– "Linnik" enterprise: The independent trade union "Oktan" was provided with an office space in July 2006. In accordance with the collective agreement, the employer transfers the relevant amount of money for cultural and recreational activities. With regard to the allegation of forgery of the collective agreement, an inspection carried out at the enterprise confirmed that some of the provisions of the collective agreement concerning the functioning of other trade unions did not correspond to the original text of the agreement. The state inspector instructed the management to eliminate the violation of the labour legislation, which had been done immediately, during the inspection.

220. The Government transmits copies of the previously requested documents in respect of the following recommendations:

– Recommendation (e): A copy of the minute of the meeting of 2 April 2004 between the management and the trade union, according to which all the problematic issues that had arisen at the "Krivorozhsky" plant had been settled jointly with the representatives of the Dnepropetrovsk regional state administration, the management and the trade unions of the plant.

– Recommendation (g): (1) Copies of the court decisions concerning dismissal of Mr Polivoda from the Aleksandrovsk State Technical College of Agriculture. The Appeal Court of Kirovograd region and the Supreme Court both maintained the decision of the lower courts, which had declared the dismissal legal. The plaintiff in these cases did not plead an anti-union discrimination. (2) Copy of the court decision concerning dismissal of Mr Dzyubko from the locomotive depot "Imeni Schevchenko". The court declared the dismissal illegal and ordered the reinstatement of Mr Dzyubko in his post, without loss of wages and ordered for a compensation to be paid for the moral damages suffered. The Government also transmits Order No. 129/0C of 27 April 2006 pursuant to which Mr Dzyubko was reinstated. (3) With regard to the dismissals from the "Promproduct" enterprise, the Government transmits copies of the court decisions concerning Mr Komissarov and Mr Dubovoi. In both cases, the courts found no violation of labour legislation. In both cases, the allegations of anti-union discrimination were rejected by the courts, which considered that there was no tangible proof of the existence of a trade union organization in time of the dismissal. The Government also indicates that there is no decision in the case of

dismissal of Mr Karpov from the "Promproduct" enterprise since the plaintiff did not appear in court. Furthermore, it is no longer possible to investigate the allegations of anti-union dismissals at this enterprise as all documents were destroyed in a fire occurred on 3 June 2006.

– Recommendation (l): Copy of the decision of the Supreme Court of Ukraine of 17 June 2004, which maintained the decisions of lower courts with regard to Order No. 1368 of 20 August 2000 of the Ministry of Justice revoking the by-laws and certificate of registration of the All-Ukrainian Union of Football Players.

– Recommendation (m): Copy of the ruling of the Economic Court of Donetsk region of 1 March 2004 to cancel registration of the independent trade union at the "Azovstal" enterprise. The Government states that this ruling is still in force.

– Recommendation (n): Copy of registration certificate No. 749 of 7 April 2000 of the Federation of Free Trade Unions of Lvov Railways, a copy of the ruling of the Economic Court of Lvov region of 8 August 2005 and a copy of the ruling of the Lvov Appellate Economic Court of 6 December 2005. Both courts consider that the dispute involving registration/liquidation of trade union organizations lies outside of the sphere of competence of economic courts.

221. The Government further states that it had requested the relevant local executive bodies to examine the complaints of violation of trade union rights of the CFTUU-affiliated trade unions. It will inform the Committee of the outcome of the inquiries carried out in this respect.

222. *The Committee notes with interest that all outstanding issues between primary trade unions at "Zolotoe" mine, "Krivorozhsky" plant and the "Kransnoarmeyskiy dinasovy zavod" and the management of these enterprises have been resolved (recommendations (d), (e) and (r)). The Committee further notes with interest the reinstatement without loss of pay of Mr Dzyubko (the locomotive depot "Imeni Shevchenko") and Mr Yushenko ("Knyagynskaya" mine) (recommendation (g)), the registration of the primary trade union at the "Krasnolimanskaya" mine (recommendation (k)) and the legalization of the free trade union "Oktan" established at the Oil Investment Company of Lysychansk city ("Linnik") (recommendation (t)). Finally, the Committee takes note of the information on the recent allegations of violation of trade union rights at the "Oktyabrskaya" mine, the "Zvezda" plant and the "Linnik" enterprise.*

223. *The Committee notes the information and the relevant documents provided by the Government in respect of: the outcome of the investigations at McDonald's Ukraine Ltd. and "Ordzhonikidze" mine which revealed no violations of trade union rights at these undertakings (recommendations (f) and (s)), the alleged anti-union dismissals from the "Promproduct" enterprise and the dismissal of Mr Polivoda from the Aleksandrovsk State Technical College of Agriculture (recommendation (g)), the liquidation of "Tomashpilsakhar" enterprise (recommendations (g) and (i)), the payment of arrears for cultural and recreational activities to the trade union at the "Stakhanova" mine by the enterprise management (recommendation (o)), the resignation of Mr Suk from the "Krasnolimanskaya" enterprise (recommendation (q)), and the alleged violations of trade union rights at the Oil Investment Company of Lysychansk city and the Sosnytsia city boarding school (recommendation (t)). Finally, the Committee takes note of the information on the recent allegations of violation of trade union rights at the "Oktyabrskaya" mine.*

224. *With regard to recommendation (c), the Committee regrets that the Government provides no information on whether appropriate compensation was paid to those trade unions of the*

Western Donbass Association of the NPGU, which suffered material damage due to the illegal search and once again requests the Government to keep it informed in this respect.

225. *With regard to recommendation (h), the Committee notes the information provided by the Government in respect of the inquiries into the allegations of physical assaults on Mr Kalyuzhny and Mr Volynets and requests the Government to continue keeping it informed of the developments regarding investigations of these cases presently being supervised by the Ministry of Internal Affairs. The Committee regrets that the Government provides no information as to the inquiries into the allegations of physical assaults on Mr Shtulman and Mr Fomenko. It therefore requests the Government to transmit this information without delay.*

226. *With regard to recommendation (j), the Committee regrets that no information was provided by the Government as to whether trade union dues were transferred during 2002–03 at the "Brodecke" and "Brodecke sugar refinery plant" enterprises were duly paid to the FPU-affiliated unions. The Committee requests the Government to ensure that transfer of these dues have been transferred and to keep it informed in this respect.*

227. *With regard to recommendation (l), while noting the decision of the Supreme Court of Ukraine of 17 June 2004, which maintained the decisions of lower courts with regard to Order No. 1368 of 20 August 2000 of the Ministry of Justice by which the by-laws and certificate of registration of the All–Ukrainian Union of Football Players were revoked, the Committee regrets that neither the Government nor the complainant have provided additional information requested on the reasons for the dissolution of the union. The Committee therefore once again requests the Government and the trade union to provide clarification in this respect, as well as to the current status of the All–Ukrainian Union of Football Players.*

228. *With regard to recommendation (m), the Committee notes the decision of the Economic Court of Donetsk region of 1 March 2004 to cancel registration of the independent trade union of the "Azovstal" enterprise for unlawful use of the enterprise's name in the title of the union and the Government's statement that this ruling is still in force. The Committee recalls that in its previous examinations of this case, it considered that the use of the company's name in the title of the trade union should not result in the cancellation of trade union registration and requested the Government to take the necessary measures so as to ensure that the trade union at the "Azovstal" enterprise is re-registered. Regretting that no measures have been taken by the Government in this respect, the Committee once again urges the Government to ensure re-registration of the trade union at the "Azovstal" enterprise and to keep it informed in this respect.*

229. *With regard to recommendation (n), the Committee notes a copy of registration certificate No. 749 of 7 April 2000 of the Federation of Free Trade Unions of Lvov Railways, a copy of the ruling of the Economic Court of Lvov region of 8 August 2005 and a copy of the ruling of the Lvov Appellate Economic Court of 6 December 2005 transmitted by the Government. The Committee notes that both courts consider that the dispute involving registration/liquidation of trade union organizations lies outside of the sphere of competence of economic courts. The present status of this organization is therefore unclear to the Committee. It therefore requests the Government to indicate whether the Federation of Free Trade Unions of Lvov Railways is presently registered.*

230. *With regard to recommendation (p), the Committee notes the Government's indication that the working group set up to draft a new collective agreement at the Ilyichevsk Maritime Commercial Port and which includes the representatives of management and of all five trade unions active at the enterprise had scheduled the collective bargaining to begin on*

1 October 2006. The Committee requests the Government to provide further information on the progress made in this regard.

231. *With regard to recommendation (s), the Committee notes the information provided by the Government in respect of the alleged violations of trade union rights at the "Ilyich" metallurgical enterprise and the "Marganets ore mining and processing" enterprise. As concerns the first enterprise, the Committee notes that while two inspections conducted at the enterprise established no violations of trade union rights, the union contested the findings of the inspections. This case was now in the stage of appeal. The Committee requests the Government to keep it informed of the developments in this regard. With regard to the second enterprise, it appears to the Committee that the inquiry into the allegations of anti-union campaign at the enterprise was limited to obtaining information from the chairperson of the board of directors of the plant. In these circumstances, the Committee requests the Government to examine this matter further with the participation of the union concerned and to keep it informed in this respect.*

232. *The Committee notes the new allegations submitted by the CFTUU. The Committee recalls that in its previous examination of this case, it had noted with interest the initiative taken to establish investigations into several of the allegations in this case which, using a tripartite model, included representatives from the employers' and workers' organizations concerned, the National Mediation and Conciliation Service and the regional state labour inspectorates. The Committee encourages the complainant and the Government to examine the new allegations, as well as some of the outstanding matters, where possible through the use of similar commissions. Noting with interest the efforts made by the Government to solve many cases brought to the attention of the Committee, the Committee trusts that the Government and the social partners, in the interest of all those involved, will examine the alleged violations of trade union rights and, where confirmed true, will take the necessary measures to eliminate all such violations. The Committee requests the Government to keep it informed in this respect.*

233. *The numerous recent allegations from the complainant concerning specific enterprises would appear to demonstrate a lack of confidence in national procedures and a resort to the Committee in the first instance. The Committee therefore firmly encourages the Government and the social partners to review the current functioning of national mechanisms so as to ensure a fully functioning system at national level to guarantee respect for freedom of association in practice in a manner which has the full confidence of all parties concerned.*

Case No. 2270 (Uruguay)

234. At its meeting in March 2006, when it examined allegations that, following the participation by dockworkers in May Day celebrations, the PLANIR SA company in reprisal had ceased to hire a number of workers, and that a blacklist had been drawn up preventing the workers in question from obtaining work, the Committee regretted the delay in the investigation of this case and requested the Government to inform it whether the enterprise had had recourse to the Administrative Tribunal against the fine imposed by the administrative authority and, if so, to inform it of the outcome. The Committee indicated that, if no appeal had been made, it expected that the fine would have been paid by the employer so as to serve as a dissuasive measure against any future acts of anti-union discrimination [see 340th Report, paras 1353–1361].

235. In its communication of 31 June 2006, the Government states that, as PLANIR SA did not seek to have the penalty (the fine imposed by the administrative authority) quashed, the Ministry filed an application on 20 April 2006 to the 25th departmental circuit magistrates'

court of the capital to order payment. On 21 July 2006, PLANIR SA reported to the Ministry of Labour and Social Security to pay the fine.

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

Case No. 2249 (Bolivarian Republic of Venezuela)

237. At its meeting in June 2006, the Committee made the following recommendations on the questions that were still pending [see 342nd Report, paras 200–203]:

- 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 Confederation of Venezuela (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 Workers' 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;
- the Committee notes the Government's statement that the appeal against the decision of the Minister of Labour denying UNAPETROL registration is currently before the Administrative Policy Chamber of the Supreme Court of Justice and requests the Government to send it the text of the ruling handed down. In the meantime, and in order to avoid the registration of UNAPETROL being held up still further by possible appeals or judicial delay, the Committee once again calls on the Government to initiate direct contacts with the members of UNAPETROL, so as to find a solution to the matter of its registration and determine how the legal shortcomings referred to by the Government can be corrected;
- with regard to the alleged acts of violence 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.

238. In its communication of 16 August 2006, the Government refers to the request for information concerning the administrative appeal calling for decision No. 2932 of 16 October 2003 of the Minister of Labour to be found void on the grounds that it is unconstitutional and unlawful.

239. In this respect, the Government provides a copy of the ruling of the Administrative Policy Chamber of the Supreme Court of Justice, dated 16 May 2006, which holds that the administrative appeal to find decision No. 2932 unconstitutional and unlawful, lodged on 3 November 2003 by the legal representatives of citizens Jorge Rodríguez, Edgar Quijano, José Alejandro Richter, Antonio Méndez, Marianella Castillo de Piñero and Víctor Ramos, and of the self-styled "National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) trade union organization", has exceeded the time limits for all legal purposes and that the appeal is therefore out of time.

240. The Government indicates that the finding that the appeal was out of time was the result of an application filed on 21 September 2005 by the legal representatives of the Office of the Attorney-General. Such an application for the limitation of a legal action is based on the grounds that the parties concerned have been inactive, that there has been no further procedural activity to maintain the action for a period of over one year. Time limits are a legal mechanism intended to prevent legal actions from being perpetuated over time and judicial bodies are under the obligation to resolve the status of legal actions in which the parties show no further interest. The ruling, which is appended, is based on section 267 of the Code of Civil Procedure, which provides that "Any legal action shall be barred where one year has elapsed without any procedural activity by the parties …".

241. The Government adds that the administrative appeal to find decision No. 2932 unconstitutional and unlawful, lodged on 3 November 2003 by the legal representatives of Jorge Rodríguez, Edgar Quijano, et al., lapsed as there was no activity by the plaintiffs for over one year (there was no activity between 8 September 2004 and 21 September 2005), on which grounds the representative of the Office of the Attorney-General of the Republic filed an application for the appeal to be barred, based on section 267 of the Code of Civil Procedure.

242. *With regard to the appeal filed by UNAPETROL against the decision by the Minister of Labour refusing to register the organization, the Committee notes the Government's statements that the Administrative Policy Chamber of the Supreme Court of Justice, ruling*

on the application filed by the legal representative of the Office of the Attorney-General of the Republic in accordance with the law, found on 16 May 2006 that the appeal was out of time as the plaintiffs had been inactive (there had been no activity to maintain the appeal for a period of over one year). The Committee is nevertheless bound to regret that the Government has not given effect to the recommendation made at its meeting in June 2006 calling on the Government "to initiate direct contacts with the members of UNAPETROL, so as to find a solution to the matter of its registration and determine how the legal shortcomings referred to by the Government can be corrected" [see 342nd Report, para. 203].

243. *Finally, the Committee regrets to note once again that, despite the seriousness of this case, and with the exception of the point examined in the previous paragraph, the Government has not provided information on the other recommendations that it made previously. The Committee accordingly reiterates those recommendations and urges the Government to give effect to them on an urgent basis and without delay so that the Committee can examine all the questions that are still pending in full knowledge of the facts.*

Cases Nos. 1937 and 2027 (Zimbabwe)

244. The Committee last examined these cases, which concern violations of the right to strike, the assault of a trade union leader and attacks on trade union premises, at its March 2006 meeting [see 340th Report, paras 224–228]. On that occasion, the Committee noted with deep regret the Government's lack of cooperation, as demonstrated by its continued and explicit refusal to implement the measures the Committee had requested of it on several earlier occasions. Recalling once again its previous comments on the very serious matters raised in these cases, the Committee strongly urged the Government to amend the Labour Relations Amendment Act No. 17/2002 to allow workers and their organizations to take industrial action in respect of economic and social policy questions without being sanctioned, as well as to ensure that no imprisonment sanctions are taken in the case of peaceful strikes and that the sanctions are proportionate to the seriousness of the infringement. The Committee also regretted that the Government refused to hold independent investigations into the assault on Mr Tsavangirai and the arson of ZCTU offices, allegations which had been pending since 1997, by referring simply to the separation-of-powers doctrine as grounds for its refusal to take action on this matter. The Committee urged the Government to keep it informed of all developments envisaged or undertaken in relation to the matters raised in these cases.

245. In a communication dated 6 September 2006, the Government reiterates that the legislative provisions relating to strike action in the Labour Act adequately address the concerns of the Committee, and that its intention was to penalize unlawful collective job action just as much as any other law penalizes criminal conduct. Penalizing unlawful action, furthermore, does not take away the right to strike.

246. The Government further states that the police have not been able to find those responsible for the attack on Mr. Tsavangirai and the arson of ZCTU offices. It adds that it has reservations on instituting an inquiry regarding alleged attacks on Mr Tsavangirai due to his current political standing, and above all because there had already been a case finalized by the courts – the judgement of which was submitted to the ILO.

247. *The Committee notes with deep regret that the Government provides no new information but instead reiterates, yet again, its previous position in respect of these cases. The Committee is, as such, obliged to express its deep concern with the Government's continued and long-standing failure to cooperate. It once again strongly urges the Government to amend the Labour Relations Amendment Act, in accordance with its previous recommendations, and refers this aspect of the case to the Committee of Experts*

on the Application of Conventions and Recommendations. As regards its recommendations concerning the allegations of assault and arson, the Committee deplores the position of the Government that it has reservations with conducting an independent inquiry due to Mr Tsavangirai's current political standing. The Committee recalls that Mr Tsavangirai was the Secretary-General of the ZCTU at the time of the alleged attack, and that the ensuing proceedings failed to find a guilty party; in this regard the Committee recalls once again that in the event of assaults on the physical or moral integrity of individuals, the Committee has considered that an independent judicial inquiry should be instituted immediately with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts. Furthermore, the absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights [see ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 50 and 52] and deplores the inaction of the Government in this regard.*

Case No. 2328 (Zimbabwe)

248. The Committee last examined this case, which concerns anti-union discrimination in relation to the dismissal of the President of the Zimbabwe Congress of Trade Unions (ZCTU) and the indefinite suspension of three other ZCTU executives at its March 2006 session [see 340th Report, paras 229–232]. With respect to the three union executives, Messrs Nkala, Chizura and Munandi, the Committee requested the Government to indicate the results of the arbitrator's decision concerning their suspension, as well as whether an appeal had been filed and, if so, its final result. The Committee also asked the Government to keep it informed of the outcome of the arbitration proceedings initiated by ZCTU President, Mr Matombo, against his dismissal.

249. In a communication dated 6 September 2006, the Government indicated that Messrs Nkala, Chizura and Munandi had appealed the decision of the arbitrator to the Labour Court, and that Mr Matombo had also appealed to the Labour Court following the arbitrator's decision respecting his dismissal; both appeals were still pending.

250. *The Committee takes note of the information provided by the Government. Noting that in both cases the arbitration awards had apparently decided against the reinstatement of concerned individuals, the Committee requests the Government to transmit copies of both of the arbitration decisions in these cases and to inform it of the outcome of the parties' respective appeals to the Labour Court.*

* * *

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

Case	Last examination on the merits	Last follow-up examination
1991 (Japan)	November 2000	November 2006
2006 (Pakistan)	November 2000	November 2005
2086 (Paraguay)	June 2002	March 2006
2088 (Bolivarian Republic of Venezuela)	March 2004	November 2006
2096 (Pakistan)	March 2004	November 2006
2109 (Morocco)	June 2001	June 2006
2126 (Turkey)	March 2002	June 2006
2160 (Bolivarian Republic of Venezuela)	June 2002	June 2006
2186 (Hong Kong (China))	March 2004	November 2006
2237 (Colombia)	June 2003	November 2006
2257 (Canada)	November 2004	June 2006
2258 (Cuba)	June 2005	November 2006
2267 (Nigeria)	June 2004	November 2006
2272 (Costa Rica)	March 2004	June 2006
2275 (Nicaragua)	November 2005	November 2006
2292 (United States)	November 2006	–
2296 (Chile)	June 2004	June 2006
2302 (Argentina)	November 2005	June 2006
2303 (Turkey)	November 2004	June 2006
2313 (Zimbabwe)	November 2006	–
2321 (Haiti)	June 2006	–
2326 (Australia)	November 2005	June 2006
2329 (Turkey)	November 2005	June 2006
2342 (Panama)	November 2005	November 2006
2348 (Iraq)	November 2006	–
2352 (Chile)	November 2005	June 2006
2354 (Nicaragua)	March 2006	November 2006
2366 (Turkey)	June 2006	–
2367 (Costa Rica)	June 2005	June 2006
2368 (El Salvador)	March 2006	–
2376 (Côte d'Ivoire)	November 2005	June 2006
2377 (Argentina)	March 2006	November 2006
2381 (Lithuania)	March 2005	November 2006
2382 (Cameroon)	November 2005	November 2006
2385 (Costa Rica)	November 2005	June 2006
2404 (Morocco)	November 2005	June 2006
2405 (Canada)	November 2006	–
2408 (Cape Verde)	June 2006	–
2413 (Guatemala)	November 2006	–
2424 (Colombia)	March 2006	–
2425 (Burundi)	November 2006	–
2426 (Burundi)	November 2006	–

Case	Last examination on the merits	Last follow-up examination
2429 (Niger)	March 2006	November 2006
2430 (Canada)	November 2006	–
2433 (Bahrain)	March 2006	November 2006
2436 (Denmark)	November 2006	–
2438 (Argentina)	November 2006	–
2439 (Cameroon)	March 2006	November 2006
2440 (Argentina)	November 2006	–
2443 (Cambodia)	November 2006	–
2447 (Malta)	June 2006	–
2452 (Peru)	November 2006	–
2453 (Iraq)	June 2006	–

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

253. In addition, the Committee has just received information concerning the follow-up of Cases Nos. 2017 (Guatemala), 2048 (Morocco), 2050 (Guatemala), 2087 (Uruguay), 2139 (Japan), 2176 (Japan), 2188 (Bangladesh), 2234 (Mexico), 2236 (Indonesia), 2239 (Colombia), 2252 (Philippines), 2259 (Guatemala), 2293 (Peru), 2304 (Japan), 2336 (Indonesia), 2338 (Mexico), 2383 (United Kingdom), 2396 (El Salvador), 2402 (Bangladesh), 2414 (Argentina), 2416 (Morocco), 2432 (Nigeria), 2441 (Indonesia), 2444 (Mexico), 2451 (Indonesia) and 2455 (Morocco), which it will examine at its next meeting.

CASE NO. 2373

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

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

Allegations: The complainants object to two rulings of the Undersecretariat of Labour and Social Security of Mendoza Province according to which direct industrial action (a workplace meeting) was declared illegal and the parties involved were required to maintain a minimum 50 per cent level of health and municipal services during a stoppage on the grounds that they constituted essential public services. Furthermore, the complainants allege the transfer of workers at the General Directorate of the Property Registry in the Province of Misiones following a strike, as well as the hiring of workers to break the strike and the replacement of striking workers

254. The Committee last examined this case at its November 2005 Session and on that occasion presented an interim report to the Governing Body [see 338th Report, paras 359–384]. The Central of Argentinean Workers (CTA) sent further information in a communication of June 2006.

255. The Government sent its observations in communications of 24 February and 16 August 2006.

256. 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. Previous examination of the case

257. At its November 2005 session, the Committee made the following recommendations [see 338th Report, para. 384]:

– As regards the disputed ruling No. 2735/04 of the Undersecretariat of Labour and Social Security of Mendoza Province according to which the industrial action (assembly at the workplace) of 22 June 2004 by workers of Godoy Cruz municipality was illegal, the Committee recalls that responsibility for declaring illegal an action in support of claims, including strike action and equivalent measures such as permanent assemblies, should not lie with the Government, but with an independent body which has the confidence of the parties, and it requests the Government to keep it informed of the outcome of the

trade union *amparo* proceedings initiated by the ATE and currently under examination by the judicial authorities of the province.

– As regards the alleged sanction of warnings issued to 45 workers who had participated in the industrial action carried out on 22 June 2004, which was declared illegal by the administrative authority of Mendoza Province, the Committee, noting that the *amparo* proceedings initiated by the ATE regarding the declaration of illegality also cover this issue, requests the Government to keep it informed of the outcome of those proceedings.

– As regards the new allegations presented in a communication of May 2005 concerning acts of anti-union discrimination (transfers and the drawing up of a blacklist) against workers who took part in the industrial action carried out on 4, 5, 6, 7, 8, 12, 13, 14, 20, 21, 22, 26, 27 and 28 April 2005 in the Province of Misiones, the Committee requests the Government to send its observations on the matter.

B. Further information

258. In their communication of June 2006, the complainant organizations refer to the allegations already made concerning the transfer of workers at the General Directorate of the Property Registry of the Undersecretariat of State of the Treasury, Finances and Public Works and Services of the Province of Misiones, for having participated in industrial action on 4, 5, 6, 7, 8, 12, 13, 14, 20, 21, 22, 26, 27 and 28 April 2005 in all the public sectors of the Province of Misiones, as well as the hiring of workers to break the strike (a Government list containing the names of nine persons hired under a dependent relationship is attached to the communication). Furthermore, the complainant organizations attach the text of Decree No. 493/05 containing the decision to hire these workers.

C. The Government's replies

259. In its communication of 24 February 2006, the Government indicates that the *amparo* proceedings initiated by the complainant organization ATE are still at the evidentiary stage.

260. In its communication of 16 August 2006, the Government refers to the allegations of acts of anti-union discrimination against workers who participated in industrial action in April 2005 in the Province of Misiones and, in particular, the hiring of workers by the Provincial Directorate of the Property Registry of the Province of Misiones while it was affected by industrial action. According to the complainants, on 1 April 2005, the Undersecretariat of Labour and Social Security of the Province of Mendoza was notified of the stoppage, the state of alert, the assembly and the mobilization for the period from 4 to 28 April 2005 by employees of the public administration in the province demanding wage increases and improvements in working conditions. As the industrial action was most intense at the National Directorate of the Property Registry, the provincial government issued Decree No. 493/05 determining that nine workers would be hired by the General Directorate of the Property Registry of the Province of Misiones in view of the need to recruit officials so that the service was not affected. The complainant organizations allege that a few days later three workers from the General Directorate of the Property Registry who had participated in the strike were transferred to another section. In short, according to the complainants, the Province of Misiones punished workers for participating in a strike by transferring them and hiring staff to undermine the effectiveness of the strike.

261. The Government denies each of the allegations, and in particular denies that it acted in violation of the right to strike. In this respect, the Government states that the right to strike is respected throughout the national territory. This is demonstrated by the fact that this right is not only protected by constitutional guarantees, but also by the international treaties with constitutional ranking that have been ratified by Argentina, and which have

been referred to repeatedly in the presentation of the case. The Government considers that at no stage can the attitude of the Province of Misiones be interpreted as a violation of the right to strike and that the industrial action was not in any way related to the transfer of the three workers or the hiring of nine workers. As set out in the Decree referred to by the complainant organization, these measures are related to the modernization of the institution, involving new computer systems which require skilled personnel.

262. The Government denies that a "blacklist" of the persons participating in the strike was drawn up or that it was related to disciplinary measures against workers in violation of Articles 3 and 10 of Convention No. 87. The Government adds that the Argentine State and the Province of Misiones respect the right to strike, in the meaning of a concerted withdrawal of labour as a result of a legitimate action to protect collective interests. Nevertheless, according to the Government, in this case it is necessary to take certain circumstances into consideration in order to understand that the action taken did not fulfil these characteristics: (1) the industrial action involved workers performing functions related to judicial and notarial activities, encompassing all activities related to the exercise and restriction of the right to property ownership. This is the function of the Provincial Directorate of the Property Registry. All "changes and legal acts" in the life of real estate (restrictions, seizure, sales, etc.) are recorded in the register, and therefore the certificates delivered by workers attesting to acts relating to property ownership are issued on behalf of the State; (2) these operations are related to the functioning of the State, involve the need to maintain the service and require suitable staff in view of the complex nature of the archive system. The decision to transfer and hire staff was taken in relation to the changes involved in technological modernization and was in no way linked to the industrial action. This is demonstrated by the fact that no administrative complaints have been lodged challenging the transfers; (3) the industrial action had an excessive impact in relation to the legal service for which the institution is responsible, as it prejudiced the right of professional workers who require State services or data for property registration processes. It should be emphasized that these services involve the payment of duties, and that failure to provide the services may also give rise to liabilities by the State in relation to third parties, thereby affecting parties other than those involved in the dispute; (4) the industrial action not only involved a "work stoppage", but also the practice known as working to rule, which was accompanied by the sale of food, the use of loudspeakers during office hours and the gathering of groups in the doorway to the establishment, thereby disturbing the work of those not participating in the industrial action and obstructing the access of the public. This led to disruption in the operation of the service, due to what was in practice an occupation of a workplace in which there is highly sensitive documentation (the loss, damage or careless handling of which could have led to penal action), while the resulting agitation among those with urgent business relating to the sale of property or the need to meet deadlines for legal orders led to situations bordering on the violent. The Government considers that such an attitude adds nothing to further the claims of the workers and goes well beyond the objective of the action.

263. Finally, the Government denies that the list of persons who participated in the industrial action constitutes a "blacklist". It explains that the industrial action disrupted the clocking in and out system and was accompanied by staff members leaving their posts to participate in marches. Consequently, this information was necessary for basic checking purposes so as to determine the persons who, irrespective of the type of action, did not come to work for various reasons and whether their absences were justified.

D. The Committee's conclusions

264. *The Committee recalls that at its November 2005 session it requested the Government to keep it informed of the outcome of the* amparo *proceedings initiated by the ATE in relation to disputed ruling No. 2735/04 of the Undersecretariat of Labour and Social Security of*

Mendoza Province declaring the industrial action (assembly at the workplace) of 22 June 2004 by workers of the municipality of Godoy Cruz illegal and the alleged sanction of warnings issued to 45 workers who had participated in the industrial action carried out on 22 June 2004, which was declared illegal by the administrative authority of Mendoza Province. In this respect, the Committee notes the Government's statement that the amparo *proceedings are still at the evidentiary stage. The Committee observes that, on 12 May 2005, the Government made the same observation and considers that a period of almost two years to rule on* amparo *proceedings on matters relating to trade union rights is excessively long. Under these conditions, the Committee regrets the delay, recalls that "justice delayed is justice denied" [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 105] and expects that the judicial authorities will issue a ruling in the near future. The Committee requests the Government to keep it informed of the outcome of these proceedings.*

265. *Furthermore, at its November session, the Committee requested the Government to send its observations on the allegations of acts of anti-union discrimination (transfers of workers and the drawing up of a blacklist) against the workers of the General Directorate of the Property Registry who participated in the industrial action carried out in April 2005 in all the public sectors of the Province of Misiones, as well as the hiring of workers to break the strike. The Committee notes that the Government denies all the allegations and states in particular that: (1) the National State and the Province of Misiones respect the right to strike, but the industrial action in question not only involved a "work stoppage", but also the practice known as working to rule, accompanied by the sale of food, the use of loudspeakers during office hours and the gathering of groups of persons in the doorway to the establishment, thereby disrupting access by non-strikers and the public; (2) the industrial action included workers engaged in functions linked to legal and notarial activities, including all activities related to the exercise and restrictions of the right to property ownership (the employees of the General Directorate of the Property Registry issue certificates on behalf of the State attesting to acts relating to property); (3) the transfers of three workers and the hiring of nine workers are not related to the industrial action, but are linked to the modernization of the establishment and new computer systems which require skilled personnel; (4) no "blacklist" was drawn up, although as a consequence of the industrial action, the clocking in and out system was disrupted and the strike involved employees leaving their posts to participate in marches, which meant that information was required for a basic check on those who had not come to work and whether their absence was justified.*

266. *As to the allegation that strike breakers were hired, the Committee observes that the documents attached to the complaint show that the hiring of nine workers was determined by Decree No. 493 of 18 April 2005, issued by the Government of the Province of Misiones. The introductory part of the Decree states that the General Directorate of the Property Registry of the Province of Misiones needs to employ officials to ensure that the ongoing project to update the property register is not affected and that it is highly necessary for the implementation of improvements to the establishment, identified by a firm of consultants, to have suitable staff selected on the basis of their specific skills and knowledge related to the handling of property registry information. Furthermore, as of 1 January 2005, the Decree acknowledges the services provided by the nine individuals and approves their contracts for the provision of services in the context of a dependent relationship until 31 December 2005. With regard to the alleged anti-union transfer of three workers, the Committee notes that this was decided on by Resolution No. 170 of the Secretariat of State for the Treasury, Finances and Public Works and Services of the Province of Misiones, dated 29 April 2005, the introductory part of which indicates that the Undersecretariat of Government and Registry Affairs of the Ministry of Government requires administrative officials and/or experts with knowledge of property registry issues, from the General Directorate of the Property Registry, to discharge functions in Civil*

Defence establishments and that the General Directorate of the Property Registry put forward the names of the three workers in question in view of their experience, length of service and knowledge of property registry issues.

267. *Under these circumstances, taking into account the Government's statements and the contents of the decrees referred to by the complainants, the Committee will not pursue its examination of these allegations.*

The Committee's recommendation

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

> ***Emphasizing that a period of almost two years for the issuing of a decision on* amparo *proceedings concerning issues relative to trade union rights is too long, the Committee expects that the judicial authorities will issue a ruling in the near future with regard to the* amparo *proceedings initiated by the ATE concerning contested ruling No. 2735/04, in which the Undersecretariat of Labour and Social Security of Mendoza Province declared the industrial action (assembly at the workplace) carried out by the workers of Godoy Cruz municipality on 22 June 2004 to be illegal, as well as the alleged sanction of issuing warnings to 45 workers who had participated in the industrial action of 22 June 2004, which was declared illegal by the administrative authority of Mendoza Province. Recalling that responsibility for declaring a strike illegal should not lie with the Government, but with an independent body which has the confidence of the parties concerned, the Committee requests the Government to keep it informed of the outcome of these* amparo *proceedings.***

CASE NO. 2456

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

Complaint against the Government of Argentina presented by the Central of Argentinean Workers (CTA)

Allegations: The complainant organization alleges that, after participating in a trade union assembly, several workers were dismissed and others penalized by the Aerohandling S.A. enterprise

269. The complaint is contained in a communication of the Central of Argentinean Workers (CTA) dated 30 September 2005.

270. The Government sent its observations in a communication of 11 August 2006.

271. 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

272. In its communication of 30 September 2005, the Central of Argentinean Workers (CTA) alleges that the Aerohandling S.A. enterprise, which is controlled by the Aerolíneas Argentinas S.A. enterprise, owned in turn by the Transnacional Marsans enterprise, which has its corporate headquarters in Spain, has been pursuing a policy of overt prohibition and repression of any trade union activity by its employees. The CTA adds that the Aerohandling S.A. enterprise engages in arbitrary, unlawful and fraudulent practices such as concluding a series of casual or fixed-term contracts with the same worker for the same job, and that, faced with this situation, the workers' representatives at the workplace complained to the enterprise management, in view of the impact on job stability and other labour rights of the workers they represent.

273. The CTA states that, following the assembly held on 23 and 24 March 2005 and in the context of the dispute, on 30 March 2005 the enterprise dismissed six employees: Martín Pucheta, Andrés Chavez, Fabián Ross, Fabián Aquino, Guillermo Cortegoso and Walter Bergon, on the grounds that they had "participated in an assembly called by the internal trade union committee". In addition to the dismissals, all the members of staff who had participated in the assembly were subjected to persecution. The workers concerned were individually summoned, pressured to give an explanation, and told to repent. Workers who argued or defended themselves were labelled "dissenters" or "intractable" and accordingly severely penalized with warnings and suspensions.

274. The CTA concludes that the Aerohandling S.A. enterprise has exerted anti-union and discriminatory, and hence unlawful, pressure in the form of dismissal and suspension of workers, both union members and non-members, thus overtly violating the principles of freedom of association enshrined in Act No. 23551 on trade unions and article 14bis of the national Constitution, as well as ILO Conventions Nos. 87 and 98.

B. The Government's reply

275. In its communication of 11 August 2006, the Government states that the National Directorate for Labour Relations informed it that "the complaint presented by the Association of Aeronautical Personnel (APA) against the Aerohandling S.A. enterprise was filed under No. 1.100.424/04". The file shows that after a number of hearings, the parties requested a recess as they were engaged in direct negotiations. After notification of the parties, they did not submit any petition in the proceedings, and the case was accordingly shelved for lack of submissions on 25 October 2005. In the light of this information, the Government considers that the complaint is moot.

C. The Committee's conclusions

276. *The Committee observes that in this case the complainant organization alleges that the workers' representatives submitted complaints to the Aerohandling S.A. enterprise, that in this context a workers' assembly was held on 23 and 24 March 2005 and that on 30 March six workers were dismissed for having participated in that assembly called by the internal trade union committee. The complainant organization states further that in addition to the dismissals, the enterprise began persecuting the staff who had participated in the assembly (according to the CTA, the workers were individually summoned, required to give an*

explanation, and told to repent; workers who argued or defended themselves were penalized with warnings and suspensions).

277. *The Committee notes that the Government states that the National Directorate for Labour Relations informed it that the Association of Aeronautical Personnel (APA) filed a complaint against the Aerohandling S.A. enterprise (No. 1.100.424/04) and that after a number of hearings, the parties requested a recess (suspension of the administrative proceedings in order to reach a settlement) as they were engaged in negotiations. The Government adds that, after notification of the parties, they did not submit any petition in the proceedings, and the case was accordingly shelved on 25 October 2005.*

278. *In this regard, the Committee recalls that it has emphasized on several occasions that "the right of occupational organizations to hold meetings in their premises to discuss occupational questions, without prior authorization and interference by the authorities, is an essential element of freedom of association" and that "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 (revised) edition, 2006, paras 130 and 771].*

279. *The Committee expects that the dispute in question will be settled by the parties in the very near future, bearing in mind the principles mentioned above, and requests the Government to keep it informed in this regard, and in particular to indicate the employment situation of the workers alleged to have been dismissed.*

The Committee's recommendation

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

> ***The Committee expects that the dispute in question will be settled by the parties in the very near future, bearing in mind the principles mentioned above, and requests the Government to keep it informed in this regard, and in particular to indicate the employment situation of the workers alleged to have been dismissed.***

CASE NO. 2458

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

Complaint against the Government of Argentina presented by — the Aeronautical Technical Workers' Association (APTA) and — the Association of Airline Pilots (APLA)

Allegations: The complainant organizations allege that during a collective dispute with the enterprises Aerolíneas Argentinas SA and Austral Líneas Aéreas Cielos del Sur SA, during the course of which a strike was called in July

2005, the labour administration authority on two occasions invoked the Mandatory Conciliation Act, suspending all direct action and ultimately the right to strike, unilaterally fixed a minimum level of service on the grounds that it regarded air transport as an essential service, and initiated summary proceedings with a view to fining the trade union organizations. The complainant organizations allege that the companies concerned took advantage of the measures adopted by the labour administration to dismiss or otherwise discipline workers for exercising their legitimate right to strike

281. The complaint is contained in communications from the Aeronautical Technical Workers' Association (APTA) and the Association of Airline Pilots (APLA) dated 30 November and 1 December 2005.

282. The Government sent its observations in a communication dated 22 August 2006.

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

A. The complainants' allegations

284. In their communications of 30 November and 1 December 2005, the Aeronautical Technical Workers' Association (APTA) and the Association of Airline Pilots (APLA) state that Aerolíneas Argentinas SA and Austral Líneas Aéreas Cielos del Sur SA, which is controlled by the former, both being owned by the transnational enterprise Marsans based in Spain, have been implementing an openly repressive policy aimed at banning all trade union activity by their workers, a fact made clear by what follows. The complainants indicate that as a result of the mounting incidences of contraventions by the companies of the law and of the applicable collective agreement, as well as the relevant provisions relating to freedom of association, a collective dispute began in early 2005 and led ultimately to a strike in July of that year, when the labour administration invoked the Mandatory Conciliation Act (No. 14786), suspending all direct action for a period of 20 working days – which meant in fact a complete ban on all strike activity for almost one month.

285. The complainants add that, given the impossibility of resolving the collective dispute owing to the companies' blatant and repeated refusal to negotiate effectively and in good faith, the trade union association declared on 22 September that it would be taking legitimate trade union action including the exercise of the right to strike. Subsequently, following an immediate summons by the labour administration and express and specific measures to block the union action, an agreement was reached with the companies on a new period of talks and the suspension of the strike. As a result of this, during the new round, in this particular case of 60 days, the union representatives refrained from exercising their right to call strike action. When the 60 days had elapsed, and there appeared to be no real willingness on the part of the employers to resolve the differences between themselves and the workforce that had arisen in connection with, among other things, the continuing and marked decline in the purchasing power of wages, the APTA

and APLA on 24 November ordered that trade union action continue as the only means of defending the rights of their members.

286. According to the complainants, the labour administration (the Ministry of Labour, Employment and Social Security), in a manner that was manifestly arbitrary and illegal, and without any legal competence to do so, decided once again to invoke the mandatory conciliation procedure, which resulted in another suspension of strike action. The labour authority ordered the suspension of the strike under penalty of fines (Act. No. 25212) and measures to restrict trade union representation (Act No. 23551); issued an administrative order on 25 November requiring a minimum level of service to be maintained on the grounds that air transport was deemed (arbitrarily and illegally) to be an essential service; and initiated summary proceedings with a view to fining the trade unions concerned up to 8 million Argentinian pesos.

287. The complainants consider that the above information suggests that the labour authority has adopted attitudes and conduct which seriously undermine rights of freedom of association by seeking to obstruct the right to strike and intimidate trade unions and workers in order to deter them from taking part in any action relating to the dispute. Since July 2005 and until the date on which the complaint was presented, that is, for a period of 120 days, the trade unions have been prevented by the recurrent interference of the labour authority from taking any appropriate union action. Instead, under penalty of serious financial sanctions and the possible withdrawal of recognition from the unions, the latter have been arbitrarily prevented by the state authorities from undertaking any union activity, which means in practice that such activity has been prohibited.

288. The complainant organizations add that in addition to the temporary restriction on the right to strike, there has also been an attempt to impose restrictions through the arbitrary and illegal decision to define air transport as an essential service, imposing a minimum service of 50 per cent of all domestic flights and 75 per cent of international flights. Under the terms of current legislation (section 24 of Act No. 25877), the labour authority has no authority to extend the concept of "essential service" established in the same Act; that is the exclusive prerogative of an "independent commission" acting in accordance with the relevant regulation. The Executive had 90 days to issue the appropriate regulation (section 24 in fine of Act No. 25877), which must be consistent with "the principles of the International Labour Organization". Despite this provision, which invokes the principles established by the ILO's supervisory bodies with regard to the right to strike, the Government has failed to issue the appropriate regulation and, by invoking an obsolete provision (Decree No. 843/00), continues to grant itself prerogatives which it does not legally have by extending the concept of essential service, although that is not envisaged in this case by the terms of section 24 of Act No. 25877.

289. The complainants allege that, quite apart from the persistent and arbitrary refusal to negotiate a solution to the collective dispute, the companies concerned have been disrupting the union's activities in order to take advantage of the labour authority's arbitrary action to discipline and dismiss workers for exercising their legitimate right to strike. Following the labour authority's actions, the companies began a public campaign of intimidation against the unions and a private campaign against individual workers represented by APTA and APLA.

290. According to the complainants, the companies, citing National Labour Relations Department (DNRT) Order No. 148/05, began notifying workers unilaterally and illegally that they were required to turn up for work or face sanctions. In this way, simply because workers represented by APTA and APLA were exercising their right to strike, the company attempted to disrupt that action by imposing minimum levels of service. Nevertheless, following the intimidation, the companies announced numerous dismissals

on the grounds that the minimum service established by DNRT Order No. 148/05 had not been maintained, with the ultimate aim of prohibiting all strike action, whatever the purpose. The companies have thus discriminated against workers for participating in union actions, in some cases even dismissing workers for exercising the right to strike, and have applied pressure that is illegal by virtue of its anti-union and discriminatory character by dismissing or suspending workers, whether or not they are members of the unions. It has in this way blatantly violated the principle of freedom of association enshrined in Act No. 23551 concerning trade union associations and in article 14bis of the National Constitution, as well as in ILO Conventions Nos. 87 and 98.

B. The Government's reply

291. In its communication of 22 August 2006, the Government recalls that the complainant organizations base their action on the fact that Aerolíneas Argentinas SA and Austral Líneas Aéreas Cielos del Sur SA (controlled by the former), both of which are owned by the transnational enterprise Marsans based in Spain, had disrupted the unions' direct action. The Government's understanding is that it is being made responsible for allowing arbitrary application of Act No. 14786, which was invoked by the companies in order to discipline and dismiss workers for exercising their lawful right to strike. It is claimed that the companies, citing the DNRT Order No. 148/05, began notifying workers that they were required to work or be subject to disciplinary sanctions, and invoked the minimum service recognized by the labour authority in another DNRT Order No. 145/05. The complainants allege that the companies have applied unlawful, anti-union, discriminatory pressure through dismissals and suspensions of workers, both union members and non-members. The complaint alleges violations of Act No. 23551 concerning trade union associations, section 14bis of the national Constitution, ILO Conventions Nos. 87 and 98, and section 53 (concerning unfair practices) of Act No. 23551.

292. The Government's understanding is that the complainants are alleging the arbitrary application by the Government of Act No. 14786, including a call for mandatory conciliation; suspension by decree of the strike; arbitrary fines (Act No. 25212); incorrect application of national and international provisions in setting minimum levels of service (Decree No. 147/05) on the grounds that air transport is considered an essential service; and lastly, as a consequence of this, imposition of an arbitrary fine on the trade union through summary proceedings.

293. The Government maintains that the documentation that has been submitted indicates that there are two disputes. The first began in May 2005, when four consecutive strikes took place at the instigation of the unions (on 8 and 9 May, 5 August and 22 September 2005). The second related to the strike of 24 November 2005. Lastly, on 2 December 2005, an agreement was signed between the parties, and was approved by the labour authority on 15 December. The Association of Airline Pilots (APLA) lodged an *amparo* (protection of constitutional rights) appeal against the minimum services fixed in the last dispute. The court of first instance rejected the *amparo* appeal and that ruling was itself referred to a higher court.

294. As regards the mandatory conciliation procedure (Act No. 14786), the Government states that in the dispute in question, the labour authority acted in response to requests from the companies. The action (case file 1125633/05) started with a complaint by the company dated 26 July against the members of the APTA Executive Committee for their part in a demonstration in front of the company premises at Ezeiza and Aeroparque aimed at bringing about a work stoppage, without knowing the reasons for the claims being made. This is attested by notarial certificate No. 102, which indicates the unions' demands in connection with the action and how this took place. This resulted in Ministry Order No. 83,

of the same date, by which the provisions of Act No. 14786 are extended to cover the parties so that no objection can be made to intervention by the Ministry of Labour.

295. The Government states that, with that measure, which in accordance with section 2 of Act No. 14786 suspended direct action for a period of 20 days, a series of developments took place, leading ultimately to further union direct action and an agreement being reached on 23 September 2006. This included provisions for non-remunerative payments and an undertaking by the company to grant employees long-term contracts. The union suspended the direct action and the employer agreed not to take disciplinary action against those involved. Everything was implemented at the Ministry of Labour through a conciliation order. The dispute thus ended with the conclusion of the agreement, according to which a fixed sum was to be paid out on a non-remunerative basis and the workers given long-term contracts, and with the subsequent approval of the agreement by the Ministry of Labour through ministry resolution No. 99 of 28 September 2005. It is thus clear that the State intervened only once and at the request of the parties, since the agreement was approved at their request; the dispute was thus effectively settled by the parties themselves. The dispute ended because the parties had defined the object of the dispute in terms of a non-remunerative payment and a reclassification of the employees, allowing the other disputed points to be dealt with through negotiation, which should begin in not more than 60 days, according to the agreement of 23 September 2005. There is nothing to suggest that the talks would fail, as might be inferred from the fourth clause of the agreement, and which might have led to a renewal of the dispute; nothing of the kind was reported to the Ministry of Labour. The actions taken by the Ministry of Labour have been entirely in accordance with international principles.

296. The Government adds that the new intervention by the State in the dispute through resolution 143/05 is justified, given that negotiations had been broken off, as opposed to what happened before, when both parties sought official approval for an agreement. The new order for mandatory conciliation under the terms of DNRT resolutions Nos. 142 and 143 is entirely justified because it was a response to the fact that the unions had abandoned negotiations, which led to the strike of 24 November, and is in line with the ILO's recommendations. Consequently the measure was applied in accordance with the principles of immediacy and timeliness with a view to achieving a consensual and peaceful settlement. The Government indicates that the airport where the union action took place has the country's greatest concentration of domestic air traffic, the action was repeated throughout the year, and the average minimum internal flight in Argentina is 500 km.

297. With regard to the implementation of sanctions in accordance with Act No. 25212, they are not linked to the union's direct action but with the violation of the agreed period of social peace declared by the conciliation authority, and in accordance also with the principles of the ILO. The Ministry of Labour acted in accordance with international principles, since the sanctions provided for in DNRT resolutions Nos. 142 and 143 are based on intervention by the State calling for mandatory conciliation in a manner entirely consistent with the international standards to which we have referred. At any event, it had to be emphasized that the case made by the complainants ceased to have any object once the proposal was accepted, and the attitude of the unions fully justified the action of the Ministry of Labour through the National Department for Conflict Resolution.

298. As regards the allegation concerning the establishment of minimum and essential services, the Government states that in the context of the dispute, there was a period of "promoting reconciliation" but this did not produce any positive result, and that as regards the move to extend the definition of essential service to cover air transport, the size of Argentina and its difficulties of communication and infrastructure need to be borne in mind. Lastly, the Government states that in March 2006, Decree No. 272/2006 was approved, implementing the third paragraph of section 24 of the law which incorporated a number of ILO

recommendations. Under the terms of the Decree, the commission that had been proposed would be called the "Guarantees Commission" and would advise the Executive on matters arising from the definition "essential services", and gather information from the regulatory bodies of the services concerned. It is emphasized that this body can be consulted by the Ministry of Labour either acting at the request of the parties or on its own initiative. It will be made up of five persons of acknowledged technical, professional or academic expertise in labour relations, labour law or constitutional law.

C. The Committee's conclusions

299. *The Committee notes that in the present case the complainant organizations allege that in the context of a collective dispute at Aerolíneas Argentinas SA and Austral Líneas Aéreas Cielos del Sur SA, during which a strike was called in July 2005, the labour administrative authority on two occasions applied the Mandatory Conciliation Act to suspend all direct action, resulting in the suspension of the right to strike; unilaterally imposed a minimum level of service on the grounds that it considered air transport to be an essential service; and initiated summary proceedings with a view to fining the trade unions involved. The complainant organizations allege in this regard that the companies, taking advantage of the measures adopted by the labour administrative authority, dismissed or disciplined workers for exercising their legitimate right to strike.*

300. *In this regard, the Committee notes with satisfaction that, according to the Government's information, the companies and the trade unions reached an agreement (approved by the administrative authority) in December 2005. That agreement provided for, among other things, the immediate reinstatement of all the workers dismissed in connection with the dispute and the non-application of disciplinary measures, and a commitment to establish an agenda setting out priorities with a view to an examination of all the issues of concern to the parties (the Government provides a copy of the agreement in question). Under these circumstances the Committee will not pursue its examination of these allegations.*

301. *Nevertheless, the Committee notes that the allegations relate to two issues which have arisen in connection with the intervention of the administrative authority in the dispute, and on which the Committee has already expressed an opinion in previous cases relating to Argentina. Specifically, these issues are the call for the parties to the dispute to enter into mandatory conciliation, and the unilateral imposition by the administrative authority of minimum levels of service.*

302. *As regards the call for mandatory conciliation, the Committee recalls that it would be desirable to entrust the decision of opening the conciliation procedure in collective disputes to a body which is independent of the parties to the dispute [see the Committee's 336th Report, Case No. 2369, para. 212; 338th Report, Case No. 2377, para. 403; and 342nd Report, Case No. 2420, para. 221].*

303. *As regards the imposition by the administrative authority of a minimum service on the grounds that a given activity is deemed to be essential, the Committee takes note of the Government's information that: (1) in 2006, Decree No. 272/2006 implementing the third paragraph of section 24 of Act No. 25877 was approved; this established a Guarantees Commission to advise on matters brought before it by the Executive in relation to the definition of essential service; and (2) the Guarantees Commission can be convened by the Ministry of Labour acting at the request of the parties in a collective dispute or on its own initiative, and will be made up of five members of recognized technical, professional or academic expertise in labour relations, labour law or constitutional law. In this regard, the Committee refers to its earlier conclusions in relation to the system for establishing minimum levels of service, in which it raised questions relating to the functioning of the system in practice:*

The Committee is of the opinion that the new system represents an improvement over the previous one, in that the Guarantees Commission advising the administrative authority includes representatives of workers' and employers' organizations, as well as other independent members. Nevertheless, the final decision on the fixing of minimum services still rests with the administrative authority. Under these circumstances, the Committee requests the Government to provide information on the practical application of the new provision and specifically, to supply information on the number of cases in which the administrative authority has modified the terms of rulings on minimum services issued by the Guarantees Commission [see 343rd Report, Case No. 2377, para. 18].

Moreover, the Committee requests the Government to provide information on the composition of the Guarantees Commission and to indicate in particular whether it includes representatives of the social partners.

The Committee's recommendation

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

Reminding the Government of the principles referred to in the conclusions, the Committee once again requests the Government to provide information on the composition of the Guarantees Commission and to indicate in particular whether it includes representatives of the social partners.

CASE NO. 2461

DEFINITIVE REPORT

Complaint against the Government of Argentina presented by — the Trade Union of Judicial Employees of Neuquén (SEJUN) — the Association of Judicial Workers of the Province of La Rioja (ATJPLR) and — the Judicial Federation of Argentina (FJA)

Allegations: The complainant organizations contest agreements issued by the Higher Court of Justice of the Province of Neuquén and the Higher Court of Justice of the Province of La Rioja which in their view violate the Conventions on freedom of association by designating the services rendered by judicial workers as "essential services" and by imposing a minimum service

305. This complaint is contained in a communication from the Trade Union of Judicial Workers of Neuquén (SEJUN), the Association of Judicial Workers of the Province of La Rioja (ATJPLR) and the Judicial Federation of Argentina (FJA) dated November 2006.

306. The Government transmitted its observations in a communication of 29 January 2007.

307. 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

308. In their communication of November 2005, the SEJUN, the ATJPLR and the FJA state that they consider that a legal situation has arisen which is prejudicial to workers in the state judiciary (whose trade unions are both members of the FJA) in the Provinces of Neuquén and La Rioja and constitutes a flagrant disregard of internationally accepted principles which, inasmuch as they have been incorporated into Argentina's own legislation, guarantee freedom of association and the right to strike.

309. Specifically, the complainant organizations contest: (1) point 3 of Agreement No. 3769 issued by the Higher Court of Justice of the Province of Neuquén on 2 June 2004, placing the services to be provided by employees of the Judiciary within the essential services; and (2) Agreements Nos. 133 and 62 issued by the Higher Court of the Province of La Rioja on 5 November 1988 and 27 April 2005. According to the claimants, Agreement No. 133 requires the designation of judicial employees who are to be on duty on days when there is a strike, even though it is recognized that the origin of the direct action is the non-payment of the remuneration of employees of the judiciary; there is also a requirement that a minimum service be established, which can be increased in size by decision of the relevant lower court or judge (point 5), and that the sanctions provided for in the judicial statutes be imposed on any workers who refuse to provide any or all of the services they are called upon to provide (point 3). Also according to the claimants, Agreement No. 62 stipulates that the ATJPLR must notify the Higher Court of Justice of any direct action it decides upon (point 1) and that each court of justice must communicate in writing a list of the employees who take part in a strike and of those who do not (point 2); the Agreement further instructs the Personnel Department to verify that the said points are adhered to in every office of the judiciary and to indicate the percentage of the staff who participate in any direct action. The complainants add that in the Province of La Rioja there is also Act No. 5593 which, in section 2, clause (e), declares the administration of justice to be an "essential service", contrary to all national and international practice, and refers the definition of the term to the Higher Court of Justice.

B. The Government's reply

310. In its communication of 29 January 2007, the Government states with respect to the allegations concerning the Province of Neuquén that the conflict with the union of state judiciary workers has been resolved, after arduous negotiations and by means of an agreement on a draft bill consented to by the parties, and that the consideration of judicial services as essential services, in view of the imposition of minimum services in case of a strike, conforms to the principles of the Committee of Experts and the Committee on Freedom of Association, and confirms to the national Constitution, as demonstrated by several judicial decisions. As concerns the conflict in the Province of La Rioja, the Government states that this has been resolved by the signing of agreements, the details of which are given in the Government's reply, and reiterates that the judicial service is an essential one. Decree 272/06 regulates Law No. 25771 and provides for the functioning of the negotiations committee in order to establish the minimum service.

C. The Committee's conclusions

311. *The Committee observes that the complainant organizations contest Agreement No. 3769 issued by the Higher Court of Justice of the Province of Neuquén on 2 June 2004, placing*

the services to be provided by employees of the judiciary within the "essential services", as well as Agreements Nos. 133 and 62 issued by the Higher Court of the Province of La Rioja on 5 November 1988 and 27 April 2005, which the complainants claim impose an obligation to establish a minimum service that can be increased in size by decision of the relevant lower court or judge, as well as penalties in the event of non-compliance, and which they say require the ATJPLR to notify the Higher Court of Justice of any direct action it decides upon, together with a list of the employees who take part in a strike and of those who do not. Finally, the Committee notes that the complainant organizations add that Act No. 5593 of the Province of La Rioja declares the administration of justice to be an essential service.

312. *The Committee notes the statements of the Government, according to which: (1) Province of Neuquén: the conflict with the union of judicial service workers has been resolved after arduous negotiations and by means of an agreement on a draft bill consented to by the parties, and that the consideration of judicial services as essential services, in view of the imposition of minimum services in case of a strike, conforms to the principles of the Committee of Experts and the Committee on Freedom of Association, and conforms to the national Constitution, as demonstrated by several judicial decisions; and (2) Province of La Rioja: the conflict has been resolved through the signing of agreements; as in the previous situation, the judicial service is deemed to be an essential service.*

313. *The Committee observes that it is apparent from the documentation which the complainant organizations and the Government enclose with their communications that in both cases the designation of the work carried out by employees of the judiciary as an essential service is aimed at ensuring the provision of a minimum service. The Committee recalls that it has on a number of occasions emphasized that officials working in the administration of justice and the judiciary are officials who exercise authority in the name of the State and whose right to strike could thus be subject to restrictions, such as its suspension or even prohibition [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 578] and considers that the restrictions on the exercise of the right to strike invoked by the complainants are not contrary to the principles of freedom of association. Noting that in the circumstances of this case an agreement exists on the minimum service to be respected during strikes in the judiciary, the Committee 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 or that facilities operate safely or without interruption; and that it is important that the provisions regarding the minimum service to be maintained in the event of a strike in an essential service are established clearly, applied strictly and make known to those concerned in due time [see* ***Digest***, op., cit., paras 607 and 611].

The Committee's recommendation

314. ***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. 2464

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

Complaint against the Government of Barbados presented by the National Union of Public Workers (NUPW)

Allegations: The complainant alleges that the Government refuses to engage in collective negotiations over a material condition of the employment of customs officers and guards in Bridgetown Port. The complainant further alleges that the Government had made deductions from the salaries of employees who had taken strike action in protest of the Government's refusal to negotiate with respect to this matter

315. The complaint is contained in a communication from the National Union of Public Workers (NUPW) dated 15 December 2005.

316. The Government submitted its observations in a communication dated 11 January 2007.

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

A. The complainant's allegations

318. In its communication of 15 December 2005, the complainant states that in March 2003 the Government installed a CCTV surveillance/security system in Bridgetown Port, without any consultation with the workers or their trade unions. The complainant's view is that the installation of such a system constitutes a unilateral imposition of a substantial alteration in the terms and conditions of employment of the affected officers, namely the customs officers and guards. By a letter of 16 June 2003, the complainant submitted a draft agreement (a copy of which is attached to its communication) aimed primarily at limiting access to the images generated by the CCTV system, so as to protect the customs employees and their immediate families by safeguarding their identities from drug traffickers, gun runners and others engaged in illegal activities.

319. The complainant maintains that, although it had sought negotiations over this issue through several written requests, the Government has steadfastly refused to remove the CCTV system or engage in collective bargaining with respect to the issue. The complainant adds moreover that, following a strike to protest the system's use, which took place over seven days in March–April 2003, the Government made deductions from the salaries of the participating employees in respect of the days of protest action.

320. The complainant attaches several documents in support of its allegations, including, inter alia: (1) communications of 30 July, 19 August and 25 September 2003, from the complainant and addressed to the Ministry of Finance, relating to proposed negotiations with the Government over the use of the CCTV system in Bridgetown Port. The 30 July 2003 letter refers to a portion of the draft minutes of a 3 April 2003 meeting held at the Ministry of the Civil Service to discuss the surveillance system, in which the Permanent Secretary of the Ministry is quoted as having stated that the Government "was not negotiating the placement or use of the cameras in Bridgetown Port"; (2) a communication from the complainant to the Ministry of the Civil Service, dated 31 July 2003, which refers to a circular from the comptroller of customs stating the Government's intention to make deductions from the salaries of customs staff who had participated in industrial action; and (3) a communication addressed to the complainant from the Ministry of Finance, dated 15 August 2003, which refers to the 3 April 2003 meeting held at the Ministry of Civil Service and confirms that the position set forth by the Permanent Secretary at the said meeting remains unchanged – there would be no compromise on the matter of security.

B. The Government's reply

321. In a communication of 11 January 2007, the Government states that in March 2003, senior management of the Barbados Port Inc. and the Customs and Excise Department discussed plans for enhancing the security of the Bridgetown Port, which included the installation of cameras. Part of those initial consultations included a presentation of the port's security plan to the Marine and Aviation Security Committee, which is always attended by the Comptroller of Customs. Following the start-up of the camera installation process, discussions and meetings were ongoing with management of the customs and the port, and a comprehensive plan showing the location of the cameras together with a Protocol for the proper functioning of the enhanced security measures at the port was developed. The Protocol was then refined to cover the following areas: provision for joint monitoring of the camera systems, collaboration on use and destruction of the data/information, investigative procedures, establishment of a joint Management Committee to review the operation of the camera surveillance and identification of training opportunities.

322. The Government states that with the increased security requirements of the shipping industry following the events of 11 September 2001, and the consequent establishment of the International Ship and Port Facility Security Code (ISPS) by the International Maritime Organization, the port was mandated to carry out specific security-enhancing measures, failure to comply with these measures would have caused Barbados to be blacklisted as an unsecured destination. The Government also had recognized the need for increased security at the port, and it was agreed that a number of initiatives would have to be taken, including the installation of the cameras. The Government contends that the installation of the camera system is not a change in the terms and conditions of service of the customs staff, since that term refers to fundamental "portable" terms and conditions of employment governing the relationship between an employer and employee.

323. According to the Government, the Barbados Port is legally responsible for taking any action it considers necessary to ensure the safety and security of all cargo in its care. During the customs officers' strike, the port authority had suspended the installation process and sealed the lenses on the cameras. However, once consultations leading to the drafting of the Protocol were complete the cameras were recommissioned. Since April 2006, the port authority has been awaiting confirmation from the Customs Department of its readiness to sign the Protocol.

324. The Government confirms that deductions were made from the pay of striking employees for the period of the strike, stating that under General Order 3.29 the salaries and wages of

officers and employees who go on strike will not be paid for any day or portion of a day during which they are on strike.

325. With respect to negotiations with the complainant, the Government states that a meeting between the Ministry of the Civil Service (MCS) and the complainant was held on 23 October 2003. At said meeting the MCS indicated that it was not obliged to negotiate the installation of the CCTV system at Barbados' ports of entry as that was a national security matter and therefore non-negotiable. The union's concerns, however, would be brought to the attention of the relevant agencies.

C. The Committee's conclusions

326. *The Committee notes that this complaint concerns the refusal to hold negotiations on the installation and usage of a CCTV surveillance system in Bridgetown Port – in spite of several requests by the complainant respecting the same. The complainant considers that the installation of the CCTV system constitutes a material alteration in the terms of the employment of the customs officers and guards as it may possess implications for their personal safety and security; the use of the surveillance system should therefore be subject to negotiations with the Government. The Government, for its part, maintains that the installation of the CCTV system does not constitute a change in the employees' terms and conditions of employment. The Government moreover had communicated to the complainant its position that the CCTV system's deployment is a matter of national security, and therefore not open to negotiations, but that the union's concerns would be brought to the attention of the relevant agencies.*

327. *In this respect, the Committee recalls that Article 4 of Convention No. 98 provides for the promotion of collective bargaining with a view to regulating the "terms and conditions of employment by means of collective agreement". The range of issues which may properly be subject to collective bargaining is consequently a very broad one, including, as it were, all matters which are primarily or essentially questions relating to conditions of employment; such matters include, but are not limited to: 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. [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 913].*

328. *Certain subjects may, however, be excluded from the scope of collective bargaining. For instance, with regard to allegations concerning the refusal to bargain collectively on certain matters in the public sector, the Committee recalled the view of the Fact-Finding and Conciliation Commission on Freedom of Association that "there are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation" [see* ***Digest****, op. cit., para. 920]. Nevertheless, the Committee also recalls that, even in cases involving matters which may be excluded from the scope of negotiation, such as the determination of the broad outlines of education policy, collective bargaining should still be allowed on the consequences such matters may have for conditions of employment [see* ***Digest****, op. cit., paras 922–923].*

329. *The Committee notes the complainant's statement that the very introduction of the CCTV system implies consequences for the personal safety of the customs staff and it refers specifically to the need to safeguard their identities. Bearing the above-noted principles in mind, the Committee is of the view that, although the decision to install a CCTV system may – to the extent that it forms part of a broader Government policy on port security –*

reasonably be regarded as lying outside the scope of collective bargaining, it nonetheless considers that the presence of such a system may have an impact upon the customs staff's conditions of employment, which should be the subject of consultation and negotiation between the parties. The Committee recalls that, when reviewing another complaint involving customs officials, it had emphasized the importance it attaches to the promotion of dialogue and consultations on matters of mutual interest between the public authorities and the most representative occupational organizations of the sector involved [see 299th Report, Case No. 1808 (Costa Rica), para. 380], and requests the Government to enter into dialogue with the union on the impact that the surveillance system may have on the terms and conditions of employment of customs staff. The Committee suggests that, in the event of deadlock, the Government, in consultation with the social partners, give consideration to providing, in respect of the matters raised, adequate, impartial, and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which awards, if and when made, are fully and promptly implemented. The Committee requests the Government to keep it informed of developments in this respect.

330. *As regards the deductions from the pay of employees for the days in which they participated in industrial action, the Committee recalls that salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles [see **Digest**, op. cit., para. 654]. Consequently, the Committee will not pursue its examination of this matter.*

C. The Committee's recommendation

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

The Committee requests the Government to enter into dialogue with the union on the impact that the surveillance system may have on the terms and conditions of employment of customs staff and suggests that, in the event of deadlock, the Government, in consultation with the social partners, give consideration to providing, in respect of the matters raised, adequate, impartial, and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which awards, if and when made, are fully and promptly implemented. The Committee requests to be kept informed in this respect.

CASE NO. 2491

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

Complaint against the Government of Benin presented by the National Trade Union of Workers of the Ministry of Public Service, Labour and Administrative Reform (SG/SYNTRA/MFPTRA)

Allegations: (1) Various measures taken by the authorities to separate trade union officials from their rank and file members, including the

transfer of ten members; (2) restrictions on the right to participate in trade union meetings; (3) acts of favouritism towards the SYNATRA trade union on the part of the authorities; (4) reduction or withholding of the retraining allowances of nine trade union members, because of their participation in a strike; and (5) unilateral modification of the system of management allowances, to which the complainant organization had been entitled

332. The complaint is contained in communications from SYNTRA–MFPTRA dated 26 May 2006 and 7 July 2006.

333. The Government sent its observations in communications dated 18 July 2006, and 11 September 2006.

334. Benin 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

335. In its communication dated 26 May 2006, the National Trade Union of Workers of the Ministry of Public Service, Labour and Administrative Reform (SG/SYNTRA/MFPTRA) alleges that the previous Government's division of the former Ministry of Public Service and Administrative Reform into two ministries (Ministry of Labour, Public Service and Administrative Reform and the Ministry of Administrative and Institutional Reform) has separated the trade union officials from their rank and file members, thereby weakening and destabilizing the organization and scattering its officials.

336. Moreover, the authorities have transferred union members (with no justification in terms of staffing needs), interfered in the running of the complainant organization and sown discord between trade unions operating within the same working environment.

337. More specifically, the complainant organization states that the authorities are determined to eliminate it. On 24 May 2005, ten officials and members of the complainant organization (all members of the executive committee and rank and file leaders in the Archive Department for Disputes and Disciplinary Matters (DACAD) and the Department for Civil Servant Career Management (DGAE)) were transferred and thus separated from their respective rank and file members. Union activists in the complainant organization are also alarmed by threats of transferring them to locations a long way from the capital, Cotonou, if they engage in further strike action (as in the case of trade union member Henri Akpaoka following the strike action in 2003, for example).

338. The complainant organization encloses a letter from the head of the Office of the Minister of Public Service dated 12 May 2005, stating that "permission will not be granted for any meeting of workers to be held without clear information as to the agenda" and consequently requesting the trade union to postpone the planned meeting mentioned in its correspondence – in reference to the holding of a general assembly of ministry workers. Various letters testifying to the Ministry's interference are enclosed with the complaint, including one dated 9 November 2005 refusing permission to hold training sessions on administrative ethics and stating that the conference room was in any case unavailable.

339. The complainant organization emphasizes that the Office of the Minister shows favouritism towards the Autonomous Trade Union of Workers of MFPTRA (SYNATRA) trade union and grants it special facilities (such as a vehicle for dealing with administrative formalities connected with management and performance allowances).

340. Finally, the drafting of the order to extend the specific management allowance was entrusted to the SYNATRA trade union (which is close to the Office of the Minister, according to the complainant organization), which has never called for a strike in the past. Moreover, nine members of the complainant organization had their retraining allowances reduced (by more than half) or withheld for taking part in strike action.

341. In its communication dated 7 July 2006, the complainant organization claims that, on 12 September 2003, a memorandum (No. 062/MFPTRA/DC/SGM/SA) officially confirmed the consensus reached by workers at a general meeting held at the Ministry of Public Service and Labour, to the effect that a specific management allowance of 1,000 CFA francs was payable to SYNTRA–MFPTRA. The complainant organization adds that the Ministry, with the intention of sowing discord, annulled the memorandum, thereby favouring the "employer-biased" trade union SYNATRA, which had, for example, encouraged its members not to take part in the April 2004 strike and to place their confidence in the Office of the Minister.

342. The complainant organization encloses the text of the new memorandum, No. 055, (following the annulment of memorandum No. 062), which states that:

> In view of the existence of several trade union organizations within the Ministry of Public Service, Labour and Administrative Reform, memorandum No. 062/MFPTRA/DC/SGM/SA of 12 September 2003, concerning the payment of one thousand (1,000) CFA francs per beneficiary of the specific civil servant management allowance to the Trade Union of Workers of the Ministry of Public Service, Labour and Administrative Reform (SYNTRA–MFPTRA), is and remains annulled.
>
> Consequently, the payment of the allowance must be agreed upon between the aforementioned trade union organizations.

B. The Government's reply

343. In its communication dated 18 July 2006 the Government indicates that, in the opinion of SYNTRA–MFPTRA, the complainant organization, the transfers (indicated on assignment slip No. 041-MFPTRA/DC/SGM/DA/SA of 24 May 2005) are illegal, as they mean separating members of the executive committee of the trade union from their rank and file, thus hampering trade union activities at the Ministry of Public Service and Labour. The Government observes that, in considering this allegation, there are a number of points that show that the transfers of civil servants were designed solely to ensure the smooth running of the public service and were therefore in no way aimed at a particular trade union. Firstly, the transfer slip in dispute concerns 31 civil servants, whereas SYNTRA–MFPTRA mentions only ten as being members of its executive committee and rank and file, or so-called supporters of SYNTRA–MFPTRA. Secondly, the redeployment plan affected all the general directorates within the Ministry and not just the Public Service Department, as SYNTRA–MFPTRA claims. Finally, all the employees concerned were transferred from their former services to services located in the same city, less than 5 kilometres away. Some have even been relocated on the same premises, such as the Department for Civil Servant Career Management, the Customer Relations Office and the Department of Administration.

344. The complaint refers to the division of the former Ministry of Public Service, Labour and Administrative Reform into two separate departments, the Ministry of Labour and Public

Service (MFTP) and the Ministry of Administrative and Institutional Reform (MRAI). The civil servants employed by the former General Directorate of Administrative Reform and Modernization (DGRMA) are now part of the Ministry of Administrative and Institutional Reform, whether they are trade union members or not. The presence of trade union members in the MRAI does not therefore point to any injustice or to some kind of plot to weaken the trade unions.

345. With regard to memorandum No. 055/MFPTRA/DC/SGM/SA of 24 November 2004 annulling an earlier memorandum and requiring that all payments from the specific civil servant management allowance, initially credited to SYNTRA–MFPTRA, must be agreed upon between the various trade unions, the Government states in its communication dated 11 September 2006 that this decision is justified by the fact that there are two trade union organizations at the Ministry of Labour and Public Service, the National Union of Labour Administration Staff (SYNACAT) and SYNATRA. Making automatic deduction from the allowances of all civil servants was therefore no longer viable, since the fact that no share was credited to SYNACAT or SYNATRA could lay the system open to charges of being discriminatory. The administration did not at any time take an arbitrary decision, nor is it guilty of interfering in trade union affairs; on the contrary, it has guaranteed equality of treatment.

346. With regard to SYNTRA–MFPTRA's allegation that officials of the Ministry of Public Service and Labour have opposed the holding of its consultation meetings, the Government stresses that trade union meetings have never been prohibited at the ministry level. However, workplace security is the exclusive responsibility of the head of department, who must take appropriate action in the event of public disturbances. The request for information on the agenda of a meeting cannot therefore be interpreted as interference in the life and affairs of the trade union organization, since the meeting in question could have been held at the workplace, during working hours. Finally, it should be pointed out that this request was made on the day after the political strikes called by SYNATRA–MFPTRA, in accordance with the decision of the Confederation of Workers' Trade Unions of Benin, of which SYNTRA–MFPTRA is a member.

C. The Committee's conclusions

347. *The Committee notes that the allegations concern: (1) various measures taken by the authorities to separate trade union officials from their rank and file, including the transfer of ten members; (2) restrictions on the right to participate in trade union meetings; (3) acts of favouritism towards the SYNATRA trade union on the part of the authorities; (4) reduction or withholding of the retraining allowances of nine trade union members, because of their participation in a strike; and (5) unilateral modification of the system of management allowances, to which the complainant organization had been entitled.*

348. *With regard to the allegations concerning the transfer of union officials and members belonging to the complainant organization, the Committee notes that, according to the Government, these transfers were carried out with the aim of ensuring the smooth running of the public service and concerned 31 civil servants, of whom only ten were mentioned by the complainant; the transfers took place in all the Ministry's General Directorate Ministry and involved relocation in the same city within a distance of 5 kilometres or on the same premises. Nevertheless, the Committee draws the Government's attention to the fact that the transfer of trade union members is bound to have had an impact on the effective functioning of the trade union and notes that the Government has not mentioned holding any consultations with the complainant organization during the transfer process. The Committee requests the Government to examine, with the complainant organization, how best to limit the impact of the transfer of the trade union members in question and*

requests the Government to engage in full and frank consultation whenever it deems it necessary to transfer significant numbers of workers, including trade union members.

349. *With regard to the alleged restrictions on the right to hold meetings, the Committee notes that, according to the Government, trade union meetings have never been prohibited and the request for information on the agenda was apparently connected to workplace security. The Committee points out, however, that the trade union should be able to hold meetings without the need to communicate the agenda to the authorities, in accordance with the principle embodied in Article 3 of Convention No. 87, whereby organizations have the right freely to organize their activities without interference from the authorities. Moreover, the Committee underlines the fact that the complainant organization sent a copy of a communication from the Office of the Minister of Public Service, dated 9 November 2005, refusing permission to hold training sessions on administrative ethics and indicating that the conference room was in any case unavailable. Bearing in mind the Government's statement that trade union meetings have never been prohibited at the Ministry, the Committee requests the Government to respect fully the right to hold trade union meetings without demanding the communication of the agenda, which should remain an internal trade union matter.*

350. *With regard to the allegation concerning the unilateral modification of the system of management allowances, to which the complainant organization had been entitled, the Committee notes the Government's statement that this change took account of the fact that at least three trade unions existed in the Ministry of Public Service and was designed to ensure equality of treatment between them.*

351. *Finally, noting that the Government has not sent its observations on the allegations concerning: (1) acts of favouritism on the part of the authorities towards the SYNATRA trade union (which allegedly has close links to the Director of the Office of the Minister); and (2) the reduction or withholding of the retraining allowances of nine trade union members because of their participation in a strike, the Committee requests the Government to clarify these matters with the complainant organization, with a view to ensuring full respect for the principles of freedom of association. The Committee requests the Government to keep it informed in this regard.*

The Committee's recommendations

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

(a) With regard to the allegations concerning the transfer of trade union officials and members belonging to the complainant organization, the Committee requests the Government to examine, with the complainant organization, how best to limit the impact of the transfer of the trade union members in question and requests the Government to engage in full and frank consultation whenever it deems it necessary to transfer significant numbers of workers, including trade union members.

(b) With regard to the alleged restrictions on the right to hold meetings, the Committee, bearing in mind the Government's statement that trade union meetings have never been prohibited at the Ministry, requests the Government to respect fully the right to hold trade union meetings without demanding the communication of the agenda, which should remain an internal trade union matter.

(c) With regard to the allegations concerning: (1) acts of favouritism on the part of the authorities towards the SYNATRA trade union (which allegedly has close links to the Director of the Office of the Minister); and (2) the reduction or withholding of the retraining allowances of nine trade union members because of their participation in a strike, the Committee requests the Government to clarify these matters with the complainant organization, with a view to ensuring full respect for the principles of freedom of association. The Committee requests the Government to keep it informed in this regard.

CASE NO. 2470

INTERIM REPORT

Complaint against the Government of Brazil presented by — the Single Central Organization of Workers of Brazil (CUT) and — the Unified Trade Union of Chemical Industry Workers (Vinhedo Region)

Allegations: Anti-union practices; establishment of a parallel workers' representative body at the instigation of the company; non-recognition of the National Trade Union Committee; pressure on workers to resign from the Union

353. The complainants presented their complaint in communications dated 1 December 2005 and 13 January 2006.

354. The Government sent its observations in a communication dated 12 September 2006. In a communication dated 2 October 2006, the Government sent UNILEVER's comments on the complaint.

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

A. The complainants' allegations

356. In its communication dated 1 December 2005, the complainant organization alleges non-compliance by IGL Industrial Ltd, part of the transnational economic group UNILEVER, with the guarantees relating to freedom of association provided for in Conventions No. 87 and No. 98.

357. The complainants state that the Unified Trade Union of Chemical Industry Workers (Vinhedo Region) – hereafter referred to as the Union – represents approximately 2,000 chemical industry workers in Vinhedo, of whom 822 are members. They also indicate that 313 of the 524 workers of IGL Industrial Ltd are members of the Union – a unionization rate of 59.7 per cent, which is far above the average for the country.

358. Specifically, the complainants allege that over the past 20 years, the company systematically engaged in authoritarian practices and avoided social dialogue, as can be seen from the long list of disputes that it has had with the Union during that time.

359. By way of example, the complainants cite a three-day work stoppage in 1991 that ended with the intervention of the Special Force of the Military Police of the State of São Paulo, which was requested by the company to stop strikers demonstrating outside their plant. During the 1990s, the Union called a number of work stoppages that lasted several hours. Since 2001 it has halted the company's production three times for one day to back its demand for higher wages and renewed collective agreements and to protest against the mass dismissals of recent years. IGL Industrial Ltd reacted on every occasion by making threatening telephone calls to workers and filming the demonstrations so as to identify the workers involved and put pressure on them. In addition, the company systematically infiltrates the workers' meetings and denies union officials access to the industrial plant. When access is allowed, they have to be accompanied by security guards, which makes contact with the workers difficult.

360. During the last work stoppage called by the Union in March 2005, the company ordered the security service to cut the barbed-wire fences so that the strike breakers could avoid the strikers' picket line. In addition, line managers and coordinators tried to intimidate workers into returning to work, even outside the premises.

361. The complainants allege that the company set up its own form of workers' representation in the workplace, parallel to the Union, through a body known as the Working Group on Improving the Environment. The Group, which is sponsored by the management of IGL Industrial Ltd and at its beck and call, is acting as an enterprise trade union – a legal impossibility in Brazilian labour law. Moreover, UNILEVER refuses to recognize the National Trade Union Committee of UNILEVER Brazil, which encompasses all the representative trade unions from all plants in the country.

362. The most recent and serious step taken by the company, which led to a consultation with MERCOSUR's Social and Labour Committee and to this complaint, has been its campaign to get employees to leave the Union. This began in January 2005 with the distribution of forms of resignation from the Union and culminated in March 2005 with the setting up of a toll-free 0800 telephone line, which inter alia provided company employees with the option of requesting their resignation from the Union. A worker, who selected this option, was assisted by a company agent to fill in resignation forms and send them to the Union. According to the complainant, this situation, which lasted for about a month, constituted serious interference in the legitimate activities of the Union.

363. In conclusion, the complainant organizations request that the Government of Brazil be recommended to guarantee, freedom to demonstrate inside and outside the premises of IGL Industrial Ltd, freedom to join the Union, freedom to form peaceful picket lines without interference from the company; abstention by the employer from any practice giving incentives to leave the Union, recognition of the National Trade Union Committee by the company, and the company's abstention from filming or photographing demonstrations and workers' meetings without the prior consent of the individuals concerned and the Union.

B. The Government's reply

364. In its communication of 12 September 2006, the Government reports that a complaint against UNILEVER for alleged violation of the principles contained in the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD) was submitted to Brazil's National Focal Point by the Unified

Trade Union of Chemical Workers (Vinhedo Region) and the National Confederation of Chemical Workers affiliated to the Single Central Organization of Workers (CUT), following the company's announcement of the closure of the production plant in Vinhedo and its transfer to the municipality of Ipojuca, without having informed the workers' representatives.

365. Another complaint against the company for alleged anti-union practices was submitted by the CUT to MERCOSUR's Social and Labour Committee in May 2005, in the form of a consultation, specifically concerning the distribution of a resignation form entitled "Exclusion of trade union members" and the setting up of a toll-free telephone line by the Human Resources Department so that employees could ask for union dues not to be deducted from their payslip. This practice, which had already been reported to the Ministry of Labour and Employment with a request for intervention by the Public Prosecutor for Labour, is also the subject of the present complaint before the Committee on Freedom of Association.

366. The Government reports that the Ministry of Labour and Employment sent an investigator from the Public Prosecutor's Office to interview the parties concerned and sent a written request to UNILEVER for its comments on the complaint.

367. In its meeting with the investigator from the Public Prosecutor's Office, the Union's representatives outlined their complaint and added a number of new points. In particular, they said that the company was pursuing an anti-union policy that could not always be proven with objective data but was reflected in its constant efforts to undermine the representative role of the Union. In addition, during working hours the management tries to pressure the workers to leave the Union. Until 2004 trade union officials employed in the company had to be accompanied by security guards when entering company premises; after this was reported to the authorities, the company adopted the same procedure for all its employees outside working hours. The Union does not take part in negotiations on profit sharing, as required by law. The company had set up an internal telephone service for workers to request to leave the Union, but this was deactivated following a complaint by the Union. The company organizes discussion forums with the workers – such as an open forum known as *Programe Aberto Para Ouvir* and the Working Group on Improving the Environment – and this would normally be a positive step, except that they do not allow the Union to take part. Lastly, the complainants allege that the company does not send the Union copies of the meetings of the Occupational Accidents Committee.

368. At the meeting with the investigator from the Public Prosecutor's Office the company's representatives denied the existence of any practice, covert or otherwise, aimed at restricting trade union activities. They stated that being accompanied by security guards applies to any non-member of the staff, whether a union official or not, including employees when visiting the plant outside working hours.

369. With regard to the alleged setting up of a toll-free telephone line to help workers resign from the union, they said that the company has an internal telephone service for various purposes, one of which was for workers to request that their union dues cease to be deducted from their payslip. In such cases, workers were advised first to contact the Union to make their resignation official. The company's representatives did not give any explanation why the telephone service had been stopped. On this point the Government encloses the text of a communication issued by the company, which was sent to it by the Union, entitled "Exclusion of Union members", which reads: "Call the human resources 0800 number to request that union dues not be deducted from your payslip and send us the call number".

370. With regard to the Working Group on Improving the Environment, the company's representatives stated that this had ceased to exist in 2004. That and similar forums such as the *Programe Aberto Para Ouvir* serve as a channel of communication with employees for discussing ways of improving the quality of life at work. Participation is open to all workers and the quarterly meetings take place during working hours. The company's representatives specified that union officials not employed by the company are not allowed to take part because the forum is open only to staff members. A Global People Survey was later introduced with similar objectives as those of the Working Group on Improving the Environment. They added that there was no written documentation about how these programmes work.

371. Lastly, the Government states in its communication that the Ministry of Labour and Employment, through the Regional Labour Office in São Paulo, has full jurisdiction to investigate any instance of non-compliance with labour legislation and to facilitate agreement between the parties through social dialogue.

Observations made by UNILEVER and communicated by the Government

372. In its communication of 2 October 2006, the Government communicated UNILEVER's observations on the complaint. UNILEVER states that it has been operating in Brazil for 80 years and that its 13 factories in the country employ more than 13,000 workers. Its Code of Business Principles calls for respect for any legitimate workers' representation, as well as their right to organize. The company believes in dialogue and keeps channels of communication with its workers permanently open. UNILEVER has direct contact with 15 different trade unions in the country, and the Unified Trade Union of Chemical Workers (Vinhedo Region) represents only 3.4 per cent of all its workers in the country. It notes that the high rate of unionization mentioned by the Union is itself enough to disprove the company's alleged anti-union practices and authoritarian attitude. UNILEVER rejects outright the allegations made in the complaint and states that it has always acted in such a way as to protect the physical integrity of its workers and its assets and has always respected the free exercise of the right of trade unions to demonstrate, even when it has been exercised violently and aggressively.

373. With regard to the alleged campaign encouraging workers to leave the Union, UNILEVER states that in January 2005 it introduced a new human resources service for its workers by setting up an 0800 telephone line so that all its employees in Latin America could ask questions about staff administration matters (e.g., reimbursement of medical expenses, enrolment in training courses and authorization for the deduction of union dues from the payslip). The service is provided by a subcontracted enterprise sponsored by UNILEVER. UNILEVER states that the Union is distorting the truth when it claims that a service was introduced in March 2005 to encourage workers to leave the union; the service was in fact introduced in January and had nothing to do with trade union affairs. What happened was that, because of the large number of requests for information about how to leave the trade union, which entails suspending the monthly deduction of union dues from the payslip, an employee of the subcontracted enterprise, on his own initiative and in good faith but against management policy, decided to produce an information sheet and put it on the notice board to make his job easier. The information sheet was removed from the board on the same day, and not a month later as claimed by the Union; it was replaced by another communication reiterating UNILEVER's respect for the freedom of association of its workers and its position on the subject under its Code of Principles. The terms of the communication were even agreed with the Union.

374. With regard to the allegation concerning the Working Group on Improving the Environment, UNILEVER explains that, in its constant effort to maintain permanent

channels of communication with its workers, it has set up, developed and perfected various methods of doing so. One such method is the system known as *Vai e vem* that was set up in 1998, which has been modified and adapted over the years but whose primary purpose is to provide employees with information and to hear their opinion. The *Vai* component of the system involves giving employees company progress reports through information bulletins and general meetings, etc.; the *Vem* component enables employees freely to express their opinions and demands, to clarify any doubts they might have, to make suggestions, and so on. This has taken many forms: the broadest in scope was a survey carried out two years ago with a 93 per cent response rate; other programmes included "Talk to the Chairman", "Morning coffee with the Director", etc. UNILEVER stresses that the Working Group on Improving the Environment set up in 1988 was only one of the methods used and was in no way intended to take the place of or discourage trade union activities.

375. With regard to recognition of the National Trade Union Committee, UNILEVER maintains that the Unified Trade Union of Chemical Workers (Vinhedo Region) has persistently demanded that it be represented on the Committee, which currently consists of only three trade unions which together represent 1.9 per cent of UNILEVER's workers. The other 11 trade unions, which represent 95 per cent of the staff, consider the initiative as a threat to their organization and do not recognize the National Trade Union Committee as representing their interests.

376. Lastly, UNILEVER attaches to its communication three letters from different trade unions in which, in very similar terms, the general secretaries affirm that the company respects its collective agreements and the ILO's Conventions.

C. The Committee's conclusions

377. *The Committee recalls that the allegations in this case refer to anti-union practices aimed at the Unified Trade Union of Chemical Workers (Vinhedo Region) (hereinafter, the Union), the establishment of a parallel workers' representative body at the instigation of the company, non-recognition of the National Trade Union Committee, and pressure on workers to resign from the trade union operating in IGL Industrial Ltd, which is part of the UNILEVER transnational economic group. The Committee observes that, in addition to the information sent by the complainants and the Government, it has before it the observations of UNILEVER. The Committee also notes with concern that, by and large, the Government confined itself to transmitting the information obtained from both parties, without expressing any judgement.*

Anti-union practices: Intimidation of unionized workers on account of their participation in protests and work stoppages

378. *The Committee notes that, according to the complainants, UNILEVER has for the past 20 years discouraged social dialogue and pursued an anti-union policy. In particular, the Committee notes that the complainants allege a series of anti-union practices such as threatening telephone calls to workers following their participation in work stoppages, the filming of demonstrations so as to identify employees and put pressure on them, and the infiltration of workers' meetings by managers. In addition, they allege that during one work stoppage in March 2005 the company ordered the security unit to cut the barbed-wire fences so that strike-breakers could avoid the picket line and that on the same occasion managers tried to intimidate workers to return to work, even outside the industrial plant.*

379. *The Committee notes that the company's representatives deny the existence of any practice, covert or otherwise, aimed at restricting trade union activities and stress that their Code of Business Principles calls for any legitimate workers' representation to be respected. The Committee further notes that, according to the company's representatives, the high rate of membership of the Union (59.7 per cent) is itself enough to disprove the allegations of anti-union practices.*

380. *The Committee observes the contradiction between the statements of the complainants and those of the company's representatives. The Committee regrets that the Government's reply does not contain specific observations on the alleged anti-union practices, in particular the telephone threats, the filming of demonstrations and the infiltration of workers' meetings by managers, and requests the Government to carry out an investigation into those allegations and to send it detailed information on the subject.*

381. *With regard to the allegation concerning the procedure followed by security guards accompanying union officials inside the plant, the Committee notes that, according to the statement of the company's representatives, confirmed by the complainants, this procedure now applies to anybody who is not a member of the staff, whether or not they are union officials, and including its own employees when the visit is outside their working hours. The Committee recalls the general principle that, for the right to organize to be meaningful, the relevant workers' organizations should be able to further and defend the interests of their members by enjoying such facilities as may be necessary for the proper exercise of their functions as workers' representatives, including access to the workplace of trade union members [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *fifth edition, 2006, para. 1106]. At the same time, the Committee is of the opinion that the accompaniment by security guards when accessing an enterprise may be considered a necessary measure in certain circumstances. Considering, however, that such a procedure should not result in any interference in internal trade union affairs or in the capacity of trade union representatives to communicate freely with workers in order to apprise them of the potential advantages of unionization, the Committee requests the Government to take steps to ensure that union officials have the necessary space to communicate freely with workers without interference from the employer and without the presence of the employer or the security guards. It requests the Government to keep it informed in this regard.*

Establishment of a parallel workers' representative body at the request of the company

382. *With regard to the alleged establishment by the company of its own form of workers' representation in the workplace, parallel to the Union, through a body known as the Working Group on Improving the Environment, the Committee notes that, according to the complainants, this and other discussion forums could be positive if the Union were not prevented from taking part and if they did not play the role of a company union sponsored by the management. The Committee also notes the observations of the company's representatives according to which: the Working Group in question and other similar programmes serve as a channel of communication with employees in discussing ways of improving the quality of life at work and respect the right of workers to be informed and to express their opinion; participation is open to all workers and the quarterly meetings take place during working hours; union officials not employed by the company are not allowed to participate because it is an activity which is only open to staff members. The Committee notes that UNILEVER stresses that the Working Group is only one of the methods used as a channel of communication and that it is in no way intended to take the place of or discourage trade union activities. Considering that in themselves the discussion forums and communication programmes promoted by the company do not constitute a violation of freedom of association, the Committee requests the Government to adopt measures to*

ensure, in light of the findings of the investigation into the alleged anti-union practices, that these are not used to the detriment of the Union, which is the only body that can guarantee independence both in its establishment and its operation.

Non-recognition of the National Trade Union Committee of UNILEVER

383. *The Committee notes that the complainants allege that UNILEVER refuses to recognize the National Trade Union Committee of UNILEVER Brazil formed by unions representing its plants throughout the country. The Committee notes that on this matter UNILEVER states that the Union has persistently demanded trade union representation through that committee but that the latter currently consists of only three other trade unions. The other 11 trade unions, which represent 95 per cent of the staff, consider the initiative as a threat to their organization and do not recognize that committee as representing their interests. The Committee observes the contradiction between the version of the complainants and that of the company's representatives. Observing with regret that the Government has not sent its observations on the matter, the Committee requests it to promptly carry out an investigation into this allegation and to inform it accordingly.*

Pressure on workers to leave the Union

384. *Lastly, the Committee notes the complainants' allegation that the company embarked on a campaign to encourage employees to leave the trade union, which began in January 2005 with the distribution of resignation forms and culminated in March 2005 with the setting up of a toll-free telephone line by the Human Resources Department which offered, among various options, the possibility to request resignation from the Union. This situation, they allege, lasted for about a month. The Committee notes the company's observations that this service, provided through a subcontracted enterprise, was intended for asking questions about staff administration and in principle had nothing to do with trade union affairs. However, because of the large number of requests for information about how to leave the trade union and suspend the monthly deduction of union dues from the payslip, an employee of the subcontracted enterprise produced the information sheet on his own initiative and put it on the notice board. The company claims that the sheet was taken down the same day.*

385. *The Committee considers that the distribution of resignation forms and the setting up of a toll-free telephone line providing information on how to resign from the Union constitute interference in the internal affairs of the Union. In that regard, the Committee recalls that Article 2 of Convention No. 98 stipulates that workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration, and requests the Government to put into place a mechanism that would enable it to rapidly redress any effects of this type of interference, including through the imposition of sufficiently dissuasive sanctions on the employer where appropriate, and to avoid such incidents in the future.*

The Committee's recommendations

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

(a) The Committee notes with concern that, by and large, the Government confined itself to transmitting the information obtained from both partners without expressing any judgement.

(b) The Committee requests the Government to carry out an investigation into the allegations of various anti-union practices carried out by the company (telephone threats to workers, filming of demonstrations in order to put pressure on the employees, infiltration of workers' meetings by managers, cutting of barbed-wire fences to avoid the picket line and intimidation of workers to return to work during a work stoppage) and to send it detailed information in that regard.

(c) Observing that accompaniment by security guards could be considered in certain circumstances as a necessary measure, but that such a procedure should not result in any interference in internal trade union affairs or in the capacity of trade union representatives to communicate freely with workers in order to apprise them of the potential advantages of unionization, the Committee requests the Government to take steps to ensure that union officials have the necessary space to communicate freely with workers without interference from the employer and without the presence of the employer or the security guards. It requests the Government to kept in informed in this regard.

(d) With regard to the establishment of a workers' representation body parallel to the Union, and considering that the discussion forums or communication programmes promoted by the company do not in themselves constitute a violation of freedom of association, the Committee requests the Government to adopt measures to ensure, in light of the findings of the investigation into the alleged anti-union practices, that these are not used to the detriment of the Union, which is the only body that can guarantee independence both in its establishment and its operation.

(e) Observing with regret that the Government has not sent its observations on UNILEVER's non-recognition of the National Trade Union Committee, the Committee requests the Government to carry out an investigation promptly into this allegation and to inform it accordingly.

(f) With regard to the distribution of resignation forms and the setting up of a toll-free telephone line providing information on how to resign from the Union, the Committee requests the Government to put into place a mechanism that would enable it to rapidly redress any effects of this type of interference, including through the imposition of sufficiently dissuasive sanctions on the employer where appropriate, and to avoid such incidents in the future.

CASE NO. 2496

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

Complaint against the Government of Burkina Faso
presented by
— the General Labour Federation of Burkina Faso (CGT–B)
— the National Confederation of Workers of Burkina (CMTB)
— the Trade Union Confederation of Burkina Faso (CSB)
— Force ouvrière/National Union of Free Trade Unions (FO/UNSL)
— the National Organization of Free Trade Unions (ONSL) and
— the Trade Union of Workers of Burkina Faso (USTB)

Allegations: The complainants allege that, as a result of their participation in a general strike in support of a number of socio-economic claims, striking workers and their organizations were subjected to threats, intimidation and widespread requisitioning by the Government and employers, based on a restrictive definition of strikes in law

387. The complaint is contained in communications dated 29 May and 12 June 2006 from the General Labour Federation of Burkina Faso (CGT–B), the National Confederation of Workers of Burkina (CMTB), the Trade Union Confederation of Burkina Faso (CSB), Force Ouvrière/National Union of Free Trade Unions (FO/UNSL), the National Organization of Free Trade Unions (ONSL) and the Trade Union of Workers of Burkina Faso (USTB).

388. The Government sent its observations in a communication dated 3 October 2006.

389. Burkina Faso 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

390. In their communications of 29 May and 12 June 2006, the complainants allege that, as a result of their participation in a general strike in support of a number of socio-economic claims, striking workers and their organizations were subjected to threats, intimidation and widespread requisitioning by the Government and employers, based on a restrictive definition of strikes in law.

391. In particular, they claim that, even though the right to strike is protected by the Constitution, article 22 of which provides that "the right to strike is guaranteed in Burkina Faso. It shall be exercised in accordance with the laws in force", Act No. 33/2004/AN issuing the Labour Code defines this right in a very restrictive manner. In section 351, the Act provides that: "A strike is a concerted and collective cessation of work with a view to supporting pre-determined occupational claims, which the employer refuses to meet. Any

stoppage of work that does not correspond to an occupational claim is unlawful. The right to strike does not authorize workers to perform their work in conditions other than those set out in their employment contract or as practised in the occupation and does not include the right to use the premises of the enterprise in an arbitrary manner."

392. In the view of the complainants, this definition is restrictive both in terms of the purpose of "supporting […] occupational claims" and the condition placed on its exercise, namely "pre-determined occupational claims, which the employer refuses to meet". Sections 351 et seq. (352–358) of the Labour Code therefore constitute serious hindrance to the exercise of the right to strike and call into question the very existence of unions of workers covering several employers, such as central organizations, federations and confederations of trade unions.

393. The complainants allege that, based on these provisions, employers are encouraged by the labour administration and the Government to impose sanctions on workers who comply with calls to strike made by central organizations of trade unions.

394. According to the information provided by the complainants, the negotiations between the Government and the trade unions that began on 4 May 2006 broke down the following day for reasons attributable to the Government. The latter decided to raise the price of hydrocarbons and other motor oils by between 5 and 39 per cent, even though this was a prominent issue in the minimum platform of trade union claims and the list of concerns submitted to the Government for the negotiations of 4 and 5 May 2006. Thereafter, the central organizations of trade unions and the autonomous trade unions left the negotiating table and issued a strike call for 23 and 24 May 2006.

395. The strike notice, in which the central organizations of trade unions and the autonomous trade unions warned that they were also calling on workers in the private, parapublic and informal sectors to strike, was communicated to the President of Burkina Faso, the President of the Council of Ministers and the Director-General of Labour and Social Security. The objective of the strike was to demand that the Government "respect workers and their trade union organizations, reverse the decision of 4 May to increase the price of hydrocarbons and reconsider its response to the various issues covered by their platform". This platform includes wage and pension increases, the various pending cases relating to the execution of court rulings and orders favourable to workers, the reduction of taxes on the main consumer goods, the establishment of unemployment benefit, an increase in the rate of family allowances, action to remedy the delays in promoting public officials, the implementation in the private sector of the wage increases decided upon by the Government in 2004 and respect for freedom of association and the right to strike and, consequently, the setting aside of penalties and the halting of threats against strikers.

396. In response to the strike notice, the Director-General of Labour and Social Security sent a communication to the trade unions (a copy of which is attached to the complaint) in which he reminds them that section 351(2) of the Labour Code provides that "any stoppage of work that does not correspond to an occupational claim is unlawful" and indicates that this must be an occupational claim made by workers to their employers, which is not the case of the workers covered by this strike call. He adds that section 357 provides that "Any lockout or strike is prohibited before conciliation and arbitration procedures have been exhausted", as they are in the context of collective disputes between workers and their respective employers, but not in the present case. Noting that employers in the private and informal sectors are not parties to the negotiations between the Government and the trade unions, he invites them to consider all the consequences of this strike movement so that the workers do not lose the rights guaranteed to them in law.

397. According to the complainants, the Director-General's communication constitutes a highly questionable interpretation of the Labour Code, which challenges the exercise of the right to strike. The above interpretation was also adopted by the President of the National Council of Employers of Burkina Faso, in a letter published in the press on Monday, 22 May, inviting its members to abide by the provisions of the relevant laws and regulations.

398. In conclusion, the complainants call for sections 351 et seq. to be withdrawn from the Labour Code in accordance with the Constitution of Burkina Faso and ILO Convention No. 87.

B. The Government's reply

399. In its communication of 3 October 2006, the Government refers to all the provisions adopted in Burkina Faso since it achieved national sovereignty which respect and give effect to freedom of association and its closely associated rights, including the right to strike, both in the various Constitutions and in the law.

400. In addition, Burkina Faso has ratified the relevant ILO Conventions on freedom of association and is demonstrating its goodwill through its efforts to give effect to the related international commitments.

401. With regard to the allegations that the labour administration and the Government encourage employers to penalize striking workers, the Government states that once the strike notice was received, its role was confined to informing the trade union organizations of the failure to comply with the legal provisions in force relating to strikes, as the procedures established under sections 336–347 of the Labour Code had not been exhausted. The labour administration was therefore merely exercising one of its functions, namely to provide guidance in the form of advice and recommendations to the social partners who, in this case, consisted of the workers. The Government also emphasizes that the trade union organizations responded to the call to strike without any hindrance on its part.

402. The Government maintains that its attitude is compatible with the principle of the Committee on Freedom of Association that "legislation which provides for voluntary conciliation and arbitration in industrial disputes before a strike may be called cannot be regarded as an infringement of freedom of association, provided recourse to arbitration […] does not, in practice, prevent the calling of the strike" [see *Digest of decisions and principles of the Freedom of Association Committee*, fourth edition, 1996, para. 378, and 238th Report, Case No. 1300, para. 292].

403. On the question of the unconstitutionality of sections 351–358 of the Labour Code, the Government states that the provisions in question do not in any way prejudice the right to strike, which is guaranteed by the Constitution of Burkina Faso. The Government recalls that these provisions, after defining strike action, set out the conditions governing the exercise of this right, which is not contrary to article 22 of the Constitution, under the terms of which the right to strike "shall be exercised in accordance with the laws in force". The laws in force in this case are the Labour Code and Act No. 45/60 of 25 July 1960, with which the labour administration rightly calls on the trade union leaders to comply. The Government refers in this respect to Article 8, paragraph 1, of Convention No. 87, under which, "In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land." The Government further recalls that, during its formulation, the Labour Code was submitted for opinion to the Labour Advisory Committee, a tripartite body set up under the responsibility of the Ministry of Labour by section 375 of the Labour

Code, and that it was examined and adopted by that body. The Government accordingly emphasizes the participation of workers, through their representatives, in the process of drawing up Act No. 33/2004/AN, which was the result of a minimum level of consensus between the State and the social partners.

404. Lastly, the Government affirms that sections 351–358 are not such as to prejudice the application of ILO Convention No. 87, nor to obstruct the exercise of the right to strike, as evidenced by the numerous strikes that have been held without hindrance since the complaint was made.

C. The Committee's conclusions

405. *The Committee observes that this case concerns allegations that striking workers and their organizations were subjected to threats, intimidation and widespread requisitioning by the Government and employers, as a result of their participation in a general strike in support of a number of socio-economic claims and that these measures are based on a restrictive definition of strikes in law.*

Legal aspects

406. *The Committee notes the complainants' allegations that, even though the right to strike is protected by the Constitution, Act No. 33/2004/AN issuing the Labour Code, in sections 351–358, recognizes this right in a very restrictive manner due to the narrow definition of its purpose which runs counter to the national Constitution and to Convention No. 87. In particular, the fact of requiring a strike to be motivated by occupational claims, in the context of the relations between workers and their respective employers, in the view of the complainants, prejudices the very existence of unions of workers covering several employers, such as central organizations, federations and confederations of trade unions, which would thereby be deprived of the possibility of exercising the right to strike. The Committee notes the Government's statement that the sections in question do not in any way prejudice the right to strike, but establish the conditions for its exercise, in accordance with the provisions of article 22 of the Constitution, which provides that the right to strike "shall be exercised in accordance with the laws in force", and in accordance with the principles of Convention No. 87. The Committee further notes that, according to the Government, the numerous strikes that have been called without hindrance since the complaint was made support its claims.*

407. *The Committee notes that section 351 of the Labour Code provides that: "A strike is a concerted and collective cessation of work with a view to supporting pre-determined occupational claims, which the employer refuses to meet. Any stoppage of work that does not correspond to an occupational claim is unlawful …." The Committee recalls in this regard that the right to strike is one of the essential means through which workers and their organizations may defend their economic and social interests, which not only concern better working conditions or collective claims of an occupational nature (as provided in section 351), but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 522 and 526]. The Committee emphasizes that it has, on two occasions in the past, drawn the Government's attention to these principles in relation to legislative provisions that have now been repealed, but which imposed similar constraints with regard to the objectives pursued by workers when exercising the right to strike [see 217th Report, Case No. 1089, para. 239, and 218th Report, Case No. 1131, para. 776].*

408. *Noting the complainants' allegation that this provision would preclude the exercise of the right to strike by trade union organizations covering several employers, such as central organizations, federations and confederations of trade unions, the Committee recalls 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 [see* ***Digest****, op. cit., para. 538]. The Committee therefore requests the Government to review the legislation with the social partners and to bring it into conformity with the principles of freedom of association referred to above.*

Factual aspects

409. *The Committee notes that, following the breakdown of the negotiations between the Government and the trade unions begun on 4 May 2006, the central organizations of trade unions and the autonomous trade unions issued a strike call for 23 and 24 May 2006. According to the strike notice, which concerned the public, private, parapublic and informal sectors, it was called to demand that the Government respect workers and their trade union organizations, cancel the decision of 4 May to increase the price of hydrocarbons and reconsider its responses to their various claims (including those for wage and pension increases, the various cases relating to the execution of rulings favourable to workers, the reduction of taxes on the main consumer goods, the establishment of unemployment benefit, an increase in family allowances, action to remedy the delays in promoting public officials, the implementation in the private sector of the wage increases decided upon by the Government in 2004 and respect for freedom of association and the right to strike and, accordingly, the setting aside of penalties and the halting of threats of penalties against strikers).*

410. *The Committee notes the reply by the Director-General of Labour and Social Security to the strike notice (a copy of which was attached to the complaint), in which he reminded the trade unions that section 351(2) of the Labour Code provides that "any stoppage of work that does not correspond to an occupational claim is unlawful" and indicated that this must consist of an occupational claim made by workers to their employers, which was not the case of the workers covered by this strike call (particularly those in the private and informal sectors). He also recalled that section 357 provides that "any lockout or strike is prohibited before conciliation and arbitration procedures have been exhausted", which also covers collective disputes between workers and their respective employers, and is not therefore applicable in the present case. He therefore called on the trade unions to consider all the legal consequences of the strike notice so that the workers did not lose the rights guaranteed to them in law. The Committee further notes that this interpretation was adopted by the President of the National Council of Employers of Burkina Faso in a letter published in the press on Monday, 22 May, the day before the strike.*

411. *The Committee notes that, in the view of the complainants, the reply by the Director-General constitutes a highly questionable interpretation of the Labour Code, on the basis of which employers were encouraged by the labour administration and the Government to apply penalties to workers responding to strike calls. The Committee further observes that, other than threats, the complainants do not allege that penalties were in practice applied against workers. The Committee also notes that, according to the Government, the Director-General of Labour and Social Security confined himself to informing the trade unions of the failure to comply with the legal provisions in force respecting strikes, as the procedure established by sections 336–347 of the Labour Code had not been exhausted, especially in relation to conciliation and arbitration. The Committee recalls that although, as indicated by the Government, Article 8, paragraph 1, of Convention No. 87 provides that the law of the land shall be respected in exercising the rights provided for in the Convention; paragraph 2 provides that the law of the land "shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention".*

According to the interpretation of the Director-General of Labour and Social Security, the exhaustion of conciliation and arbitration (section 257 of the Labour Code) relates to collective disputes between workers and their respective employers, which was not the situation in the present case. The Committee therefore concludes that the central organizations of trade unions and the autonomous trade unions were not in a position to exhaust these procedures as, in view of its purpose, the action of 23 and 24 May was not covered by the definition of a strike as set out in the Labour Code.

412. *Finally, the Committee notes the contradiction between the position of the complainants, who emphasize that the strike of 23 and 24 May 2006 gave rise to threats, intimidation and widespread requisitioning, and that of the Government, according to which the trade union organizations responded to the call to strike without any hindrance on its part. As the complainants have not provided any specific information concerning the use of requisitioning, the Committee requests the complainants to provide detailed information in this respect so that it may be in a position to examine this allegation.*

413. *With regard to the allegations of threats and intimidation, the Committee considers that both the language used by the Director-General in his reply to the strike notice calling on "the trade unions to consider all the legal consequences of the strike action so that the workers did not lose the rights guaranteed to them in law" and the letter published by the National Council of Employers of Burkina Faso the day before the strike, indicating that there was no collective dispute with the workers as it was not party to the negotiations between the Government and the trade unions, and calling on its members to abide by the provisions of the law in this respect, could have had an intimidating impact on workers wishing to participate in the strike. The Committee recalls that organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living [see* ***Digest****, op. cit., para. 527], and requests the Government, in accordance with the principles of freedom of association, to ensure that there is no further obstruction of the exercise of the right to strike.*

414. *The Committee reminds the Government that it may avail itself of the technical assistance of the Office.*

The Committee's recommendations

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

(a) The Committee requests the Government to review its legislation with the social partners and to bring it into line with the principles of freedom of association referred to above.

(b) Recalling that organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living, the Committee requests the Government, in accordance with the principles of freedom of association, to ensure that there is no further obstruction of the exercise of the right to strike.

(c) The Committee requests the complainants to provide detailed information on the use of requisitioning during the strike of 23 and 24 May 2006 so that it may be in a position to examine this allegation.

(d) The Committee reminds the Government that it may avail itself of the technical assistance of the Office.

CASE NO. 2468

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

Complaint against the Government of Cambodia presented by the Cambodian Tourism and Service Workers Federation (CTSWF)

Allegations: The complainant alleges that the employer has: threatened and dismissed four trade union leaders for their trade union activities; refused to respect the award issued by the Arbitration Council in August 2004 for their reinstatement; refused to attend conciliation sessions organized by the Ministry; and changed its corporate name and transferred all its labour contracts to the new entity. The complainant also alleges that two labour inspectors from the Ministry of Social Affairs intervened in favour of the establishment of another union under the influence of the employer

416. The complaint is set out in a communication dated 25 January 2006. The complainant submitted additional information in a communication of 25 October 2006.

417. The Government submitted partial observations respecting this case in a communication dated 17 October 2006.

418. In the absence of a full reply from the Government, the Committee has been obliged to defer examination of this case on three occasions. At its meeting in November 2006, the Committee made an urgent appeal to the Government, drawing its attention to the fact that, in accordance with the procedural rule set out in paragraph 17 of its 127th Report, approved by the Governing Body, it might submit a report on the substance of the matter at its next meeting even if the information or observations requested from the Government have not been received in due time [see 343rd Report, para. 10]. To date, the Government has not submitted its complete observations.

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

A. The complainant's allegations

420. In its communication of 25 January 2006, the complainant states that in March 2004 Mr Sok Thol, an employee of the Micasa Hotel, was engaged in union-organizing activities. On 22 March 2004 Mr Mike Lee Khengseang, the General Manager of the Micasa Hotel, called Mr Sok Thol in and questioned him with regards to his trade union activities. In particular, Mr Sok Thol was asked whether he was involved in the union movement, and why the union was being formed – to which he replied that he was exercising his right to join a union to protect the benefits of workers. The complainant states that Mr Khengseang replied by threatening to terminate Mr Sok Thol if he continued his union-organizing activities.

421. On 24 March 2004 the employer sent a letter of termination to Mr Sok Thol. The letter of termination offered no cause for the termination, stating only that termination compensation would be provided. The complainant maintains that Mr Sok Thol was terminated due to his trade union activities. On that same day, the employer also distributed a questionnaire form to its employees asking, among other things, whether or not the employee was a member of any union or association.

422. On 25 March 2004, the employer sent letters of termination to three other employees: Mr Kram Sok Kheang, Mr Ean Kim Hun and Mr Ol Serey Vathana. As was the case with Mr Sok Thol, these letters stated no grounds for termination and offered compensation. The complainant contends that these three individuals were terminated because their names had appeared on a list of candidates for union office that Mr Sok Thol had submitted to the employer earlier on that same day.

423. On 26 March 2004 union office elections were held. Mr Sok Thol was elected president and Mr Sok Kheang, Mr Kim Hun and Mr Serey Vathana were elected advisors of the Micasa employees' union; 86 out of 115 employees participated in the election.

424. Shortly thereafter the Micasa employees' union sought the complainant's assistance in obtaining the reinstatement of the four union officers. The complainant states that it filed a complaint to the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation (MOSALVY), requesting the latter's intervention in this matter. Although the Ministry held conciliation sessions on 8, 24 and 28 May 2004, the management refused to reinstate the concerned individuals; the issue was then presented before the Arbitration Council. The complainant contends that, during this time, the employer colluded with two inspectors from MOSALVY to form another organization to replace the Micasa employees union.

425. On 6 August 2004, the Arbitration Council issued award No. 41/04. The said award found that the four union officers had been unfairly terminated and ordered their reinstatement with full payment of wage arrears. The employer, however, refused to recognize and accept the Arbitration Council's award.

426. On 5 January 2005 the employer changed its name to the Himawari hotel. The employment contracts of all the employees were transferred to the newly created entity; staff seniority, however, was recognized only from 2000 onwards.

427. The complainant maintains that it had requested MOSALVY's intervention to compel the employer to reinstate the four union employees. Although the Government organized conciliation meetings on 23 December 2005 and 20 January 2006, on both occasions the employer refused to attend the meeting.

428. With its 25 January 2006 communication the complainant attaches several documents, including: copies of the four union officers' termination letters, a copy of the questionnaire form distributed by the employer, and a copy of Arbitration Council award No. 41/04.

429. In a communication of 25 October 2006, the complainant attaches a copy of an Arbitration Council award concerning the reinstatement dispute, dated 3 March 2006 (award No. 08/06). The said award indicates that the dispute was referred to the Arbitration Council by MOSALVY on 27 January 2006.

430. In award No. 08/06 the Arbitration Council noted that article 40, paragraph 2, of Prakas 99/04 states that "if either party to a dispute lodges such an opposition within the specified time frame, the award shall be unenforceable. In this case if the dispute is about a right relating to the application of a rule of law (for example, a provision of the Labour Law, of a collective bargaining agreement, or an arbitral award that takes the place of a collective bargaining agreement) the disputant party may bring the case before the court of competent jurisdiction for final resolution". As arbitral award No. 41/04 was objected to by the employer on 12 August 2004, the Arbitration Council maintained that that award ceased to have effect and the Council therefore lacked the authority to order compliance with that award. The case was consequently dismissed.

B. The Government's reply

431. In a communication of 17 October 2006, the Government stated that the matters raised under the present case were under investigation.

C. The Committee's conclusions

432. *The Committee deeply deplores the fact that, despite the time that has elapsed since the presentation of this complaint, the Government has not provided its observations as requested in due time, although it has been invited to do so on several occasions, notably through an urgent appeal made at the Committee's meeting in November 2006. Under these circumstances, and in keeping with the relevant rule of procedure [see the Committee's 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee must present a report on the substance of the case in the absence of the Government's observations. The Committee urges the Government to be more cooperative in the future.*

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

434. *The Committee notes that the present case involves allegations of: anti-union discrimination; the termination of four employees for their trade union activity; the refusal, on the employer's part, to accept the reinstatement award of the Arbitration Council or participate in conciliation sessions organized by MOSALVY; and the establishment by the employer of an organization to replace the Micasa employees' union.*

435. *The Committee notes that the concerned individuals were terminated for their participation in the establishment of the Micasa employees' union and had, on a number of occasions, sought reinstatement. The Committee observes moreover that these attempts have thus far proven unsuccessful: in spite of the Arbitration Council's 6 August 2004*

award of reinstatement, and several attempts by MOSALVY to bring a resolution to the matter – on 20 January 2006, most recently – the employer's refusal to accept the Arbitration Council's award and engage in meaningful conciliation continues to frustrate the four trade union leaders' attempts to be reinstated in their previous jobs.

436. *When viewed in conjunction with the other complaints against the Government presently before it, the Committee notes with concern that the present allegations follow a series of earlier violations it had previously remarked upon – one characterized by acts of anti-union discrimination, often culminating in dismissals, and an apparent lack of effectiveness of the sanctions provided for in the law to remedy such acts of anti-union discrimination [Case No. 2262, 337th Report, para. 262]. The Committee observes, moreover, that it had also drawn the Government's attention to the insufficiency of the laws and procedures in place to protect workers against anti-union discrimination in Case No. 2443 [343rd Report, para. 315]. In this regard, the Committee recalls that the Government is responsible for preventing all acts of anti-union discrimination and must ensure that complaints of anti-union discrimination are examined in the framework of national procedures which should be prompt, impartial and considered as such by the parties concerned. Furthermore, legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention No. 98 [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, paras 817 and 822]. The Committee urges the Government, as it did in the above-cited cases, to take the appropriate steps without delay to ensure that workers enjoy effective protection against acts of anti-union discrimination, including the establishment of sufficiently dissuasive sanctions and rapid final determinations. The Committee invites the Government to further avail itself of the technical assistance of the Office in this regard.*

437. *Taking into account the specific circumstances of this case, and given that the Government has not provided its observations on the present allegations, the Committee requests the Government to take the necessary steps to ensure that the four trade union leaders are fully reinstated without loss of pay.*

438. *As regards the employer's alleged establishment of a trade union in collaboration with two labour inspectors, the Committee recalls that anti-union tactics to encourage union members to withdraw from the union and the presentation of statements of resignation to the workers, as well as alleged efforts made to create puppet unions, are contrary to Article 2 of Convention No. 98, which provides that workers' and employers' organizations shall enjoy adequate protection against acts of interference by each other or each other's agents in their establishment, functioning or administration. The Committee requests the Government to conduct an independent inquiry without delay into the alleged attempt by the employer to establish a puppet union, as well as in respect of any collaboration by the Ministry and, if the allegation proves true, to take the necessary measures to ensure that the employer refrains from such acts of interference in the future.*

The Committee's recommendations

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

(a) The Committee deeply deplores the fact that, despite the time that has elapsed since the presentation of this complaint, the Government has not provided its observations as requested in due time, and urges the Government to be more cooperative in the future.

(b) Taking into account the specific circumstances of this case, and given that the Government has not provided its observations on the present allegations, the Committee requests the Government to take the necessary steps to ensure that the four trade union leaders are fully reinstated without loss of pay.

(c) The Committee urges the Government to take the appropriate steps without delay to ensure that workers enjoy effective protection against acts of anti-union discrimination, including the establishment of sufficiently dissuasive sanctions. The Committee invites the Government to further avail itself of the technical assistance of the Office in this regard.

(d) The Committee requests the Government to conduct an independent inquiry without delay into the alleged attempt by the employer to establish a puppet union, as well as in respect of any collaboration by the Ministry and, if the allegation proves true, to take the necessary measures to ensure that the employer refrains from such acts of interference in the future.

CASE NO. 2476

INTERIM REPORT

Complaint against the Government of Cameroon presented by the Union of Free Trade Unions of Cameroon (USLC)

Allegations: The complainant organization alleges that the authorities are interfering in their internal trade union affairs and are showing favouritism towards certain individuals and factions in the USLC, inter alia, with regard to the appointment of trade union representatives to national and international conferences without consulting the highest level organizations

440. The complaint is contained in a communication dated 3 February 2006. The complainant organization sent additional information in communications dated 24 April and 26 May 2006. The Government sent its observations in communications dated 9 May and 24 August 2006.

441. Cameroon 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

442. In a communication dated 3 February 2006 the Union of Free Trade Unions of Cameroon (USLC) alleges, through its Secretary-General, Mbom Mefe, that the USLC is the victim of interference by the Minister of Labour and Social Security.

443. The complainant organization states that a dispute over the attribution of powers arose following the December 2002 election of Mbom Mefe as Secretary-General and that the union's President, Flaubert Moussole, is accused of having falsified the organization's statutes and installed puppet officials with the support of the Minister of Labour and Social Security. The deposed executive board took the case to court, and the complainant organization attaches a copy of the 25 July 2005 complaint lodged against the union's President for falsification of documents, misappropriation of corporate assets, aggravated breach of trust and embezzlement of union funds, and a copy of the inscription on a court register of an inquiry into the legality of the extraordinary congress of 25, 26 and 27 August 2005 that resulted in the appointment of the new officers.

444. The complainant organization states that the departments of the Ministry of Labour and Social Security deny having received any complaint regarding these matters commenting that the Ministry has a network of people whose job it is to remove any correspondence drawing attention to the financial dealings of the President of the union.

445. The complainant organization alleges further that in Cameroon trade union representatives to national and international conferences are appointed without consulting the highest level organizations, and that this again constitutes interference by the Ministry of Labour and Social Security which, in total disregard of the rules for consulting the representative organizations, authorized the President of the union to take part in Cameroon's delegation to the International Labour Conference in June 2005.

446. In a communication dated 24 April 2006 the complainant organization sent the Committee a certified bailiff's report that was drawn up on 12 April 2006 following the closure of the USLC's union premises by the sub-prefect of the first district of Yaoundé accompanied by police officers. It alleges that the closure took place without notification of any judicial or administrative decision.

447. In its communication dated 26 May 2006 the complainant organization challenges the circumstances under which the President of the union, Flaubert Moussole, was appointed, denounces his poor management of the union's finances, which are currently being audited, and reiterates its allegations concerning the falsification of the union's statutes.

448. The complainant organization requests the Committee to declare the Government responsible for interference in its trade union activities and to urge it to take the necessary steps to ensure that the organization has once again the use of its premises.

B. The Government's reply

449. In its communication dated 9 May 2006 the Government states its belief that the allegations in the present case reflect an environment that is characterized by disputes over the union's leadership, both at the level of the union and at that of the grass-roots organizations. According to the Government, the cause of the disputes is always the same – the end of the union officials' mandate, because those holding office are afraid of being replaced and therefore refuse to organize union congresses or manage the union's dues and financial assistance.

450. In the present case, the Government states that, at an extraordinary USLC congress that was held in Yaoundé on 28 and 29 March 2002, Flaubert Moussole was elected President of the union and Mbom Mefe was elected to the post of secretary for vocational education and workers' education, for a five-year term.

451. According to the Government, Mr Mefe has from the very start suspected Mr Moussole of having tricked the clerk and obtained the USLC's registration certificate by fraudulent

means, illegally using a falsified version of the union's statutes. The Government states that, while Mr Moussole was in Geneva for the 2005 session of the International Labour Conference, he was deposed by Mr Mefe, who thus combined the functions of both President and Secretary-General of the union.

452. On his return from the Conference, Mr Moussole convened an extraordinary congress on 25, 26 and 27 August 2005, with the election of the members of the union's executive board as the sole item on the agenda. The outcome of the congress, in which the Ministry of Labour and Social Security was present as an observer, Flaubert Moussole was re-elected President of the union and André Jules Mousseni was elected Secretary-General in the place of Mbom Mefe, for a period of five years.

453. The Government considers that Mr Mefe refuses to recognize the officers who were elected at the congress. The Government, for its part, merely takes note of the outcome of the poll.

C. The Committee's conclusions

454. *The Committee notes that the present case concerns the alleged interference of the public authorities in trade union activities to the advantage of certain individuals and factions within the USLC, including the appointment of union representatives to national and international conferences without consulting the highest union organizations.*

455. *With regard to the disputes within the USLC, the Committee recalls that it is not competent to make recommendations on internal dissensions within a trade union organization, so long as the government does not intervene in a manner which might affect the exercise of trade union rights and the normal functioning of an organization, and that judicial intervention would permit a clarification of the situation from the legal point of view for the purpose of settling the question of the leadership and representation of the organization concerned [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, paras 1114 and 1116].*

456. *In this case the Committee notes that Mbom Mefe challenges the legitimacy of the new executive board, which he claims was appointed at an extraordinary congress that had been convened in violation of the organization's statutes and with the support of the Ministry of Labour and Social Security. The Government, on the other hand, considers that the congress was held as a result of an attempt by the organization's Secretary-General, Mr Mefe, to depose the President of the union and that Mr Mefe's replacement at the head of the organization had been fairly and legally undertaken.*

457. *The Committee notes that no judicial decision has yet been handed down as to the legality of the extraordinary congress of 25, 26 and 27 August 2005, Mr Mefe's removal from office and the truth or otherwise of the accusations of misappropriation of funds levelled against the President of the union. The Committee expects that the legal proceeding under way since 2005 will soon be completed and requests the Government to send it a copy of any judgement that is handed down. Moreover, given the conflicting information contained in the communications from the complainant organization and from the Government, the Committee invites the Government to accept a direct contacts mission to clarify the matter.*

458. *With regard to the alleged closure of the trade union premises, the Committee regrets that the Government has not sent its observations on the matter and considers, if the allegations are found to be true, that they constitute serious interference in trade union activities by the authorities. The Committee draws the Government's attention to the resolution concerning trade union rights and their relation to civil liberties, adopted by the International Labour Conference at its 54th Session (1970), which states that the right to*

*protection of the property of trade union organizations is essential for the normal exercise of trade union rights [see **Digest**, op. cit., para. 189]. The Committee calls on the Government to send its observations on the matter as soon as possible and requests it to inform it of the specific motives for the public authorities' intervention and whether a court warrant was issued for the purpose.*

459. *With regard to the alleged appointment of workers' representatives to the International Labour Conference, the Committee again regrets that the Government has not sent its observations on the matter. Recalling that representation at the Conference is a matter for the Conference Credentials Committee to decide, the Committee reaffirms the special importance it attaches to the right of the representatives of both workers' and employers' organizations to attend and participate in ILO meetings [see **Digest**, op. cit., para. 766].*

The Committee's recommendations

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

(a) With regard to the legality of the extraordinary congress of 25, 26 and 27 August 2005 and the truth or otherwise of the accusations of misappropriation of funds levelled against the President of the union, the Committee expects that the legal proceeding under way since 2005 will soon be completed and requests the Government to send it a copy of any judgement that is handed down. Given the conflicting information contained in the communications from the complainant organization and from the Government, the Committee invites the Government to accept a direct contacts mission to clarify the matter.

(b) The Committee calls on the Government to send its observations on the alleged closure of the USLC's trade union premises as soon as possible. The Committee requests the Government to inform it of the specific motives for the public authorities' intervention and whether a court warrant was issued for the purpose.

CASE NO. 2467

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

Complaint against the Government of Canada concerning the Province of Quebec
presented by
— the Association of Attorney-General's Prosecutors of Quebec (ASPGQ)
— the Quebec Government Professional Staff Union (SPGQ)
— the Association of State Jurists (AJE)
— the Confederation of National Trade Unions (CNTU)
— the Nurses' Federation of Quebec (FIIQ)
— the Independent Federation of Secondary Teachers (FAC)
— the Quebec Confederation of Trade Unions (CSQ)
— the Quebec Workers' Federation (FTQ)

— the Federation of Democratic Trade Unions (CSD)
— the Quebec Union of Public Servants (SFPQ)
— the Quebec State Teachers' Union (SPEQ) and
— the Quebec Provincial Association of Teachers (APEQ)

Allegations: The complainant organizations allege that the Government has passed a law (Act respecting conditions of employment in the public sector, S.Q. 2005, chapter 43) imposing conditions of employment on employees in the Quebec public sector without prior bargaining or consultation; violating their fundamental right to bargain collectively; taking away their right to strike without granting them an alternative procedure for the settlement of disputes such as mediation, conciliation or arbitration. The Association of Attorney-General's Prosecutors of Quebec (ASPGQ) further alleges that the Prosecutors Act (as amended by the Act amending the Act respecting Attorney-General's Prosecutors and the Labour Code, L.Q. 2004, chapter 22) denies prosecutors the right to join a trade union and deprives them of protection against hindrances, reprisals or sanctions related to the exercise of trade union rights

461. The initial complaint is contained in a communication from the Association of Attorney-General's Prosecutors of Quebec (ASPGQ) dated 1 February 2006 and was supplemented by three communications, two dated 14 February 2006 and one dated 19 October 2006. Additional allegations were filed by: the Quebec Government Professional Staff Union (SPGQ) in a communication of 24 February 2006; the Association of State Jurists (AJE) in a communication of 27 February 2006; the Confederation of National Trade Unions (CNTU) in a communication of 15 March 2006; the Nurses' Federation of Quebec (FIIQ) in a communication of 16 March 2006; the Independent Federation of Secondary Teachers (FAC) in a communication of 30 May 2006; and jointly by the Quebec Confederation of Trade Unions (CSQ), the Quebec Workers' Federation (FTQ), the Federation of Democratic Trade Unions (CSD), the Quebec Union of Public Servants (SFPQ), the Quebec State Teachers' Union (SPEQ) and the Quebec Provincial Association of Teachers (APEQ) in a communication dated 1 June 2006 sent by the CSQ.

462. The Government of Canada sent its reply to the complaints through the Government of Quebec on 16 January 2007.

463. Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), nor the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

The complainants and the background to their complaints

464. **ASPGQ:** In a communication dated 1 February 2006, the ASPGQ states that its membership covers all prosecutors in the employment of the Government of Quebec covered by section 10 of the Act respecting Attorney-General's Prosecutors (L.R.Q. c. S-35, hereinafter Prosecutors Act) and that it is recognized as their sole representative. Under this Act, prosecutors' chief functions are to authorize prosecutions and to represent the Attorney-General in the courts in criminal or penal matters. As prosecutors are not "employees" in the meaning of the Labour Code, their right of freedom of association, right to bargain collectively and right to strike are governed by the Prosecutors Act.

465. The ASPGQ alleges that, in its capacity as the prosecutors' bargaining agent, it negotiated in good faith with the Government of Quebec and signed an agreement governing prosecutors' conditions of employment. This agreement was due to terminate on 31 March 2007 and, under the Prosecutors Act, bargaining should have begun on 2 October 2006. However, the Government took advantage of the passing of the Act respecting Conditions of Employment in the Public Sector, S.Q. 2005, chapter 43 (hereinafter Act 43) to impose conditions of employment on the prosecutors by amending the agreement and extending it to March 2010. This Act deprives prosecutors of the right to strike which, under the agreement, may not be exercised during the term of the agreement.

466. **SPGQ:** In a communication of 24 February 2006, the SPGQ states that it is a professional organization of workers whose object is the study, defence and advancement of the professional, social and economic interests of its members. The SPGQ's scope of action extends only to professional women and men in the public service of the Province of Quebec and to salaried professional women and men in enterprises or agencies directly or indirectly dependent on the Government of the Province of Quebec. The SPGQ represents 18,800 salaried professionals employed in the Quebec public service, state companies and education and health establishments.

467. The SPGQ alleges that, as its collective agreement expired on 30 June 2003, it had bargained in good faith from November 2003 to December 2005 in order to reach an agreement with the Government of Quebec. According to the SPGQ, the Government of Quebec, dissatisfied with the progress of negotiations, adopted Act 43 ending the negotiations, reverting to the conditions of employment in the collective agreements which had lapsed since 30 June 2003, imposing conditions of employment and prohibiting the right to strike until March 2010.

468. **AJE:** In a communication of 27 February 2006, the AJE states that it is an association of salaried employees in the meaning of the Labour Code and is accredited to represent the approximately 850 jurists, lawyers or notaries employed in the Quebec public service. Since its accreditation, the AJE negotiated and concluded its first collective agreement with the Government of Quebec on 30 March 2000 which was extended to 31 December 2005.

469. The AJE alleges that negotiations with the Government of Quebec began on 1 July 2005 and that from that date it embarked on a process of consultation with the jurists to prepare its claims in those negotiations. At the end of the consultation, the AJE convened the jurists to a vote on 13 and 14 December 2005, so that they could decide on the draft union proposal concerning the renewal of their collective agreement. The jurists voted 75 per cent in favour of the draft union proposal. Act 43 was passed on 15 December imposing, without discussion or negotiation, the provisions of the collective agreement applicable to

jurists with respect to normative and remuneration clauses, to be applicable up to 31 March 2010.

470. **CNTU:** In a communication of 15 March 2006, the CNTU states that it is a trade union organization founded in 1921 which represents some 300,000 salaried staff belonging to over 2,700 unions affiliated to nine trade union federations based on their sector of activity. The CNTU has over 150,000 salaried staff working in the health, social services and education sectors who are directly affected by the provisions of Act 43. More specifically, the Federation of Health and Social Services (FSSS) represents over 105,000 staff in the social welfare sector, the Federation of Professionals (FP) represents over 4,000 staff in the social welfare sector, the National Federation of Teachers of Quebec (FNEEQ) represents over 12,000 staff in the education sector and the Federation of Public Service Employees (FEESP) represents over 30,000 staff in the education sector.

471. The CNTU alleges that although, the collective agreements of the FSSS, FP, FEESP and FNEEQ had expired in 2002 (education) or 2003 (health), it was not until autumn of 2005 that the staff resorted to legal means of pressure, notably strike action, to express their dissatisfaction with their employers' offers and to try to break the stalemate at the central bargaining table. The means of pressure were exerted (with due provision for essential services) peacefully and lawfully (strikes in the health service are governed by the Labour Code). No complaint to the Essential Services Council, application for an injunction, collective appeal or other penal appeal was made against these means of pressure. Furthermore, the use of rotating strikes (by region) was intended to minimize the inconvenience to the public. At no time did the means of pressure used endanger or compromise the safety of the public. On 17 November 2005, the president of the Treasury Council announced that negotiations must end before Christmas, failing which recourse would be had to a special law imposing conditions of employment. On 14 December 2005, the Prime Minister announced the calling of an emergency session of the National Assembly for the following day. At the time of that announcement, only seven sector-based agreements had been concluded between the Government and certain bargaining agents. In the 24 hours following the announcement, 23 other sector-based agreements on the regulatory provisions were concluded. According to the CNTU, no real bargaining had taken place on the salary clauses and other clauses with financial implications before Act 43 was passed.

472. **FIIQ:** In its complaint of 16 March 2006, the FIIQ states that it is a group of employees' associations duly accredited under the Labour Code, constituting a federation within the meaning of the law. It is made up of nurses, nursing auxiliaries, breathing therapists and staff employed as nursery nurses, transfusionists and extra-corporal circulation technicians, and represents them in the various establishments of the health system and Government of Quebec.

473. As the last collective agreements negotiated and agreed by the FIIQ expired on 30 June 2002, bargaining for all the associations affiliated to the FIIQ (at that time the FIIQ only represented nurses) officially began with the submission of proposals to the employers' side in July 2003. In June 2004, the employers tabled their offers. It was clear at that time, according to the FIIQ, that the Government had the firm intention of not deviating from the budgetary framework which it had fixed unilaterally for the total costs of the bargaining round and that it wanted to negotiate the costs of applying the Pay Equity Act (a law seeking to correct the historical pay differentials between predominantly female jobs and predominantly male jobs) within the same budgetary framework. It was thus in this restrictive framework that the bargaining was conducted and the discussions took place, first on the so-called normative clauses and then very briefly on wages. A few agreements on principle were concluded on the normative clauses before the threat of the decree and final adoption of Act 43 arose. As regards wages, apart from the Government's

announcement concerning the budgetary framework at the very beginning of the bargaining, there was no other official discussion on that subject. The FIIQ states that there was almost no real bargaining on the salaries aspect of its demands.

474. **FAC:** In its communication of 30 May 2006, the FAC states that it is a federation of teachers' unions and teachers working in public and private secondary colleges in Quebec. It has existed since June 1988 and now represents about 4,000 members belonging to 16 unions. Its aim is to promote and defend the interests of teachers and, on their behalf, to negotiate conditions of employment with secondary colleges. For the purposes of bargaining on the renewal of the collective agreement, the FAC is the bargaining agent for the trade unions that it represents. The employer colleges, for their part, are represented by the College Employers' Bargaining Committee (CPNC) which comprises all the secondary colleges of Quebec for bargaining purposes.

475. The FAC alleges that on 6 May 2002 it started the bargaining process for the renewal of the collective convention which was due to expire on 30 June 2002 by submitting to the CPNC a list of bargaining priorities. Between 27 November and 11 December 2002, the FAC submitted a complete and detailed set of its national sectoral demands to the CPNC. On 4 December 2003, the FAC tabled its salary claims. Not having received any offers from the CPNC, the FAC commenced legal proceedings on 11 December 2003 in order to seek an injunction in the courts requiring the CPNC to submit its offers. These were finally tabled by the CPNC on 2 February 2004, i.e. two years after the opening of negotiations.

476. Between March and December 2005, the CPNC submitted other offers to the FAC and agreements were even reached. On 14 December, a meeting took place between the FAC and the CPNC at which, towards midday, the employers' side announced that the bargaining must end by 6 p.m., failing which a special law would be passed by the Quebec Government to impose conditions of employment. In this context and under this pressure, the FAC was forced to conclude an "agreement in principle". This agreement in principle was not, however, ratified by the teachers belonging to the FAC. On 15 December 2005, Act 43 was passed. Conditions of employment of teachers belonging to the FAC were imposed by the Quebec Government and are less favourable than the agreement in principle that was not ratified by the members.

477. **CSQ and FTQ:** In its communication of 1 June 2006, the CSQ indicates that it is a trade union organization representing some 170,000 members. It is made up of accredited workers' associations, which themselves are formed into federations. The CSQ chiefly represents employees in the state and parastatal sectors, with over 100,000 of its members working in the education field and over 9,000 in health and social services.

478. The FTQ, for its part, is the largest trade union federation in Quebec, combining over half a million members through its affiliated unions. It has some 40 major unions affiliated to it and over 1,150 local unions. Almost two-thirds of the members of the FTQ work in the private sector and some 50,000 of them work in the education sector and health and social services.

479. Bargaining for the renewal of the collective agreements of associations of employees in the state and parastatal sectors, which were due to expire on 30 June 2003, began in December 2002. In December 2003, the CSQ and FTQ submitted bargaining proposals to the representatives of the Treasury Council. On 18 June 2004, the Treasury Council tabled a text constituting the State's financial offers and the offers relating to the pension schemes. At this meeting, the Treasury Council's spokesman said that the offer was in line with the budgetary framework of the Government's pay policy for all persons employed in all state and parastatal sectors, within which collective agreements must be concluded. He explained that pay scales fixed and limited the pay increase to 12.6 per cent for the next six

years. Consequently, the Government was seeking to conclude collective agreements for a period of six years, i.e. a period greater than set out in the Labour Code (section 111.1). In addition, it would have made it official that the budgetary framework included adjustments arising from the application of the Pay Equity Act. In October 2004, at a bargaining meeting between the parties, a representative of the Treasury Council confirmed that this budgetary framework was not supported by any study or report.

480. The CSQ and FTQ rejected the Government's financial offer presented in June 2004, taking the view that it violated the provisions of the Pay Equity Act and the Labour Code which limited the duration of collective agreements in the state and parastatal sectors to three years. The CSQ and the FTQ then advised the Treasury Council that the salary package should exclude the question of pay equity and that the Government's financial offer could not exceed three years. Despite that, between 18 June 2004 and 15 December 2005, the Treasury Council continued to link the conclusion of collective agreements to the imposition of its budgetary framework, as presented on 18 June 2004.

481. On 22 November 2005, the employers' side confirmed its position at a meeting with the FTQ. On 14 December 2005, a bargaining meeting took place between the CSQ and the Treasury Council in order to continue the discussions, especially on parental rights, reconciliation of work and family life and retirement. However, at the end of that meeting, the Treasury Council representatives advised the CSQ representatives that the Government was breaking off negotiations at 6 p.m. on that day and that, failing an agreement within that time it would, on 15 December 2005, adopt a law imposing the content of the collective agreements, including remuneration of employees in the state and parastatal sectors, as fixed by the budgetary framework presented on 18 June 2004.

482. According to the CSQ and the FTQ, the following day the Quebec Government unilaterally broke off the current collective bargaining by passing Act 43. The complainant organizations state that, during that bargaining round which had ended with the passing of Act 43, the associations of employees affiliated to the CSQ and the FTQ exercised their right to strike in full compliance with the law.

483. **CSD:** the CSD is composed essentially of associations of health and social services sector employees that are qualified to negotiate the renewal of collective agreements (Union of Employees in the Jewish Rehabilitation Hospital, the Saint-Maurice CSSS Workers' Union (CSD), the Dixville Reception Centre Staff Union (CSD), the Lisette–Dupras Rehabilitation Centre Staff Union (CSD), the Democratic Worker's Union of the Asbestos Health Centre (CSD), the Haut–Saint–Laurent CSSS Workers' Union). The number of CSD members affected by the present complaint is 1,000.

484. Between 29 June 2000 and 30 June 2002, these trade unions were covered by collective agreements between the Health and Social Services Employers' Bargaining Committee (CPNSSS) and the CSD. On 21 June 2002, these parties reached an agreement to extend the collective agreement until 30 June 2003. This agreement also provided for an increase in salary rates and scales, and the payment of lump sums for a period of three months.

485. On 18 June 2004, the Government negotiators presented to the trade unions which had concluded a collective agreement with the CPNSSS the same financial proposals as had been submitted to the other trade unions mentioned above, namely the CSQ and the FTQ. The CSD, following the CSQ line, rejected the Government's financial proposal.

486. On 22 June 2004, a meeting was held between the parties to the negotiations and both sides tabled their demands relating to the normative aspects of the collective agreement. Between July and November 2004, a few exchanges were made on the normative aspects of the collective agreement. On 19 June 2005, the CSD presented its proposed amendment

of the collective agreements to the CPNSSS. This proposal included, in particular, amendments to the clauses on increases in salary rates and scales, calculated on the basis of reports published by the Quebec Institute of Statistics and seeking to preserve the purchasing power of members of the CSD.

487. Between 29 June and 9 November 2005, the parties held only one or two meetings, at which only the normative aspects alone were discussed. On 10 November 2005, the employers' side called the CSD representatives to a meeting to inform them of an ultimatum concerning the normative aspects of the collective agreement, including retention of staff, retirement, insurance schemes, arbitration procedure (arbitration expenses shared equally between the two parties) and trade union release. The CSD representatives were then advised that if they did not accept the ultimatum in its entirety, no other aspect could be discussed. Despite the threatening tone of the employers' ultimatum, the CSD rejected the "proposal".

488. On 12 December 2005, the employers' side again called the CSD representatives to a meeting to submit a new offer to them on the normative aspects of the collective agreement, amended in particular from the standpoint of human resources development, salaries insurance, reclassification and arbitration expenses. During this meeting, the CSD representatives were informed that, if they did not accept the proposal, the Government intended to legislate and impose even less-generous conditions of employment. On 13 December 2005, the CSD representatives submitted a counter-proposal which, despite many attempts, was rejected by the employers' side. Thus, on 14 December 2005, the CSD representatives were forced to accept the offer on the normative aspects as formulated on 12 December 2005 by the employers' side.

489. However, although no exchange other than that of 18 June 2004 had taken place on salary issues and no agreement had so far been reached, the Government proposed, passed and then ratified Act 43 on 15 and 16 December.

490. This Act takes up the salary scales announced on 18 June 2004 which had been rejected in its entirety by the various trade unions. Furthermore, it imposed a collective agreement for a period of almost seven years. During the bargaining process, up to the passing of Act 43, the members of the CSD exercised their right to strike in accordance with the legal provisions of the Labour Code.

491. **SFPQ:** The SFPQ chiefly represents salaried staff, public servants and manual workers working in the Quebec public service and governed by the Public Service Act. The SFPQ thus represents office, technical and manual staff working for a state company or an agency whose mission is equivalent to that of a public service department. The SFPQ has 43,000 members.

492. On 25 June 2003, the SFPQ presented its demands for the renewal of the collective agreements expiring on 30 June 2003 to the Treasury Council. On 24 March 2004, after only nine bargaining meetings, the Treasury Council tabled partial offers. The SFPQ accordingly requested the appointment of a mediator with a view to obtaining global employers' offers from the Treasury Council. On 27 July 2004, the mediator submitted his final report, in which he could only note that negotiations had reached a stalemate due to the failure of the employers' side to present global offers.

493. On 18 June 2004, at a meeting with the government negotiators, the SFPQ representatives received the employers' proposals relating to salaries and pension schemes. As mentioned above, the SFPQ representatives were then informed that the Government intended to conclude collective agreements for a period of six years and was linking its salary proposals to settlement of the pay equity issue. The SFPQ, following the line of the CSQ,

rejected the financial offer and the offer relating to the duration of agreements. Between 18 June 2004 and 15 December 2005, the Treasury Council did not make any concessions on salaries and maintained the financial framework presented on 18 June 2004.

494. On 9 November 2005, an agreement in principle on the normative aspects of the collective agreement was ratified by the SFPQ bargaining committee. These normative aspects concern in particular the dispute settlement procedure and arbitration, long service, provisions on career development and awards, job security, subcontracting, holidays, unpaid leave and life, health and medical treatment insurance schemes.

495. However, although no agreement had so far been reached on salary issues, the Government passed Act 43 which, firstly, confirms the agreement in principle on the normative clauses of 9 November 2005 and, secondly, lays down the conditions of employment in all the areas of the collective agreement where no agreement could be reached, including wages, parental rights and pay equity. In addition, this Act imposes a collective agreement for a period of almost seven years (it is due to expire on 31 March 2010) and reverts to the salary scales announced on 18 June 2004 which had been massively rejected by the various trade unions. During the bargaining process, up to the passing of Act 43, the members of the SFPQ exercised their right to strike in accordance with the legal provisions of the Labour Code.

496. **SPEQ:** The SPEQ is a trade union organization formed to represent teachers who are public servants within the meaning of the Public Service Act, and whose chief and usual occupation is teaching specific groups. The 853 members of the SPEQ perform their functions in music conservatories and schools of dramatic art, the Food Technology Institute, the Quebec Tourism and Hotels Institute and workplaces under the authority of the Ministry of Immigration and Cultural Communities.

497. On 28 March 2003, the SPEQ presented its proposal for the collective agreement which was due to expire on 30 June 2003 to the Treasury Council. On 21 June 2004, the government negotiators tabled the employers' proposal on salaries and pension schemes. This proposal was essentially the same as the one submitted to the other trade unions. The SPEQ rejected the Government's financial proposal.

498. On 4 November 2004, the government representatives tabled the employers' proposals concerning the normative aspects of the collective agreement. The parties met between November 2004 and October 2005, but only the normative aspects of the collective agreement were discussed; the Government refused to deal with salary issues. On 14 December 2005, the employers' side called the SPEQ representatives to a meeting to present them with a draft proposal on the normative aspects of the collective agreement, and specifically on leave, provisions applicable to occasional teachers and job security. At that meeting, the SPEQ representatives were informed that, if they did not accept the proposal, the Government intended to legislate and impose even less generous conditions of employment. Fearing this, the SPEQ representatives agreed at the last minute to sign the offer relating to the normative aspects on 14 December 2005. However, as no agreement had yet been reached concerning salary issues, the Government passed Act 43, thus unexpectedly putting an end to negotiations. The Government thereby ratified the agreement on the normative aspects of the collective agreement and also imposed conditions of employment in all areas of the collective agreement where agreement could not be reached, including parental rights, salaries and pay equity.

499. The SPEQ states that at no time between June 2004 and 14 December 2005 did the employers' side make any concession or even hold discussions with the SPEQ about its salary demands or the duration of the collective agreement. During the bargaining process,

up to the passing of Act 43, the members of the SPEQ exercised their right to strike in accordance with the legal provisions of the Labour Code.

500. **APEQ:** The APEQ has 7,000 members and represents all the employees, within the meaning of Quebec labour law, of ten Quebec school boards. The APEQ is a trade union association formed by the staff associations which are members of it. The APEQ represents employees in the state and parastatal sectors and is responsible in particular for negotiations and for the application of collective agreements.

501. The APEQ concluded a collective agreement at the national level with the Employers' Bargaining Committee for the English-Speaking School Boards, which was due to end on 30 June 2003. After a request for negotiations had been sent to the employers' side in January 2003, the bargaining began in April 2004 and continued until 14 December 2005.

502. On 14 December 2005 at about 4.30 p.m., the Minister of Education informed an APEQ representative that the parties had only another 90 minutes to reach an agreement, failing which a special law would lay down the conditions of employment of APEQ members. The parties concluded the agreement at 8.15 a.m. on 15 December 2005. Throughout the negotiating phase, the APEQ members sporadically exercised their right to strike, always in accordance with the law.

The law concerning conditions of employment in the public sector and the allegations relating to it

503. The complainant organizations state that Act 43 applies to the whole public service, the education sector and the health and social services sector (section 2). Its purpose is set out in section 1 as being, on the one hand, to ensure the continuity of public services and, on the other, to provide for the conditions of employment of employees of public sector bodies within the limits imposed by the state of public finances. Sections 5–9 apply to all public sector employees, irrespective of the service in which they work. Sections 10–19 establish conditions of employment in the public service sector (section 10), the education sector (section 11) and the health and social services sector (sections 12–19).

504. The complainant organizations first draw attention to certain irregularities in the procedure for the adoption of Act 43. They claim that the deliberations surrounding its adoption were not democratic, with no parliamentary commission or public consultation, the whole process being rushed when there was no need for urgency. The Act was presented, adopted in principle and passed on the same day, 15 December 2005; it was then ratified on 16 December 2005 and entered into force on the same day. In addition, according to the FIIQ, certain amendments were even added after the Act was ratified. The FIIQ also emphasizes that the provisions of Act 43 were void because they were adopted in violation of article 133 of the 1867 Constitution of Canada, which requires that the acts of the Quebec legislature must be printed and published in French and in English. This obligation also applies to the documents to which Act 43 refers (collective agreements and others), and which are indissociable from it and are necessary and fundamental to an understanding of the law. It is thus alleged that the failure of the Quebec National Assembly to print and publish these documents in French and English is a violation of the Canadian Constitution, which renders the law in its entirety void.

505. According to the complainant organizations, the adoption of Act 43 could not be justified by an emergency situation (for example, an economic crisis). Moreover, according to the CSQ, it was impossible to evaluate the Government's financial justification for the law, as it did not refer to any study on the question. The FIIQ indicates that there was nothing to suggest that the climate at the central bargaining table was deteriorating to the point where there might have been an industrial dispute. In December 2005, there was thus no reason,

no urgency of any kind justifying the Government's changing its role from employer to legislator in order to pass this Act during a "special session" of the National Assembly. Indeed, contrary to the explanatory notes accompanying Act 43, there was no de facto or de jure situation in the health and social services which threatened to compromise the continuity of services. According to the CNTU, the adoption of Act 43 was intended in fact to put an end to the workers' expressions of discontent and very visible climate of protest that was tarnishing the Government's image in the media. It was to put a stop to this situation which was handicapping it in the eyes of public opinion that the Government sought to adopt a law setting conditions of employment, making collective demands by employees and their unions and bargaining agent illegal or pointless or too discouraging.

506. In order to determine the conditions of employment of the employees concerned, Act 43 renews the collective agreements which had expired and maintains them in force until 31 March 2010 (section 5). In section 6, the Act deals specifically with prosecutors and provides that "the conditions of employment of the Attorney-General's prosecutors entered into under section 12 of the Act respecting Attorney-General's Prosecutors … is amended to give effect to the provisions of paragraphs 11–14 of Schedule 1 until 31 March 2007. The agreement is renewed as of 1 April 2007 and, with the necessary modifications, is binding on the parties until 31 March 2010".

507. According to the complainant organizations, Act 43 violates fundamental trade union rights and infringes the principle of free and voluntary collective bargaining by unilaterally imposing the renewal of collective agreements and suppressing collective bargaining. In the first place, by providing that the collective agreements will be valid until March 2010, Act 43 gives them a duration greater than the maximum duration of three years provided for in the Labour Code for collective agreements in the state and parastatal sectors (section 111.1). Secondly, Act 43 imposes new conditions of employment which it incorporates into the renewed collective agreements (section 9 and Schedule 1). For the most part, these are conditions relating to remuneration – increase in salary rates and scales (the Act imposes an increase of 2 per cent for each of the years 2006, 2007, 2008 and 2009) and to maternity and adoption leave (Schedule 1). In addition, this Act modifies the concept of marriage and revokes certain memorandums of understanding concerning pay equity and salary relativity. The Act contains absolutely no guarantees aimed at protecting the standard of living of the persons covered by it.

508. Furthermore, the collective agreements renewed by section 5 are modified where necessary to include, in addition to Schedule 1, the text of a number of agreements between the Government and certain bargaining agents (sections 10, 11 and 13). This concerns especially the FP, the FNEEQ and the FEESP. For the groups which did not conclude such agreements (notably the FSSS), and those which had not ratified their agreement before the deadline of 1 February 2006, the Act imposes a set of new normative conditions (sections 10, paragraph 2; section 11, paragraph 2; sections 14 and 44; and Schedules 2–4). Likewise, in the health and social services sector, certain normative conditions have been introduced in addition to the agreements reached with certain groups of employee (section 14 and Schedule 4, paragraph 40).

509. According to the complainant organizations, especially the CNTU, in applying a sanction to a group of employee by imposing conditions of employment less favourable than those agreed in a sector-based agreement, Act 43 penalizes this group of employee because it did not conclude an agreement on conditions of employment in face-to-face bargaining. The FAC says that it is especially penalized because it had concluded an agreement in principle which it had not been possible to have ratified by its members. The CNTU believes that the employee represented by the FSSS have had less favourable conditions of employment imposed on them because of their convictions and opinions. According to the CNTU, the imposition of less favourable conditions of employment on a group because it did not

conclude an agreement has no rational connection with the state of public finances. It seems at least somewhat improbable to the CNTU that the state of public finances varies according to the trade union counterpart and whether or not it was able to reach a prior agreement with the Government. The disparity of treatment of the employee covered in Schedule 4 appears to be the result of an arbitrary legislative act unrelated to the purpose of the law, which was to fix conditions of employment within the framework of the limits imposed by the state of the public finances. Act 43, according to the CNTU, is therefore an attack on the right to belong to an association and to participate in its activities without being penalized for doing so.

510. In addition, according to the complainant organizations, the Act would impose restrictions on future bargaining, especially on salary scales. It would abolish any collective bargaining for the duration of the collective agreements, i.e. until 31 March 2010.

511. The FIIQ alleges that, if the negotiating parties cannot agree on the text of the sector-based agreement between them (section 5 and first paragraph, section 13), Act 43 empowers the Minister of Health and Social Services to decide on the text at his discretion, which would then have the status of a collective agreement between the parties (section 19). According to the FIIQ, it is blatantly obvious that the Minister of Health and Social Services, acting as both judge and jury, does not fulfil any of the conditions of independence and impartiality that are required to act under the powers conferred on him by Law 142.

512. According to the complainant organizations, the Government has not respected its obligation to negotiate in good faith. According to the CNTU in particular, by maintaining throughout the bargaining process the same rigid and intransigent position on the percentage increase in salaries and the period over which they are spread – a position which was clearly unacceptable to the trade union side – the Government made no real effort to conclude an agreement or even discuss one. Moreover, by maintaining a non-negotiable position on the duration of the collective agreement, in violation of the Labour Code, it was negotiating in bad faith. Finally, by calling on the legislative power to impose salary conditions corresponding to that same position, the Government merely confirmed its unwillingness to negotiate in good faith.

513. Act 43 also violated the right to strike, according to the complainant organizations, since, by unilaterally ending the negotiations and imposing collective agreements for a specified period, Act 43 automatically takes away the workers' right to strike for the same period, since Quebec labour law prohibits strikes while a collective agreement is in force. The law imposes an unjustified ban on strikes and other forms of direct action for as long as it is applicable, even though there was no emergency and, according to the ASPGQ, AJE and CSQ, without putting in place a dispute settlement procedure providing guarantees of independence and impartiality. Furthermore, according to the CSQ, as the provision of essential services was at no time threatened by the direct action taken during the negotiations, no emergency situation could justify such a legislative provision.

514. Act 43 imposes a series of obligations and prohibitions in order to maintain the continuity of public services, which is the second purpose of the Act. Section IV of the Act (sections 22–42) withdraws the workers' right to strike and, according to the complainant organizations, introduces a battery of repressive measures which prevent any form of pressure. Employees are required to report for work according to their regular work schedule (section 22) and to perform all the duties attached to their functions without any stoppage, slowdown, reduction or degradation of their normal activities (section 23). Declaring or pursuing a strike or participating in any concerted action in violation of sections 22 and 23 is prohibited. An association of employees must take appropriate measures to induce the employees it represents to comply with sections 22 and 23. Likewise, a group of associations must take appropriate measures to ensure that its

affiliated unions comply with sections 25 and 26. Thus, associations of employees are prohibited from engaging in any strike or concerted action that might entail employees not respecting their obligation to carry out their duties (section 25). Act 43 also contains a general ban on interfering in any way with the maintenance of public services or with the performance of work by employees (section 28) and a general prohibition on hindering access to the facilities where the public services are provided (section 29).

515. According to the complainant organizations, the sanctions that Act 43 provides for in the event of associations of employees and individuals not complying with these obligations and prohibitions are out of all proportion. Thus, the deduction of an association of employees' dues at source can be suspended merely by the employer declaring that there has been an infringement of the Act, for a period of 12 weeks for each day or part of a day that the infringement is observed (section 30). According to the CSQ, this sanction violates, in particular, the principles of freedom of association in that it interferes with the right of the associations of employees concerned to organize their management and their activities, by depriving them of the resources essential for the purpose. Moreover, according to the FIIQ, should a trade union organization appeal to a court to claim its members' dues, section 31 could provide its members with the means of suspending the payment of those dues. This last sanction, coupled with the non-payment of time spent on trade union release (section 34, examined below) in the event of a failure to comply with the Act, could compromise the duty of fair representation imposed by the law (section 47.2 of the Labour Code).

516. As for the employees, their salary is reduced by an amount equal to the salary they would have received for any period during which they infringe the Act, in addition to not being paid during that period (section 32). In addition, any employees who are on trade union release during a period when their association of employees is in breach of its obligations not only are not paid during that period and have their salary reduced by an equivalent amount, but also have their salary suspended for 12 weeks for every day or part of a day that they were on trade union release (section 34). Lastly, the Government may, by simple decree, amend, replace or delete any clause of the collective agreement in order to ensure the provision of services in a public sector organization. Section 37 carries, for the association, a civil liability vis-à-vis third parties in the event of damages caused by employees in breach of section 22 or 23. The same applies to a group of associations. Furthermore, section 38 greatly facilitates class actions against an association of employees in the event of an infringement of the Act. This latter measure could only be explained, according to the FAC, by the Quebec Government's total contempt for the right to strike, which is an established trade union right. It is purely and simply an invitation to public condemnation of trade unions. Taken together, according to the FAC, these severe sanctions against offenders are aimed at stifling trade unions' legitimate means of action.

517. Finally, according to the complainant organizations, severe penal sanctions may be imposed in the event of an infringement of the Act. The penalties envisaged, by day of the contravention or part thereof, are $100–500 for employees and natural persons in general, $7,000–35,000 for executives, employees and representatives of an association of employees, and $25,000–125,000 for associations, groups or bodies (sections 39–41). These measures may not be deferred, cancelled or reduced by agreement. All these provisions on continuity of services are effective until 1 April 2010, i.e. the day following the expiry of the collective agreements as renewed (section 49).

518. The complainant organizations (CSQ, FIIQ, FAC, ASPGQ) allege that, even where restrictions on the right to strike may be considered justified, the sanctions imposed in the event of an infringement of the law must not be disproportionate to the intended purpose. Act 43, however, would impose clearly disproportionate sanctions. According to the FIIQ,

if these penal and administrative sanctions were applied, they would seriously compromise the viability, if not the very existence, of the trade unions covered by that Act.

519. According to the CNTU, the Quebec Government is no novice when it comes to passing special laws to force its employees to return to work. Between 1964 and 2001, no fewer than 34 special laws on returning to work – almost one a year – were passed to put a stop to industrial disputes, 23 of which were legal.

520. Observing that the Act is in violation of the ILO's Conventions and principles concerning trade union matters, the complainant organizations are asking that the principles of freedom of association and their right to bargain collectively be respected, and that the Quebec Government establish dispute settlement machinery jointly with the trade unions. Three organizations (AJE, CNTU and FIIQ) are requesting ILO technical assistance. One organization, the SPGQ, is asking the Committee to declare Act 43 unconstitutional. Finally, the CNTU and the CSQ are asking the Government to repeal Act 43.

Additional allegations of the ASPGQ

521. The ASPGQ further indicates that the Prosecutors Act (as amended by the Act amending the Act respecting Attorney-General's Prosecutors and the Labour Code, L.Q. 2004, chapter 22) denies prosecutors the right to join a trade union and deprives them of protection against hindrances, reprisals or sanctions related to the exercise of trade union rights.

522. In its two communications of 14 February, the ASPGQ raises points that are not related to the other complaints submitted by the complainant organizations. Following the adoption of the amending Act, the ASPGQ withdrew a complaint submitted to the Committee, although the amendments to the Prosecutors Act did not bring the latter into line with international standards on freedom of association. The ASPGQ thus informed the Committee that: (1) the legislative provisions applicable to prosecutors prohibits them from concluding a service agreement with a trade union or from joining such an organization; and (2) prosecutors are still deprived of any protection against interference, hindrance, reprisals or any sanctions related to the exercise of the right of association.

523. Concerning the first point, the ASPGQ alleges that the new section 10.1 of the Prosecutors Act provides that it cannot conclude a service agreement with a trade union organization or be affiliated to such an organization. Before the adoption of that section, the ASPGQ had negotiated in good faith with the Government and signed an agreement governing prosecutors' conditions of employment which provides that for the years 2004, 2005 and 2006, the pay scale for prosecutors would follow the same general parameters applied to the pay scales of state and parastatal sector employees, with the exclusion of any adjustment due to pay equity or salary relativity (clause 7-1.04).

524. The ASPGQ indicates that traditionally, in Quebec, certain conditions of employment of state and parastatal sector employees, such as pay scales and basic social benefits, were negotiated at a central bargaining table around which sat several federations or trade union groupings representing a large number, if not the majority, of employees in those sectors. Thus, the "pay scales of state and parastatal sector employees" to which clause 7-1.04 refers are negotiated by trade union organizations to which the ASPGQ does not have the right to affiliate and with which it does not have the right to conclude a service agreement under section 10.1 of the Prosecutors Act. The real effect of section 10.1, therefore, is to impose conditions of employment on prosecutors following a bargaining process in which it does not have the right to participate.

525. According to the ASPGQ, section 10.1 of the Prosecutors Act constitutes an attack on the prosecutors' fundamental trade union rights. Specifically, it breaches Articles 2, 5 and 8 of Convention No. 87 by prohibiting prosecutors from joining the workers' organization of their choice. Furthermore, the ASPGQ alleges that the effect of section 10.1 of the Prosecutors Act is to deprive prosecutors of their fundamental right to bargain collectively by making their remuneration subject to a bargaining process in which they do not have the right to participate.

526. With regard to the second point (set out by the complainant organization in a third communication sent on 13 February), the complainant organization denounces the lack of protection granted to prosecutors against hindrance, reprisals or any sanction related to the exercise of the right of association. Workers subject to the Labour Code enjoy such protection (the ASPGQ describes certain sections concerning protection against interference by employers in an association of employees, prohibition of intimidation and threats to persuade someone to join, not to join or cease to be a member of an association of employees, prohibited constraints, reinstatement, burden of proof). However, the ASPGQ recalls that prosecutors are not subject to the Labour Code and that the Prosecutors Act does not provide for any protection in these areas. According to the ASPGQ, the lack of protection of prosecutors against reprisals for exercising the right of association has become of even greater concern following the Government's adoption of Act 43. This Act prohibits recourse to strikes or any other means of pressure and the incitement to such actions by workers' organizations and prohibits any hindrance to the maintenance of normal services. Draconian administrative measures, including the withholding of salaries, are envisaged for employees who breach these prohibitions. The effect of this Act is that prosecutors are likened to employees in the meaning of the Labour Code for the purposes of reprisals for certain prohibited trade union activities, but do not enjoy the protection accorded to other employees under the same Code.

527. Finally, in a communication of 19 October 2006, the ASPGQ indicates that a notice of non-agreement was sent on 25 September 2006 to the Quebec Ministry of Justice concerning the withdrawal of the priority right to use premises for the ASPGQ's activities, a right embodied in the agreement on the working room (4,150) in the office of the Quebec Attorney-General's Prosecutors. The ASPGQ states that the situation denounced by this appeal is an eloquent illustration of the attacks on freedom of association authorized by the Government in the absence of provisions to protect prosecutors from hindrance, reprisals or sanction related to the right of association.

528. The ASPGQ request the Committee to make the necessary recommendations to ensure that prosecutors may enjoy the right to bargain collectively in the meaning of the international labour Conventions.

B. Reply of the Government of Quebec

529. In its communication of 16 January 2007, the Government maintains that it acted in compliance with the principles of freedom of association established by the ILO to achieve its aims and objectives. The measures introduced by Act 43, such as the extension of the negotiated collective agreements but with salary increases, were necessary for a reasonable period, were kept to the minimum and were accompanied by appropriate guarantees to protect workers' standards of living. The Government maintains that state employees' freedom of expression was in no way affected by Act 43, which did not have the effect of muzzling the trade unions as the publication in the media of the trade unions' positions clearly shows.

530. The Government states that its observations relate to the overall conformity of Act 43 with international principles of freedom of association. It also states that the SPGQ cannot

request the Committee to pronounce on the constitutional validity of Act 43, as only the domestic courts are qualified to pronounce on conformity with the charters of Canada and Quebec.

531. The Government draws a general picture of the bargaining system in place in Quebec, which it says was in no way modified by Act 43. The Government explains that, subject to certain adaptations, the Labour Code applies to the state and parastatal sectors (which include the Government, its ministers and departments, and public health, social service and public education establishments). Thus, the principle of the monopoly of trade union representation, the compulsory deduction of trade union dues for all employees, whether or not members of a trade union, and the ban on replacing striking employees apply to trade unions in both the private and the state and parastatal sectors.

532. The Government emphasizes that in the state and parastatal sectors in Quebec, where the services provided to the public constitute essentially a monopoly and where employees have a high degree of job security, there is very little machinery for regulating competition. Convincing people that the State's ability to pay has reached or even exceeded its limit is more difficult since, unlike the situation in the private sector, the threat of closure, bankruptcy or receivership is not really an option.

533. The Government explains that the collective agreements of the majority of state employees are negotiated on a sectoral basis. There are two levels of bargaining, one national and one local. The provisions of collective agreements on salaries and salary scales are negotiated at the national level, at the central bargaining table, by the Government and the principal workers' associations. Other matters which may have important financial implications, such as pension schemes, may also be negotiated at the central bargaining table. Other points are negotiated at the various sectoral tables with each association of employees. This procedure is adapted to the peculiarities of the state and parastatal sectors. It differs from the general system set out in the Labour Code whereby, in principle, bargaining takes place at the level of each company.

534. The Government points out that the remuneration of 520,000 state employees is by far its largest expenditure item (in 2005–06 it accounted for over 56 per cent of expenditure to that). Given the size of the sums allocated to the remuneration of state employees, any increase in remuneration inevitably has a major impact on the Government's financial resources and, therefore, on its ability to finance other categories of expenditure to meet the needs of the population.

535. The Government goes on to discuss the negotiations which took place with, among others, the complainant organizations. According to the Government, the last collective agreements on conditions of employment for almost all state employees were concluded in 1998. After having been extended for a year, again by agreement between the employers' and workers' sides, they were due to expire on 30 June 2003. As regards the prosecutors, the agreement that serves as a collective agreement was due to end on 31 March 2007. As to the AJE collective agreement, concluded on 30 March 2000, that had been extended to 31 December 2005.

536. On 15 December 2003, the major trade union associations representing almost all the state employees tabled their demands relating to the renewal of the collective agreements. These demands covered various aspects of the employees' conditions of employment (indexation of salaries, increase in retirement benefits, increase in insurance, payment of parental rights and holidays, review of classifications, etc.) but, according to the Government, did not contain any proposals concerning adjustments related to pay equity. On 15 June 2004, the Government responded to the demands tabled by the trade unions by announcing that, for

the first time, it was setting itself a budgetary framework for its overall policy of remuneration of state employees (the Pay Policy).

537. At a press conference held on that date, the President of the Treasury Council and the Minister responsible for Government Administration (the Minister) announced to the trade unions and the general public that the Government intended to limit the increase in state employees' unit pay from 2003–04 to 2009–10 to 12.6 per cent, or $3.25 billion of additional expenditure on remuneration, and that this would encompass all increments agreed to by the State, including the salary adjustments resulting from the Pay Equity Act. This budgetary framework reflected the Quebec's taxpayers' capacity to pay and set the limits within which the Government intended to exercise its budgetary responsibilities towards the population as a whole. Finally, the Government indicated that the distribution of the global increase over time and its distribution among the groups covered by the Pay Policy or to resolve the various remuneration problems could be determined by negotiation with the trade union associations representing state employees.

538. The Government indicates that responsible management of the public finances required such a measure, given the economic situation and the Government's difficult budgetary situation at the time. Since the outlook for economic growth in Quebec was poorer than in previous years, the slowdown in the growth of the Government's autonomous revenues would limit the resources available to pay state employees. Moreover, expenditure on government programmes was relatively high compared with the general wealth of the people of Quebec and other North-American societies. Although it was then forecast that budget equilibrium would be achieved in 2004–05, a shortfall of $1.6 billion remained to be absorbed in 2005–06 in order to meet the requirements of the Budget Balancing Act (L.R.Q. c. E-12.00001), which requires the Government to maintain a balanced budget. Against that background, it was essential for the Government to keep very tight control of its spending, including its expenditure on remuneration. The Government had in fact mentioned the precarious state of public finances on various occasions since 2003, in particular in a speech by the Minister of Finance on 16 December 2003, and when presenting the budgets for the financial years 2003–04 and 2004–05.

539. On 18 June 2004, the government negotiators presented offers to the principal trade union associations, proposing a series of increases within the budgetary framework of the Pay Policy. As explained to the trade union associations, the Government's proposals included, inter alia, salary increases of 2 per cent for each of the financial years 2006–07, 2007–08 and 2008–09, leaving the salary increases for the financial years 2004–05, 2005–06 and 2009–10 to be determined. At the time of the presentation of these offers to the trade union associations, the government negotiators explained to the representatives of the principal associations the basis, parameters and above all the limits of the budgetary framework of the Pay Policy.

540. During the months that followed, numerous bargaining meetings took place without the parties being able to reach agreement on the renewal of the collective agreements. At a press conference held on 9 February 2005 to report on the status of negotiations, the Minister stated that the Government wished to reach an agreement with its employees, but that there could be no question of exceeding the budgetary framework which had been fixed, taking into account the state of the public finances and the citizens' capacity to pay. Also at that press conference, the Minister observed that the trade unions' demands in respect of salary adjustments alone (excluding the pay equity adjustment) – an increase of 12.5 per cent over three years – was double the increase proposed by the Government. Despite the explanations given by the Government regarding the Quebec people's capacity to pay and the intense efforts it made to find common ground, no agreement was reached.

541. During August 2005, the government offers were improved, in particular to allow an additional salary increase of 2 per cent for the financial year 2009–10, but the total increases proposed were still within the budgetary framework established in June 2004. In September 2005, the Minister and the Minister of Finance met the leaders of the principal trade union associations to explain to them why it was impossible for the Government to increase the employers' offers over and beyond the budgetary framework fixed in June 2004. At those meetings, the trade union leaders concerned were informed of the fragility of public finances (due to the rise in oil prices, the budget deficit to be absorbed, the lack of government resources) and the harmful consequences on public finances of failing to respect the budgetary framework set by the Government. The Government states that it also explained that the target for expenditure on programmes that the Government had established for financial year 2006–07, which had had to be increased by 2.6 per cent to 3.6 per cent in the 2005–06 budget mainly in order to meet the additional cost of the pay equity adjustments and the renewal of the collective agreements, could not be set any higher without increasing the tax burden on taxpayers and harming economic growth or falling back into a deficit situation. Later, in September 2005, Ministry of Finance officials also met the economists of the principal trade union associations to give them the same information.

542. In addition, the monitoring of government financial balances in the financial year 2005–06 shows overspending on programmes of over $800 million, which calls for a further major effort to reduce expenditure in ministries and government agencies, mainly by a credit freeze. The information given to the trade union leaders and economists concerning the fragility of Quebec's public finances and the consequences of increasing the government offers beyond the budgetary framework fixed in June 2004 was made public by the Minister of Finance at a press conference on 27 September 2005.

543. A comparative analysis of the government offers and the trade union demands was also presented by the Minister in a press release of 29 September 2005. According to the Government's calculations, the trade unions' demands would, in the long run, entail an increase in annual remuneration of over $6.8 billion for financial year 2009–10, more than double the increase of $3.2 billion for the same period envisaged in the budgetary framework. After stating the magnitude of the gulf between the parties, the Minister reiterated the Government's budgetary position and appealed to the social conscience of the trade unions in order to reach an agreement. Repeatedly, during November and December 2005, the Minister outlined the Government's position and called on the parties to step up negotiations so as to reach final agreements before the holiday season.

544. However, despite the numerous representations by various ministers on behalf of the Government, the salary demands of the trade unions representing state employees, with the exception of the FIIQ, did not change and several trade union associations even announced their intention of intensifying the pressure they had already brought to bear to force the Government to give in to their demands. By way of example, revolving strikes of 24-96 hours were announced on 13 December 2005 for several regions of Quebec in the education and health and social services sectors. These means of pressure were in addition to numerous revolving strikes that actually took place in these sectors between 10 November and 15 December 2005 and the strikes and other direct action by government employees between May and December 2005, which cause serious disruptions for both the Government and the public.

545. Since the announcement of the budgetary framework in its Pay Policy on 18 June 2004, the Quebec Government has taken part in 56 negotiation meetings at the central bargaining table to try and reach agreement with the principal trade unions (CNTU, CSQ, FTQ and, occasionally, FIIQ, SFPQ and SPGQ). It also took part in over 1,400 bargaining meetings at various sectoral tables.

546. On 14 December 2005, the Government announced that, faced with the manifest stalemate in the negotiations, the National Assembly had been convened for the following day to table and adopt Act 43. The Minister said at the time that she thought that the bargaining process had produced all that it could; that, while further progress in closing the gaps might still be possible with other trade union groups concerning normative matters, the gap between the proposals and demands on salaries could not be bridged; that the salary demands of the trade unions involved in the negotiations were irreconcilable with the taxpayers' ability to pay and the fragility of Quebec's public finances; that, although they were legal, the direct action and strikes which had been multiplying for some time must cease, since the disruption of services did nothing to help improve public finances or increase taxpayers' ability to pay; that it was with a strong sense of responsibility and a profound conviction of acting in the general interest, and out of respect for the citizens and taxpayers of Quebec, that legislative measures would be presented the following day in the National Assembly that were designed to set the salary scales of employees in the state and parastatal sectors. If it were to accede to the trade unions' salary demands, the Government would find itself forced to increase taxes, cut public services or plunge into deficit. The Minister said she was convinced that the public did not want anything to do with those options and that they were altogether impracticable, and she appealed to the social conscience of the trade union leaders to recognize that the Government could not ignore the budgetary facts and mortgage future generations.

547. In short, Act 43 gives effect to the Pay Policy that the Government presented to the trade unions. It is framed within the budgetary framework for salaries that the Government had announced a year earlier. It was impossible to increase the salary proposals so as to meet the trade union demands without raising taxes to finance the additional expenses and, by so doing, harming Quebec's economic growth, or without significantly cutting public services, for example, mainly in the health and education sectors, or without reverting to a deficit situation which, as well as placing a heavy burden on future generations, would have risked downgrading Quebec's rating on the financial markers and thus reduced its access to bond markets and increasing the cost of government borrowing. The Government could not contemplate any of these options without seriously compromising the priorities to which it had committed itself vis-à-vis the people of Quebec namely, health, education and increased economic prosperity. It is against this background that the Government decided to cease negotiations which, given the parties' respective positions, were clearly doomed to failure and, thereby, to bring the resulting climate of uncertainty and instability to an end.

548. In the hours preceding the adoption of Act 43, bargaining continued and led to the signing of numerous agreements with the trade unions associations, bringing to 35 the total number of agreements covering over 365,000 state employees. These agreements, which are listed in sections 10–13 of Act 43, cover normative aspects of work, some of which have financial implications. Of the complainant trade unions, the SPGQ, the FIIQ, the unions affiliated to the CNTU, the FAC, the unions affiliated to the CSQ, the FTQ, the CSD, the SFPQ, the SPEQ and the APEQ all concluded agreements with the Government which were fully respected by Act 43.

549. Parallel to the negotiations for the renewal of the collective agreements which the Government ended with the adoption of Act 43, the discussions on pay equity continued and various exchanges took place in this regard. A number of agreements were reached between December 2005 and June 2006 on the payment of annual pay equity adjustments which in due course, i.e. in 2009–10, will amount to $825 million. These adjustments were also within the budgetary framework fixed by the Government in June 2004.

Act 43

550. The purpose of Act 43 is to ensure continuity of public services and to provide conditions of employment of employees of public sector bodies within the limits imposed by the state of public finances (section 1). An analysis of the historical, social and economic background of Act 43 confirms and explains these objectives namely, the legislator's desire to put an end to a climate of uncertainty about the Government's ability to deliver responsible budget planning and continuity of public services in a manner compatible with the state of public finances.

551. As regards sections 5–9 and Schedule 1, on the one hand, and section IV and section 49, on the other, these are more specifically aimed at ensuring the maintenance and continuity of services to the public and are essential to the application of and compliance with Act 43. These objectives are clearly related to urgent and real concerns for the elected Government and for the population of Quebec as a whole.

552. The Government has explained its concerns. In addition, it adds that, as collective agreements covering over 500,000 people had expired over two-and-a-half years previously and all the exchanges between the Government and its employees had been focused on their renewal, it was becoming increasingly difficult for the Government to take decisions, especially in relation to health and education. The Government, as guardian of the interests of the population of Quebec as a whole, felt duty bound to propose the adoption of Act 43. To act otherwise would have endangered the continuity of public services and harmed the economic growth of Quebec by the very damaging effect it would have on the state of public finances. Act 43 was intended to ensure uniformity, consistency and stability in collective employment relations between the Government and its employees.

553. It is from this standpoint that the Government of Quebec considers that the Pay Policy must be approached. In the interests of transparency and fairness vis-à-vis all the people of Quebec, the Government lay down the basis for negotiations on salaries. Despite the "imperative" economic reasons presented by the Government, the trade unions refused to negotiate within that financial framework and the Government accordingly proposed the adoption of Act 43.

554. According to the Government, the trade union associations representing the state employees were warned of the limits of the Government's budgetary framework and were called on to collaborate with the Government in finding a negotiated solution. Apart from the agreements signed prior to the adoption of Act 43, which were respected, the trade unions' position on salary issues remained unchanged, which goes some way to showing how necessary Act 43 was.

555. Act 43 is a response to specific objectives and concerns. Contrary to what is alleged by certain complainant trade unions, it is not one of a series of special laws. Act 43 is not the successor of other laws, some of which have been examined by the Committee. Likewise, the Government reiterates that Act 43 embodies the agreements reached on the normative aspects of employment – some of which have financial implications – concluded with 35 associations of employees. Since the adoption of the Act, the FSSS, affiliated to the CNTU, has concluded an agreement with the Government, as has the SPGQ. Negotiations are still continuing with other associations, which shows that the Government is still willing to negotiate with associations of employees.

556. Finally, the penal and administrative provisions contained in Act 43 are the normal and necessary result of the means chosen by the legislator to achieve the objectives set. Indeed, the importance of one of these objectives, i.e. to maintain services to the public, especially

in the health and education sectors, required the adoption of adequate administrative and penal measures to ensure full compliance with the Act.

557. In the circumstances, extending the collective agreements negotiated to 2010 was reasonable and necessary to provide a stable, medium-term horizon for expenditure on state employees' remuneration so as to enable the Government to plan a responsible budget that was compatible with the state of public finances. The Government emphasizes that it is thus following a trend in Quebec towards the long-term renewal of collective agreements in all sectors of the economy and especially in large companies. Such agreements meet the needs of trade unions and employers, both of which want a stable and predictable environment to govern their relations.

558. In addition, the Government emphasizes that Quebec's credit rating rose in June 2006, largely because of the stability resulting from the adoption of Act 43 and, more generally, from the economic and budgetary policy pursued by the Government. The Government is thus in a position to pay off its debt without having to reduce the services to the public.

559. The salary increases provided for in Act 43 should maintain the standard of living and purchasing power of all state employees. When it laid down its Pay Policy, the Government was keen to provide its employees with a remuneration that compared favourably on average with that paid to employees in the Quebec private sector and was in keeping with the State's ability to pay.

560. In 2002, a study concluded that the salaries paid by the Quebec Government were on average higher than those paid in the private sector. Encouraged by this, the Government drew up its Pay Policy in such a way as to follow the overall growth of salaries in the economy. Basing itself on the finding that the average salary of Quebec workers had grown at a rate similar to that of consumer prices in recent years, the Government established a policy aimed at granting similar salary increases throughout the public sector. It was with these salary figures in its possession that the Government adopted the responsible policy of ensuring that the costs of production of government services do not exert inflationary pressure and do not increase the tax burden on taxpayers. The combined impact of the annual increase of 2 per cent for salaries from 2006, pay equity adjustments retroactive to November 2001, promotions and upgrading means that Act 43 will maintain the purchasing power of all employees in the Quebec public sector.

561. Through its Pay Policy, the Government has shown its determination to achieve internal equity by reserving part of its budgetary envelope for state employees to correct the salary differentials caused by discrimination in the past, under the heading of pay equity adjustments. Employees in predominantly female work categories, often among the most vulnerable, thus benefit from salary increases resulting from the pay equity adjustments, as well as the increases provided for in Act 43.

562. In June 2006, the Government concluded a historic agreement on pay equity for the health and education sectors and the Quebec public service. Under this agreement over 360,000 people, mostly women, will benefit from salary adjustments. In the health and education sectors, the average salary adjustment is equivalent to 5.97 per cent, while for the public service, the average is 5.04 per cent. The salary adjustments are retroactive to 21 November 2001.

563. In the difficult budgetary context in which it found itself, the Government, acting responsibly, established a Pay Policy which allowed it to allocate in the long term, as from 2008, an additional $3.25 billion of expenditure on the annual remuneration of its employees. The Government admits that it could have offered higher salary increases to all its employees, but it would not then have been in a position to make the required

adjustments in respect of its most vulnerable employees without being irresponsible in its management of public finances. Faced with this choice, the Government and the legislator chose the salary adjustment which the most vulnerable employees were entitled to expect, in accordance with the principles of justice, fairness and equality characteristic of Quebec society.

564. The Government considers that Act 43 constituted an exceptional and purely circumstantial effort to ensure the necessary stability of public finances. The Government and the legislator took pains to limit the new law to essentials, to restrict it to a reasonable period and to accompany it with appropriate guarantees to protect employees' standard of living. Salary scale increases are maintained, job security also, and employees benefit from salary adjustments under the Pay Equity Act. The Government of Quebec maintains that it respects the ILO's instruments concerning freedom of association to which it has subscribed. It requests the Committee on Freedom of Association to refrain from making recommendations with respect to the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154). The Government of Quebec also requests the Committee on Freedom of Association and the ILO Governing Body to conclude that Act 43 is in conformity with international labour standards and to consider that the complaints contained in Case No. 2467 do not call for further examination.

C. The Committee's conclusions

565. *The Committee notes that the complainant organizations allege that the Government has passed a law, Act 43, imposing conditions of employment on employees in the Quebec public sector without prior bargaining or consultation, thus violating their fundamental right to bargain collectively, and taking away their right to strike without granting them an alternative procedure for the settlement of disputes such as mediation, conciliation or arbitration. The ASPGQ further alleges that the Prosecutors Act (as amended by the act amending the Act respecting Attorney-General's Prosecutors) denies them the right to join a trade union and deprives them of protection against hindrances, reprisals or sanctions related to the exercise of trade union rights.*

Act 43

566. *With regard to Act 43, the Committee notes the often very detailed complaints submitted by the complainant organizations which raise several questions concerning: (1) certain irregularities in the procedure for the adoption of this Act; (2) the extension of collective agreements; (3) the imposition of conditions of employment; (4) the violation of the obligation to bargain in good faith; (5) the violation of the right to strike; and (6) the imposition of disproportionate sanctions in the event of non-compliance with the provisions prohibiting recourse to strikes or means of pressure.*

567. *The Committee also notes the Government's detailed reply in which it emphasizes that Act 43 is the solution that was judged necessary by the legislator to achieve objectives that are in the public interest, namely to put an end to the climate of uncertainty regarding the Government's ability to deliver responsible budgetary planning and to ensure the continuity of public services in a manner compatible with the state of public finances. The Government maintains that it acted in accordance with the principles of freedom of association established by the International Labour Organization. The Committee notes that the Government stresses certain facts: (1) the conditions of employment of state employees are better than those in the private sector; (2) the renewed collective agreements had been freely negotiated; (3) the economic situation was precarious and did not allow the trade unions' salary demands to be met; (4) numerous meetings had taken*

place with a view to renewing the collective agreements; (5) the legal strikes by the employees had caused serious disruption and the parties' positions were irreconcilable; (6) consultations had taken place before the adoption of Act 43; (7) the extended collective agreements provided for salary increases to maintain the employees' standard of living; and (8) the extension was for a reasonable period. The Committee notes the Government's arguments of an economic order and notes its observation as to Quebec's credit rating, which had risen since the adoption of Act 43.

568. *Concerning the procedure followed for the adoption of Act 43, the Committee notes with concern the description of the circumstances of its adoption set out by the complainant organizations. According to them, the deliberations surrounding the adoption of Act 43 were not democratic, with no parliamentary commission or public consultation, the whole process being rushed through a special session of the National Assembly when there was no apparent emergency. Certain amendments were even added after the law had been ratified. The Committee, however, notes discrepancies between the versions of the facts submitted by the complainant organizations and by the Government, the latter alleging that many consultations had taken place before the adoption of the Act. The Committee cannot express an opinion on the specifics of the adoption of Act 43 and its conformity with the normal domestic procedure, but it remains concerned by the allegations relating to the haste and absence of consultation preceding its adoption, and recalls that any limitations on collective bargaining on the part of the public authorities should be preceded by consultations with the employers' and workers' organizations in an effort to obtain their agreement [see* ***Digest of decisions and principles of the Committee on Freedom of Association****, fifth edition, 2006, para. 999].*

569. *Furthermore, the complainants allege that the provisions of Act 43 are said to be void because they were adopted in contravention of article 133 of Canada's Constitution of 1867, which requires that the laws of the legislature of Quebec should be printed and published in French and in English. As these are arguments of a constitutional order, the Committee considers that it is not competent to formulate an opinion on the compatibility of this legislation with the Canadian Constitution, which is a matter within the purview of the domestic courts. For these reasons, the Committee will similarly not express an opinion on the request of the SPGQ to pronounce itself on the unconstitutionality of Act 43.*

570. *The Committee notes that Act 43 has the effect of unilaterally extending collective agreements which had expired or were about to expire, when the parties were still in the middle of negotiations. The Committee emphasizes, first of all, the fundamental importance that it attaches to the right to bargain collectively. The Committee recalls, in general, that the right to bargain freely with employers with respect to conditions of employment constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that employers' and workers' organizations should have the right to organize their activities and to formulate their programmes [see* ***Digest****, op. cit., para. 881]. In addition, the Committee has had occasion to express its opinion specifically on the extension of collective agreements and is of the view that any action involving, as it did, intervention in the collective bargaining process should be taken only in cases of emergency and for brief periods of time [see* ***Digest****, op. cit., para. 1023]. According to the Government, the urgency was due to the irreconcilable positions of the parties, the strike situation and, given the economic circumstances, the impossibility for the Government to change its offer relating to salaries. According to the information provided by the complainant organizations, there was no emergency situation and certain parties were still in the*

middle of negotiations. According to the FIIQ, there was nothing to suggest that the climate at the central bargaining table was deteriorating to the point where there was a prospect of industrial conflict. The Committee notes in particular that, according to the complainant organizations, the collective agreements of certain organizations, such as the ASPGQ or the AJE, had not yet expired and that negotiations on their renewal had just begun. As to the strikes, the CNTU, for example, only resorted to strike action in autumn of 2005, a few months before the adoption of Act 43. Moreover, the fact that all the strikes by the complainant organizations were legal is not in dispute.

571. *The Committee recalls that, while certain workers concerned by the complaints are employees engaged in the administration of the State whose right to negotiate may be subject to restrictions, that is not the case of teachers or health service employees. The Committee observes moreover that, in Quebec, the right to bargain collectively exists for all categories of workers. The Committee recalls in this regard that, in so far as the income of public enterprises and bodies depends on state budgets, it would not be incompatible with the principles of Convention No. 98 – after wide discussion and consultation between the concerned employers and employees' organizations in a system having the confidence of the parties – for wage salary ceilings to be fixed in state budgetary law neither would it be a matter for criticism that the Ministry of Finance prepare a report prior to the commencement of collective bargaining with a view to ensuring respect of such ceilings [see* ***Digest****, op. cit., para. 1036]. However, the Committee is of the opinion that it is vital for workers and their organizations to have the possibility of participating fully and significantly in the determination of this wider bargaining framework. That would mean their having access to all financial, budgetary or other information to allow them to assess the situation in full knowledge of the facts.*

572. *The Committee notes the allegations that the extension of the collective agreements to 2010 is of an excessive duration, especially since the Labour Code limits the duration of collective agreements to three years. The Committee recalls that the duration of collective agreements is primarily a matter for the parties involved, but if government action is being considered any legislation should reflect tripartite agreement [see* ***Digest****, op. cit., para. 1047] and, in particular, a three-year period of limited collective bargaining on remuneration within the context of a policy of economic stabilization constitutes a substantial restriction, and the legislation in question should cease producing effects at the latest at the dates mentioned in the Act, or indeed earlier if the fiscal and economic situation improves [see* ***Digest****, op. cit., para. 1025]. Moreover, the Committee has in the past considered a restriction on collective bargaining lasting three years and nine months to be excessive [see 330th Report, Case No. 2166, para. 293]. The Committee considers that, bearing in mind that the extension was imposed unilaterally by means of legislation, the effect of Act 43 on the duration of certain collective agreements is unreasonable and that the conditions required by the Committee for an extension to be acceptable are not fulfilled.*

573. *The Committee notes that collective agreements in force were amended by Act 43. This is particularly the case of the agreement negotiated by the ASPGQ which was due to expire on 31 March 2007 and which was amended and renewed by Act 43 in December 2006. The Committee emphasizes that a legal provision which allows the employer to modify unilaterally the content of signed collective agreements, or to require that they be renegotiated, is contrary to the principles of collective bargaining [see* ***Digest****, op. cit., para. 942].*

574. *Furthermore, conditions of employment were imposed by Act 43, specifically with regard to salaries, or can be imposed. The Committee is of the opinion that if, as part of its stabilization policy, a government considers that salary rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional*

*measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect employees' living standards [see **Digest**, op. cit., para. 1024]. The Committee expressed its opinion on the reasonable duration above. As regards guarantees to protect employees' living standards, the Committee again notes the discrepancy between the allegations of the complainant organizations and the Government's reply. The complainant organizations consider that no measure has been taken to protect the living standards of the employees, who will suffer a loss of purchasing power as a result of Act 43 in so far as the percentage salary increase of 2 per cent, imposed for each of the years 2006, 2007, 2008 and 2009 is lower than the forecast for increases in the cost of living and entails a salary freeze for 2004 and 2005. The Government alleges, on the other hand, that it decided on the salary increases after carrying out a study and that the employees' standards of living are protected. The Committee requests the Government to review the restriction on the salary increase with the social partners, if possible requesting a study by an independent person who has the confidence of all the parties.*

575. *Act 43 takes into account certain agreements concluded prior to its adoption. However, the Committee notes that, according to the allegations, some of the agreements were concluded at the last minute, under the threat of the adoption of a bill imposing less favourable conditions. Those agreements were concluded between the Government and the representatives of the FNEEQ, FEESP, FP, CSD and SPEQ, who signed agreements on 13 and 14 December following the statements by the Government of Quebec concerning the imminent adoption of Act 43. The Committee also notes that APEQ was forced to accept the employers' offer relating to normative aspects after being informed by the Government, at about 4.30 p.m. on 14 December, that the parties had only another 90 minutes to reach an agreement, failing which a special law would lay down the conditions of employment of APEQ's members. The parties concluded the agreement at 8.15 a.m. on 15 December 2005. The Committee is concerned at the manner in which these agreements were concluded and considers that collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining [see **Digest**, op. cit., para. 926]. The Committee considers that the agreements concluded in a precipitate manner, under the threat of the adoption of a law providing lesser guarantees and without their exact terms being known, are not voluntary in character and do not respect the obligation to negotiate in good faith.*

576. *The Committee wishes to recall here the fundamental obligation to bargain in good faith. The Committee notes that the trade union and government parties appear to have refused to compromise over the provisions on salaries and 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**, op. cit., para. 936] and that, while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement [see **Digest**, op. cit., para. 938]. The Committee requests the Government, who also acts in this case as the employer, to ensure respect for these principles in the future.*

577. *As regards the right to strike, the Committee notes that under the rule in Quebec labour law prohibiting strikes during the term of a collective agreement, Act 43, by unilaterally putting an end to negotiations and imposing collective agreements for a determined period, thereby deprives employees of the right to strike for that same period. The Committee recalls the fundamental importance that it attaches to the right of workers to have recourse to strike action and that it has always maintained that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests [see **Digest**, op. cit., para. 522].*

578. *The Committee underlines, however, 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]. The Committee notes the Government's comments according to which the strikes would have caused serious disruption both for the Government and the people of Quebec. The Committee emphasizes that, whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, a back-to-work order might be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation. However, a back-to-work requirement outside such cases is contrary to the principles of freedom of association [see **Digest**, op. cit., para. 634]. Furthermore, the Committee emphasizes that, where the right to strike is restricted or prohibited in certain essential undertakings or services, adequate protection should be given to the employees to compensate for the limitation thereby placed on their freedom of action with regard to disputes affecting such undertakings and services [see **Digest**, op. cit., para. 595]. However, according to the information available to the Committee, regrettably no compensation was granted in the form of conciliation or arbitration and, with respect to salaries and certain other conditions of employment, Act 43 essentially imposes the employers' offer.*

579. *The complainant organizations allege that the sanctions in the event of an infringement of the provisions prohibiting recourse to strike action or means of pressure are severe and disproportionate. The Act provides in particular that the deduction at source of trade union dues may be suspended merely by the employer declaring that there has been an infringement of the Act, for a period of 12 weeks for each day or part of a day that the infringement is observed (section 30). In the view of the Committee, the withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided [see **Digest**, op. cit., para. 475]. In the event of an infringement of the ban on resorting to strike action, the employees' salary is reduced by an amount equal to the salary they would have received for any period during which they infringe the Act, in addition to not being paid during that period. In addition, any employees who are on trade union release during a period when their association of employees is in breach of its obligations also have their salary suspended for the time during which they are on trade union release, at a rate of 12 weeks for each day that they infringe the Act. The Committee is of the opinion that salary deductions for days of strike give rise to no objection from the point of view of freedom of association principles [see **Digest**, op. cit., para. 654], but it recalls that, when the deductions of pay are higher than the amount corresponding to the period of the strike, the imposition of sanctions for strike action is not conducive to harmonious labour relations [see **Digest**, op. cit., para. 655]. Moreover, section 38 greatly facilitates class actions against an association of employees in the event of an infringement of the Act by reducing the conditions required by the Civil Procedures Code for such an action. In the view of the Committee, there is no reason to treat this type of class action differently from others and it sees no justification for this difference of treatment. Finally, severe penal sanctions may be imposed in the event of an infringement of the Act – up to the considerable sum of $35,000 per day of the contravention for natural persons and up to $125,000 per day of the contravention for associations. The Committee is of the opinion that the sanctions laid down in Act 43 are excessive and not conducive to developing harmonious relations between the parties or to encouraging the conduct of fruitful negotiations. The Committee therefore requests the Government to review the sanctions provided for in Act 43 in order to ensure that they will be applied only in cases where the right to strike may be limited in accordance with the principles of freedom of association and that they are proportionate to the infringement committed.*

580. *The Committee recalls its conclusions in another Canadian case concerning legislative intervention in the state and parastatal sectors [see 330th Report, Case No. 2166, para. 294], and it concludes here too that Act 43 violates freedom of association principles inasmuch as it does not respect the autonomy of the bargaining parties and legislatively imposes terms and conditions of employment by means of legislation, without the employees being able to submit the dispute to mutually and freely chosen independent and impartial arbitration. The Committee urges the Government to amend Act 43 to bring it in line with the principles embodied in Conventions Nos. 87 and 98 and to avoid, in the future, having recourse to such legislative intervention without full and frank consultations with the parties concerned and to consider submitting, in case of a conflict, disputes to impartial and independent arbitration. The Committee expects that the next round of negotiations will be held in accordance with the principles mentioned above. In the meantime, the Committee recommends that the Government adopt a flexible approach, should the parties be willing to modify the so-called "presumed agreement", which is in fact a settlement imposed by legislation. The Committee requests to be kept informed of developments in this respect.*

581. *Finally, the Committee requests the Government to take into consideration the possibility of establishing a bargaining procedure that has the confidence of the parties concerned and allows them to settle their differences, especially by having recourse to conciliation or mediation and by voluntarily calling on an independent arbitrator to resolve their differences, on the understanding that the arbitration decisions are binding on both parties and are fully and swiftly executed.*

Additional allegations of the ASPGQ

582. *The Committee notes, according to the allegations of the ASPGQ: (1) that the legal provisions applicable to prosecutors prohibits them from concluding a service agreement with a trade union organization or affiliating to such an organization; (2) that prosecutors are deprived of any protection against interference, hindrance, reprisals or any sanction related to the exercise of the right of association; and (3) the Government's decision to withdraw from the prosecutors the priority right of use of a room.*

583. *Despite the absence of any comment by the Government on these questions, the Committee considers that, judging from the Act, prosecutors or the ASPGQ do not have the right to join the organization of their choice. Considering that this contravenes Articles 2 and 5 of Convention No. 87, the Committee recalls that the principle laid down in Article 2 of Convention No. 87 that workers and employers shall have the right to establish and join organizations of their own choosing implies for the organizations themselves the right to establish and join federations and confederations of their own choosing [see* ***Digest****, op. cit., para. 710]. The Committee requests the Government to ensure that prosecutors and the ASPGQ have the right to join the organization of their choice and to keep it informed in that regard.*

584. *As regards the second point in this complaint, the Committee emphasizes that anti-union discrimination is one of the most serious violations of freedom of association, as it may jeopardize the very existence of trade unions [see* ***Digest****, op. cit., para. 769], and that legislation should lay down explicitly remedies and penalties against acts of anti-union discrimination in order to ensure the effective application of Article 1 of Convention No. 98 [see* ***Digest****, op. cit., para. 813]. The Committee calls on the Government to ensure that prosecutors enjoy legislative protection against any act of anti-union discrimination, and to keep it informed in that regard.*

585. *As regards the allegation by the ASPGQ that the Government withdrew its priority right, established by agreement, to use a room in the Courts of Justice building for its activities*

and removed all the articles which were in those premises, without its consent, the Committee first recalls that agreements should be binding on the parties [see ***Digest****, op. cit., para. 939]. The Committee requests the Government to respect agreements that have been negotiated voluntarily and to cease all action contrary to such agreements without first engaging in negotiations with the parties concerned. The Committee requests the Government to review this matter with the ASPGQ and to keep it informed in that regard.*

586. *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case, especially with respect to the various allegations of the ASPGQ.*

The Committee's recommendations

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

(a) The Committee urges the Government to amend Act 43 to bring it in line with the principles embodied in Conventions Nos. 87 and 98. The Committee urges the Government to avoid in future having recourse to legislative intervention imposing conditions of employment without full and frank consultations with the parties concerned and to consider submitting, in case of a conflict, disputes to impartial and independent arbitration. The Committee expects that the next round of negotiations will be held in accordance with the principles mentioned above. In the meantime, the Committee recommends that the Government adopt a flexible approach, should the parties be willing to modify the so-called "presumed agreement", which is in fact a settlement imposed by legislation. The Committee requests to be kept informed of developments in this respect.

(b) Given the restrictions on negotiations relating to salaries and the fact that they are so lengthy, the Committee requests the Government to review the restrictions with the social partners, if possible by requesting a survey by an independent person who has the confidence of all the parties.

(c) The Committee requests the Government to review the excessive sanctions provided for in Act 43 in order to ensure that they will be applied only in cases where the right to strike may be limited in accordance with the principles of freedom of association and that they are proportionate to the infringement committed. In addition the Committee considers that there is no reason to treat class actions against an association of employees differently from other class actions in the Civil Procedures Code.

(d) The Committee requests the Government to establish a bargaining procedure that has the confidence of the parties concerned and allows them to settle their differences, especially by having recourse to conciliation or mediation and by voluntarily calling on an independent arbitrator to resolve their differences, on the understanding that the arbitration decisions are binding on both parties and are fully and swiftly executed.

(e) As regards the Attorney-General's Prosecutors of Quebec, the Committee calls on the Government to ensure that prosecutors and the ASPGQ have the right to join the organization of their choice and enjoy legislative protection

against any act of anti-union discrimination, and to keep it informed in that regard. The Committee requests the Government to respect agreements that have been negotiated voluntarily and to cease all action contrary to such agreements without first engaging in negotiations with the parties concerned. The Committee requests the Government to review this matter with the ASPGQ and to keep it informed in that regard.

(f) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of this case, especially with regard to the various allegations of the ASPGQ.

Annex

Extract of Bill 142

An Act respecting conditions of employment in the public sector

The Parliament of Québec enacts as follows:

Division I

Purpose and scope

1. The purpose of this Act is to ensure the continuity of public services and provide for the conditions of employment of employees of public sector bodies within the limits imposed by the state of public finances.

…

Division II

Conditions of employment

§1. – General provisions

5. The latest collective agreement between a public sector body and an association of employees representing employees in its employ which, on 16 December 2005, has expired, is renewed and, with the necessary modifications, is binding on the parties until 31 March 2010.

   A collective agreement between a public sector body and an association of employees representing employees in its employ that expires on 31 December 2005 is renewed as of 1 January 2006 and, with the necessary modifications, is binding on the parties until 31 March 2010.

6. The agreement on the conditions of employment of Attorney General's prosecutors entered into under section 12 of the Act respecting Attorney General's prosecutors (R.S.Q., chapter S-35) is amended to give effect to the provisions of paragraphs 11 to 14 of Schedule 1 until 31 March 2007.

   The agreement is renewed as of 1 April 2007 and, with the necessary modifications, is binding on the parties until 31 March 2010.

7. The latest agreement between the Minister of Health and Social Services and:

(1) the association of employees representing residents in medicine, entered into under section 19.1 of the Health Insurance Act (R.S.Q., chapter A-29),

(2) the body representing pharmacists working in institutions and the body representing clinical biochemists, entered into under section 432 of the Act respecting health services and social services (R.S.Q., chapter S-4.2), and

(3) the body representing midwives entered into under section 432.1 of the Act respecting health services and social services,

is renewed and, with the necessary modifications, is binding on the parties until 31 March 2010.

8. For the purposes of section 9, Division IV and section 46, the agreements referred to in sections 6 and 7 are considered to be collective agreements and the persons covered by them are considered to be employees. For the purposes of the second paragraph of section 10, the same applies to the agreement referred to in section 6.

9. The conditions of employment stipulated in collective agreements renewed by sections 5 to 7 are modified to give effect to the provisions of Schedule 1.

The same applies to the conditions of employment of medical physicists stipulated in the Regulation respecting the terms of employment of medical physicists working for institutions operating a hospital centre, made by Ministerial Order 2003-002 dated 10 February 2003 (2003, G.O. 2, 964).

…

Division IV

Obligations regarding the continuity of public services

§1. – Delivery of normal services

22. Employees must, as of 00:01 a.m. on 16 December 2005, report for work according to their regular work schedule and other applicable conditions of employment.

The first paragraph does not apply to employees not reporting for work because they have tendered their resignation, unless they have done so as part of concerted action, or because they have been fired or suspended or have exercised their right to retire.

23. Employees must, as of 00:01 a.m. on 16 December 2005, perform all the duties attached to their respective functions, according to the applicable conditions of employment, without any stoppage, slowdown, reduction or degradation of their normal activities.

24. A public sector body, its executives and its representatives must, as of 00:01 a.m. on 16 December 2005, take the appropriate measures to ensure that normal services are provided.

25. No association of employees may call or continue a strike or participate in concerted action if the strike or concerted action involves a contravention of section 22 or 23 by employees.

Similarly, no public sector body may declare a lock-out if the lock-out involves such a contravention.

…

§2. – Administrative measures if obligations not fulfilled

30. On noting that its employees are not complying with section 22 or 23 in sufficient number to ensure that normal services are provided, a public sector body must suspend withholding any union assessment or dues or amount in lieu thereof from the wages paid to the employees represented by an association of employees.

    The suspension is effective for a period equal to 12 weeks per day or part of a day during which it is noted by the public sector body that the employees are not complying with section 22 or 23 in sufficient number to ensure that normal services are provided.

31. Despite any clause of a collective agreement or of an agreement, employees represented by an association referred to in section 30 are not required to pay an assessment or dues, a contribution or an amount in lieu thereof to the association or to a third party for the benefit of the association for the duration of the suspension under section 30.

32. No employee who contravenes section 22 or 23 may receive remuneration for the contravention period.

    In addition, if the contravention consist in absence from work or participation in a work stoppage, the salary to be paid to the employee under the applicable collective agreement for work performed after the absence or work stoppage is reduced by an amount equal to the salary the employee would have received for each period of absence or work stoppage.

    …

38. Any person who suffers damage by reason of an act in contravention of section 22 or 23 may apply to the competent court to obtain compensation.

    Despite article 1003 of the Code of Civil Procedure (R.S.Q., chapter C-25), if a person brings a class action under Book IX of that Code by way of a motion under the second paragraph of article 1002 of that Code, the court authorizes the class action if it is of the opinion that the person to whom the court intends to ascribe the status of representative is in a position to adequately represent the members of the group described in the motion.

§4. – Penal proceedings

39. A person that contravenes any provision of section 22, 23, 24, 27, 28 or 29 is guilty of an offence and is liable, for each day or part of a day during which the offence continues, to a fine of:

    (1) $100 to $500 if the person is an employee or a natural person other than a person referred to in paragraph 2;

    (2) $7,000 to $35,000 if the person is an executive, employee or representative of an association or group, or if the person is an executive or representative of a body; and

    (3) $25,000 to $125,000 if the person is an association, group or body.

40. An association of employees that contravenes the first paragraph of section 25 is guilty of an offence and is liable to the fine prescribed by paragraph 3 of section 39 for each day or part of day during which the offence continues. The same applies to a public sector body that contravenes the second paragraph of section 25.

CASE NO. 2462

INTERIM REPORT

Complaint against the Government of Chile presented by the National Trade Union of Professionals, Postal Technicians, Supervisors and other Employees of Correos de Chile (SNP)

Allegations: the complainant organization alleges that, with the intention of wrecking the trade union, Correos de Chile has dismissed its union members, failed to comply with provisions of the collective agreement, discriminated against its members over a productivity incentive, offered new workers special assignments if they give up the benefits to which they are entitled under the collective contract and engaged in other anti-union practices, such as pressuring workers to leave the trade union; it also alleges that the Labour Directorate has not included Correos de Chile in the list of enterprises that have been found guilty of anti-union and anti-labour practices by the judicial authority

588. The complaint is contained in a communication from the National Trade Union of Professionals, Postal Technicians, Supervisors and other Employees of Correos de Chile (SNP) dated 10 January 2006. The organization sent further information and new allegations in communications dated 17 February and 18 May 2006.

589. The Government sent its observations in a communication dated 6 July 2006.

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

A. The complainant's allegations

591. In a communication dated 10 January 2006, the SNP alleges a series of unfair and anti-union practices by the Chilean postal service, Correos de Chile, which is part of the Chilean state administration, and which it accuses of having embarked upon a secret campaign to eliminate the trade union by persuading all its members to resign from the union, by dismissing workers arbitrarily and by offering low-level line managers affiliated to the union promotion to senior management posts or to positions of trust. The union, which had 500 members when it was initially established on 4 November 1997, now has only 230, as a result of the enterprise's systematic harassment and discrimination.

592. The complainant organization adds that the enterprise refuses to pay the benefits provided for under the collective contract to its new members who are therefore obliged to lodge complaints through the union. One employee, Italo Ferraro Moya, for example, was

dismissed in August 2005 for initiating legal proceedings against the enterprise for non-payment of an "allowance" stipulated in the collective labour contract. On other occasions, when the enterprise was ordered by the labour tribunals to pay allowances scheduled under the collective contract, it dismissed Patricia Macarena Cortes Monroy in March 2005 and Jaime Amor Illanes, both of whom were union members.

593. According to the allegations, the management of Correos de Chile completely disregards the rulings handed down against it by the labour tribunals, as well as all the fines imposed on it by the various departments of the labour inspectorate. Consequently, a lot of union members are so afraid of losing their source of income because of their membership that they have resigned under pressure from the intermediate and senior line managers.

594. The Minister of Labour promised to try to find a solution to the various problems that have arisen, which he described as very serious, and in October 2005 said that he would hold another meeting with the union to inform it of the outcome, but so far he has not done so.

595. The complainant organization states that, in a court case brought against it in 2003 for unfair and anti-union practices, the enterprise was fined 150 tax units; the court also ordered the Labour Directorate to include this state enterprise in the list of enterprises that constantly infringe the labour laws, which is published in a national newspaper. The enterprise was supposed to appear in the July 2005 list, but for some reason it never did. Consequently, the Eighth Labour Court of Santiago was obliged to notify the National Labour Director, and the chiefs of its Labour Relations and Legal Department to comply with the Court's ruling the next time the list was published. This condemnation for anti-union practices shows how the union has been sidelined from the work meeting held by the enterprise, by the general manager's refusal to meet the union's Executive Board (for four years) and the human resources manager's deliberate policy not to meet the union so long as it did not change its attitude and appoint a new spokesperson (the President of the union was banned from the collective bargaining process in 2003).

596. The complainant organization alleges that in May, June and August 2005, along with other unions operating in the enterprise, it was invited by the manager of the Mail and Parcels Division to a number of work meetings to set up a productivity incentive system for employees working in the various parcel units and routing centres throughout the country, based on the number of parcels, the number of kilograms received and the number dispatched. Once the system had been worked out, it was agreed to apply it to all workers in this area regardless of the union they belonged to, and to pay the incentives retroactively from May 2005 together with the September 2005 salaries. This is what happened for the vast majority of the workers involved, but not for the 17 employees working in this area who were members of the complainant organization. When the manager was asked to explain the discrimination, he apologized, saying that he had been sure that the incentive was intended for all the workers without any discrimination, but he had received instructions from the woman responsible for human resources, with the general manager's backing, not to go along with what had been agreed and not to pay the incentive to members of the SNP; specifically, he said that the manager of human resources and the general manager had told him that it was not the right time and that the circumstances were not appropriate, because the union had issued a press release denouncing that and other unfair practices. As a result, a second complaint alleging unfair and anti-union practices was lodged with the Ninth Labour Court of Santiago on 7 October 2005. The complaint is still being investigated.

597. The complainant organization states that it lodged a third complaint concerning unfair and anti-union practices on 9 November 2005, which is currently being examined by the Eighth Labour Court of Santiago, because Correos de Chile, in order to avoid having to pay workers who join the SNP, has devised the ruse of offering gilts to the workers it

recruits in exchange for their giving up their benefits under the collective agreement, provided that they sign a declaration to the effect that the salary for which they have been recruited includes the allowance they are entitled to. Even more serious in this escalade of dishonest incentives, the enterprise is offering a meals allowance of 43,000 pesos, far more than it pays members of the five unions operating in Correos de Chile, who only receive 17,000 pesos. This is the policy that the management is following to prevent freedom of association.

598. In its communication dated 17 February 2006, the complainant organization recalls that it managed to have a meeting with the Minister of Labour, who said he would do what he could to persuade the management of Correos de Chile to sit down with the union's Executive Board to try and resolve their differences and would meet the SNP again to inform it of the outcome, but he never did. The authorities responsible for the state enterprise Correos de Chile have never answered the notes that the SNP has sent them; instead, they have obliged the trade union to lodge complaints with the labour tribunals, since they are not prepared to talk directly with the union's Executive Board (they will only talk if the trade union accepts the collective contract that they tried to impose during the three series of collective bargaining). It is therefore impossible to find any common ground. The situation has done enormous harm to the union which, at the beginning of 2005, had 320 members and now has 240, during which time 50 of its members have been dismissed following a major scare campaign in which they were told that they would be dismissed one by one if they did not leave the union.

599. The complainant organization attached with its communication copies of two additional complaints it has lodged. On one of these, accusing the enterprise of failing to pay in full a bonus provided for under paragraph 39 of the collective contract in force, the Court of First Instance ruled in its favour. The other complaint was lodged by officials of four of the five trade unions operating in Correos de Chile for non-payment of its social security contributions in respect of all the bonuses payable under the collective contracts between 1994 and 2001; the enterprise faces a possible debt of around 4,500 million pesos.

600. In its communication dated 18 May 2006, the complainant organization alleges that, at the end of March, without any coherent or valid grounds, the enterprise dismissed four union members, all of them professionals working in the Financial Control Unit, and that on 5 May 2006 it dismissed a woman in the same unit who was a member of the union. The enterprise has not provided any technical or professional justification for its action, merely saying that the unit is being restructured. Correos de Chile claims it is covered by article 161 of the Labour Code, which refers the exigencies of the enterprise; but the fact is that an employer who invokes that article is not allowed to recruit new staff for the same functions, whereas the enterprise dismissed these employees and promptly recruited new workers for the same jobs. The complainant organization stresses that only members of the SNP have been dismissed from this unit; the rest of the unit's staff, who are members of another trade union, have been told either by the enterprise or by the President of the union that they have nothing to fear and will be relocated to other parts of the enterprise. Correos de Chile has not responded to the SNP's request for a meeting to discuss these matters.

601. The Labour Directorate recently published in a national newspaper a list of enterprises which do not comply with the labour laws or respect trade union rights and which have been condemned by the labour courts, but Correos de Chile has still not been included in the list even though the Eighth Labour Court of Santiago found it guilty of anti-union practices.

B. The Government's reply

602. In its communication dated 6 July 2006, the Government states that the national legislation contains a series of legal and constitutional provisions recognizing the right to join a trade union, as well as detailed regulations governing the process of collective bargaining at the various levels (enterprise level or above) with a view to introducing better conditions of work and remuneration. Without entering into details, these provisions embody the criteria laid down in Conventions Nos. 87 and 98 of the International Labour Organization. At the top of the national legislative pyramid, the Chilean Constitution (article 19, paragraph 19) guarantees for all citizens the right to establish and join trade unions in the circumstances and manner prescribed by the law. The article goes on to state that "affiliation shall always be voluntary", thereby clearly establishing the autonomy of the workers, whose membership or non-membership of such organizations cannot be subject to any kind of condition. The constitutional provision is reflected in article 212 of the Labour Code, which recognizes the right of all workers in the private sector and in state enterprises, irrespective of their juridical status, to establish trade union organizations freely and without prior authorization. In other words, the labour provisions contained in the Labour Code, and specifically those indicated in Book III ("Of trade union organizations and staff delegates", articles 212 et seq.), refer explicitly to the basic standards of freedom of association, broadly following the criteria set out in ILO Convention No. 87.

603. As to the right to negotiate conditions of work and remuneration collectively, this too is regulated in detail by national legislation, especially articles 303 et seq. of the Labour Code. The provisions governing collective bargaining have also been the subject of successive amendments that Chilean Governments have introduced since the beginning of 1990. Act No. 19759 of 2001 did away with all agreements imposed by the employer once and for all, with the result that collective agreements in Chile can now only be concluded by a trade union or with a group of workers with a minimal form of organization, and always within a more or less regulated procedure that guarantees minimum negotiating conditions.

604. The Government adds that the rights embodied in ILO Conventions Nos. 87 and 98, and recognized in Chile's national legislation, include an effective enforcement mechanism, in the form of a system of labour inspection and labour management, which incorporates additional protective measures for ensuring compliance (if necessary, compulsory compliance) by means of administrative and judicial procedures. Article 476 of the Labour Code provides for labour inspection to be carried out by the Labour Directorate. Inspection is in fact the very essence of this decentralized public service, which has legal personality and its own assets and is controlled by the President of the Republic through the Ministry of Labour and Social Security (Legislative Decree No. 2 of 1967, Labour Directorate Act). One of the fundamental tasks of the Labour Directorate with respect to trade unions is to ensure that their organizations conform to the legislation in force and to the principles of freedom of association laid down in ILO Conventions Nos. 87 and 98. Moreover, the Directorate acts as certifying officer in collective bargaining. During the actual negotiations it maintains a neutral stance, but it still has the power to prevent unfair practices even though the law courts always have the last word.

605. The foregoing is completely in line with the provisions of article 292 of the Labour Code, reaffirmed by the administrative case law of the Labour Directorate itself, which is empowered, on its own initiative or at the request of an interested party, to rule on the interpretation and scope of labour laws (Legislative Decree No. 2 of 1967, Labour Directorate Act). The National Labour Directorate has stated in this respect that it is for the law courts to determine whether a practice is anti-union in nature, notwithstanding the right of intervention of the competent labour inspectorate in accordance with the provisions of article 292 of the Labour Code. Labour inspectorates operating under the

National Labour Directorate have a duty to report any incidents they consider to constitute anti-union or unfair practices, and there is a legal presumption that the accompanying investigation report is a true reflection of the facts (article 292, paragraph 4, of the Labour Code). A labour inspectorate that reports an anti-union or unfair practice may be called upon to appear in court in any legal proceedings that ensue. Likewise, workers may lodge a complaint directly with an ordinary court of law regarding any incident which they consider to constitute an anti-union practice or anti-union bargaining.

606. The matters dealt with by the labour courts under article 420(b) of the Labour Code include "questions arising from the application of provisions relating to trade union organization and collective bargaining, which by law are examined by courts responsible for labour issues".

607. It is clear from the foregoing that Chile has a whole series of laws that recognize, promote and protect the rights set out in Conventions Nos. 87 and 98, especially as regards anti-trade union and unfair practices in the course of collective bargaining. Moreover, Act No. 19759 of 2001 listed what are considered unfair and anti-union practices in great detail, increased the amount of fines and granted increased powers to the National Labour Directorate, which it authorized to be a party to court proceedings on such matters. As will be seen, Chilean labour law provides for special courts, with exclusive competence in labour matters which, inter alia, are empowered to deal with complaints of anti-union practices lodged by the workers themselves or by the Labour Directorate, as well as any questions arising from the application of provisions on trade union organization and collective bargaining.

608. As to the specific aspects of the complaint, the organization alleges that the enterprise has engaged in anti-union practices in a bid to force the trade union to remove its President and legal adviser as a condition for concluding an agreement with the workers. It also states that it had negotiated a system of variable remuneration with the enterprise, which the latter subsequently refused to implement on the grounds that it did not trust the union since it had publicly denounced Correos de Chile. The complainant adds that it was this type of action that led it to lodge a complaint for anti-union practices directly with the Eighth Labour Court of Santiago, which culminated in a ruling against the enterprise.

609. The Government recalls that, in its *Digest of decisions and principles*, the Committee on Freedom of Association has stated that "legislation should lay down explicitly remedies and penalties against acts of anti-union discrimination in order to ensure the effective application of Article 1 of Convention No. 98", which stipulates that "workers shall enjoy protection against acts of anti-union discrimination" that are calculated to diminish their freedom of association in relation to their employment. As the Committee will understand, the trade union lodged its complaint regarding the perpetration of anti-union practices by Correos de Chile directly with the Eighth Labour Court of Santiago. In Case No. 4224-2003, the workers alleged that the enterprise had sidelined them from work meetings that it held with other trade unions, that the management refused to meet its officials without giving any reasons and that the enterprise's authorities refused to have any dealing with the President of the union.

610. The workers' allegations were found to be valid by the court, which therefore upheld their complaint and ordered the enterprise to include the complainant union in the work committees dealing with general matters and to hold meetings with the union's Executive Board in accordance with normal consultation procedures; the court also fined the enterprise 50 monthly tax units. This ruling is now final, inasmuch as the Supreme Court, on 30 November 2005, dismissed Appeal No. 2243-2005 lodged by the enterprise to have it overturned. The Santiago Court of Appeal's ruling of 14 April 2005, which had already upheld the decision of the Court of First Instance, was therefore confirmed.

611. In cases such as this, the Labour Directorate is required by article 294bis of the Labour Code to keep a record of court rulings on anti-union and unfair practices and to publish a six-monthly list of enterprises and trade union organizations that have been found guilty. A court that rules on a matter of anti-union or unfair practices must, accordingly, send a copy of the relevant ruling to the Labour Directorate.

612. As indicated by the complainant organization, Correos de Chile should, following the ruling handed down by the Eighth Labour Court of Santiago, appear in the list of offending enterprises published in accordance with article 294 of the Labour Code already referred to. This list is due to be published in the second half of 2006, as was explained to the officials of the complainant trade union by the Labour Directorate authorities at the meeting referred to by the workers themselves.

613. Similarly, the Committee on Freedom of Association has stated that: "as long as protection against anti-union discrimination is in fact ensured, the methods adopted to safeguard workers against such practices may vary from one State to another, but if there is discrimination the government concerned should take all necessary steps to eliminate it, irrespective of the methods normally used."

614. The Committee goes on to state that: "the basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed." The Committee further states that: "complaints against acts of anti-union discrimination should normally be examined by national machinery which, in addition to being speedy, should not only be impartial but also be seen to be such by the parties concerned."

615. As mentioned earlier, Chile has a whole series of provisions in its Labour Code, and specifically those indicated in Book III ("Of trade union organizations and staff delegates", articles 212 et seq.), that refer explicitly to the basic standards of freedom of association, along the broad lines of the criteria established in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), of the International Labour Organization. In addition, the country has special procedures for labour disputes between the parties to an employment relationship, as well as specialized tribunals under the judiciary which are independent of the executive and which accordingly have exclusive competence in disputes brought before them. Furthermore, Chile has modified the structure of its labour procedure so as to ensure that speed and focus are of the essence. The new procedure is modern, speedy, expeditious, unencumbered by ritual, based on oral presentations, free of charge to the workers and requires the direct participation of the judge in all the hearings.

616. But this series of labour standards is not all; Chile's labour legislation also provides for machinery to guarantee the freedom of association of all the country's workers, including those employed by Correos de Chile, and to prevent unfair practices. These provisions do more than simply prohibit anti-union practices; they also establish clear and pre-established procedures that have in fact been extensively revised. Under these provisions, workers are entitled to apply for judicial protection of their rights, including the public notification of the offending enterprise through administrative channels.

617. Moreover, the point should be made that, when the present complaint was brought to its attention, the National Labour Directorate invited the claimant trade union to submit documentation so that it could carry out an investigation and discuss the matter with the enterprise. As the Labour Directorate's report No. 190 of 17 January 2006 shows, Luis Castillo Aravena, President of the union, and Rigoberto Espinoza Sazo, its Director, were invited on two occasions to meet the Directorate's Labour Relations Unit. At these

meetings, the union officials informed the Labour Relations Unit that they wished to speak directly with the highest authorities, i.e. the National Labour Director or the Minister of Labour. Without seeking to belittle the capability of the Unit, they opted not to take advantage of the possibility of mediation offered them by the Labour Directorate.

618. The union officials thus chose to hold talks with higher authorities rather than with the Labour Relations Unit, even though they had already met the highest authority in labour matters, the Minister of Labour and Social Security, on 17 October 2005.

619. In other words, the complainant organization has had access to all the administrative and judicial bodies provided for under Chilean legislation and to the highest authorities in labour matters, namely the National Labour Director and the Minister of Labour, whom its officials met personally.

620. The Committee will appreciate from the foregoing, and from the submission of the claimant organization itself, that the ordinary courts of law have been fully informed of the alleged violation of the provisions of Conventions Nos. 87 and 98.

621. The Government concludes by pointing out that the complainant organization followed due procedure by appealing to the labour inspectorate and also, on its own initiative, to the courts of justice, and that these took up the matters submitted to their jurisdiction and, after having passed judgement on the allegations in first or final instance, ruled on a number of issues in favour of the claimants.

622. The Government stresses further that the complainant organization was invited to take advantage of the labour inspection system of the administrative authority but rejected the Labour Directorate's offer of mediation for all the aspects of the complaint that had not been ruled upon in the courts, opting instead for the direct mediation of the Minister of Labour and National Labour Director.

623. The Government, within the framework of the independence of the state authorities and respecting the obligation laid down in article 73 of the Constitution "not to exercise jurisdictional functions, express an opinion on matters that are still pending, review the grounds or content of court rulings or reopen lawsuits that have been settled", undertakes to keep the ILO informed of developments in the labour court proceedings initiated by the complainant organization that are still pending.

624. The Government attached a statement by Correos de Chile dated 9 November 2005, setting out its position on the complaint, which is summarized below.

The position of the enterprise

625. Correos de Chile states that it is an autonomous state enterprise established by law, which is subject to the control of the Office of the Comptroller General and governed by the standards of the financial administration of the State; its relations with its employees are governed by the provisions of the Labour Code and complementary legislation, in accordance with the Ministry of Transport (Subsecretariat for Telecommunications) Act contained in Legislative Decree No. 10 of 1981.

626. A 1993 amendment to that Act established the right of the workers of the enterprise to bargain collectively. The first round of collective bargaining was accordingly held in 1994, followed by 1996, 1998, 2000 and 2002. In 2002, the National Trade Union of Postal Operators and Postmen No. 1 concluded collective agreements for a period of four years, with the sole exception of the SNP whose members decided, in all the collective

negotiations held since 2000, to take up the option provided for under article 369 of the Labour Code.

627. There are currently five trade unions operating in the enterprise: the National Trade Union with 3,018 members, the Postal Operators' Trade Union with 739, National Trade Union No. 1 with 359, the Postmen's Trade Union with 374, and the complainant organization, the SNP, with 255. Union membership in the enterprise is of the order of 96 per cent, while the proportion of workers whose remuneration and benefits have been established under collective contracts and collective agreements is 97 per cent.

628. It is clear from the foregoing that the senior management of the enterprise has strictly respected the provisions governing individual and collective labour rights in Chile and has at all times practised dialogue and negotiation in a climate of complete freedom of association and respect for workers' rights.

629. With regard to the collective contracts concluded with the complainant trade union, the enterprise states that, when the collective contract of 1998 came to an end in December 2000, the enterprise and the complainant organization signed a collective contract of employment whose terms the organization has subscribed to in successive negotiation since that date, taking up the option afforded by article 369 of the Labour Code.

630. The said agreement was the outcome of difficult collective bargaining that ended up with the compulsory arbitration provided for by the law, since at the time there was still a ban on strikes (the ban was repealed in 2001). On that occasion, the arbitration ruling that was handed down in first instance was in favour of the draft collective contract submitted by the workers. The enterprise appealed against the ruling and an arbitration committee was accordingly set up in accordance with the law, which engaged in a process of mediation between the parties in a bid to reconcile the clauses of the said draft with the position of the enterprise. The outcome was the contract of 6 December 2000. This means that the said contract is binding as regards the ruling handed down in the first instance, and conventional with respect to the adaptations and amendments that were introduced in the second instance with the agreement of the parties concerned and the mediation of the arbitration committee.

631. In the collective bargaining processes that followed the conclusion of the 6 December 2000 agreement, the law afforded the workers three options in the final stage of the negotiations:

(a) they could accept the employer's final offer;

(b) they could vote in favour of a strike in the hope of having the workers' position prevail; or

(c) they could maintain the provisions of the contract concluded prior to their submission of the new draft collective contract, by taking up the option afforded by article 369 of the Labour Code and under the terms stipulated therein.

In all negotiations that followed the 6 December 2000 contract, the Executive Board of the complainant trade union opted to exercise its right under the aforementioned legal provision, i.e. to maintain the provisions of that contract that were in force at the time of submission of the draft collective agreement at each round of negotiations.

632. At no time did the enterprise intervene either directly or indirectly in the organization's decision; rather, it invariably respected the decision taken freely and of their own accord

by the workers regarding the manner of engaging in and concluding the successive negotiation processes.

633. Nor did the enterprise at any time during the collective bargaining that took place after 2000 propose revoking the fundamental benefits under the 6 December 2000 contract; in the last round of negotiations on the subject, the enterprise recognized and maintained those benefits, specifically as regards professional category and seniority allowances for workers entitled to those benefits under the earlier contract, as can be seen from the records.

634. Moreover, it is not true that the enterprise has ceased complying with the provisions of the collective contracts deriving from the complainant's use of the aforementioned article 369 of the Labour Code; the benefits provided for in those contracts have been honoured in full.

635. The dispute referred to by the complainants, which led to the legal proceedings in the labour courts, stems from their attempt to revive contractual clauses regarding benefits that were only ever paid once, or compensation for causes which predated the agreement and which the payment was supposed to have covered once and for all, and from their intention to demand the end-of-negotiation bonus in those instances where they resorted to article 369 of the Labour Code, whereas both the Labour Directorate and the enterprise consider that this bonus should be payable only in respect of the collective bargaining process in which it actually arose and cannot be raised again in subsequent negotiations that end in the application of that same provision of the Labour Code.

636. In any case, no final judgement has been rendered in the proceedings referred to, as judicial appeals are still pending before the Appeals Court of Santiago and the Supreme Court.

637. It is clear from the foregoing that the claimant cannot blame the enterprise for the consequences of decisions that its Executive Board took of its own volition, without any interference whatsoever, regarding the way it concluded the negotiations.

638. As to the other allegations, the enterprise states that, given the urgency of adapting the enterprise to the exigencies and challenges posed by the international and Chilean postal system, a restructuring and modernization programme was introduced in 2002 that included a retirement plan affecting 1,600 employees working for Correos de Chile in various towns and other parts of the country.

639. It should be pointed out that the said plan was fully endorsed by the trade union organizations representing the vast majority of the workers, and included the additional benefits referred to in the collective contracts concluded with National Trade Union No. 1 and the Postal Operators Trade Union on 11 October 2002, which together had a membership of over 4,000; moreover, the plan was applicable to all the workers of the enterprise, irrespective of their membership or non-membership of the various trade unions, and all were entitled to the same benefits and retirement terms.

640. When the retirement plan was implemented, and in response to requests from the trade unions, the enterprise invited the organizations to sign a labour stability agreement; both National Trade Union No. 1 and the Postal Operators Trade Union did so, while the complainant trade union refused.

641. Under this agreement, the enterprise undertook for the four years following the entry into force of the retirement plan not to introduce any new restructuring or modernization plans nor to take any action that might involve extensive resort to article 161 of the Labour

Code; in other words, the enterprise would abstain from invoking the circumstances provided for in that article to justify any mass dismissals. The agreement did not and does not prevent the enterprise from resorting to that article in circumstances other than those mentioned, or from invoking the same circumstances to terminate the employment relationship in individual cases, should the situation so justify.

642. Consequently, the individual cases referred to by the complainant organization are not and were not covered by the agreement referred to, quite apart from the fact that its own officials decided not to be a party to the agreement.

643. The dismissals to which the complainant refers thus relate to specific instances that have nothing to do with the agreement in question, and the action taken is strictly in keeping with a right that the country's labour legislation explicitly confers on employers as such.

644. As to the complainant's accusation of anti-union practices, it should be pointed out that the union's Executive Board denounced ten alleged violations, of which the ruling handed down in the first instance by the Eighth Labour Court of Santiago upheld only three – a ruling that was nevertheless confirmed in the second instance. This second ruling was challenged in an appeal that the enterprise lodged both as to the form and as to the substance. In any case, the fact is that the complaints that led to the legal proceeding were not endorsed by two union officials who were members of the Executive Board at the time, and who expressly challenged the grounds on which the complaints were based.

645. Furthermore, all rulings concerning anti-union practices must, by law, be published in the *Labour Directorate Bulletin*.

646. As to the agreements entered into with professional workers who have recently taken up service with the enterprise, these are in conformity with the law.

647. In criticizing these workers, the complainants are being altogether inconsistent since the employees concerned have merely exercised their rights under labour legislation, complying with all the formalities and requirements established therein, given that Chile's legal system stipulates that the freedom of workers to join or not to join trade unions is a fundamental right.

648. With regard to the system of variable remuneration in certain of the enterprise's units that the complaint refers to, it should be made clear that this system of remuneration is provided for in Appendix 4 of the collective contract of employment of 11 October 2002 that it entered into with National Trade Union No. 1 and the Postal Operators Trade Union; the system was not applied to the complainant union, which was not party to the agreement. This was explained to the complainant union in a letter that the human resources manager of the enterprise sent to its Executive Board; the letter reiterated the enterprise's willingness to discuss modifying its existing collective contract with the organization so as to include the new pay scheme. Instead, the union's Executive Board chose to lodge a complaint with the labour courts on the grounds that it constituted an anti-union practice, thereby excluding any possibility of agreement extending the system of variable remuneration to its own members. This is how it came about that, without any kind of negotiation, the complaint was lodged with the Ninth Labour Court of Santiago on 17 October 2005, in total disregard of the enterprise's willingness to consider applying the said benefit to the members of the complainant organization.

649. With regard to the allegations concerning the promotion of workers to managerial functions, the enterprise states that the appointment of employees to management posts is a reflection of the growth of the enterprise; such promotions make it possible to put to advantage the experience they have gained in the past and their knowledge of the units in

which they work and encourages labour mobility and advancement – for example, to posts of responsibility that can constitute a considerable promotion, involving as it does an increase in remuneration and the acquisition of management skills that can be used both in the enterprise and elsewhere. Attributing a negative connotation to such promotion as does the complainant trade union, on the grounds that it can cause a decline in its membership, is clearly self-interested and disregards the legitimate aspirations of workers for recognition and advancement in their careers.

650. It is also clearly unjust and unrealistic to maintain that the enterprise could approve such promotions with the deliberate intention of reducing the claimant union's membership, since the indiscriminate promotion of workers to management posts would entail failing to meet targets and fulfil requirements and would seriously undermine the normal functioning and development of the enterprise in such a sensitive area as management.

651. Furthermore, the workers who accede to management posts do so freely and of their own accord and even express their desire to join the management ranks before any decision regarding their promotion is taken.

652. It is obvious from the above that the enterprise has never acted in any way that might be construed as even an indirect attempt to undermine the membership of the complainant organization, or of any other trade union.

653. In the same way, it has never acted in any way to encourage workers to join a particular trade union.

654. It is likewise unacceptable to attribute a declining membership to the 2002 retirement plan or to individual dismissals that were decided upon by the enterprise in its capacity as employer.

655. If the complainants feel that membership of their union has declined among workers in the enterprise then, instead of arbitrarily and without any justification blaming the attitude and decisions of the enterprise, they should consider freely and without prejudice the objective reasons that might explain their poor showing, instead of pretending that the enterprise is responsible for the consequences of decisions that their own Executive Board took freely and of their own accord and in full exercise of their trade union rights; for it is essential that people assume their responsibilities in the exercise of their rights and in the fulfilment of their obligations.

656. In conclusion, the enterprise states that:

– the complainants' views, particularly as regards alleged arbitrary dismissals and the enterprise's supposed non-compliance with labour and social security legislation, are nothing more than subjective and mistaken observations concerning incidents which, in the unlikely event that they might be open to debate, can be challenged in juridical proceedings which anyone who believes he or she has been wronged can initiate under Chile's legal system, on the understanding that the legislation in force also provides for the right of appeal through administrative channels and that the enterprise has acted in the belief that it has complied fully with the law;

– as can be appreciated from the foregoing considerations, the complainant alludes to incidents that are the subject of dispute between the parties concerned, and which have been submitted for a ruling to the appropriate specialized courts;

– thus, the legal proceedings concerned are still before the courts established by law, and the disputes cannot therefore be referred to any bodies other than those to which the complainants themselves took their case freely and of their own accord; and

– the enterprise considers that it has complied fully with the requirements of the law and has at all times respected the rights of the workers and of their trade union organizations.

C. The Committee's conclusions

657. *The Committee observes that, according to the allegations of the complainant trade union: (1) Correos de Chile has refused to grant new members of the complainant union the benefits to which they are entitled under the collective contract, thereby obliging them to lodge complaints through the union and then dismissing those who do so (Italo Ferraro Moya) or who obtain a ruling in their favour (Patricia Macarena Cortes Monroy and Sr Jaime Amor Illanes) – these dismissals occurred in 2005; (2) many of the trade union's members have resigned their membership under pressure from managers and intermediate chiefs; (3) the Labour Directorate has ignored the ruling of the judicial authority (condemning the enterprise for anti-union practices for not allowing the trade union to take part in work meetings, and for the general manager's refusal to meet the union's Executive Board for four years or to have any dealings with the President of the union during the 2003 negotiations) that the enterprise be included in the list of enterprises found guilty of constantly violating the labour laws; (4) the enterprise has discriminated against 17 members of the complainant trade union (but not against the members of other unions) by excluding them from the right to the productivity bonus for the parcels unit and routing centre that was agreed upon by the enterprise and all the trade unions in 2005; the complainant has initiated legal proceedings alleging anti-union practices; (5) the enterprise has offered new employees better financial conditions than those offered to members of the five current trade unions operating in the enterprise, in exchange for their giving up the benefits to which they would be entitled under the collective contract; (6) the enterprise has dismissed 50 members of the union since 2005, thereby reducing its membership from 320 to 240; (7) four of the five trade unions have lodged a complaint for non-payment of the workers' social security contributions, in violation of the collective contract; (8) the enterprise dismissed five employees of the Financial Control Unit at the end of March 2006, claiming that it was restructuring, and then recruited other people to carry out the same functions (the members of other unions in the unit were not affected by the dismissals). In more general terms, the trade union stresses the lack of dialogue on the part of the enterprise and its intention to wreck the trade union by various means, including an offer of promotion to the management level or to positions of trust that it made to low-level line managers affiliated to the union.*

658. *The Committee notes the Government's statement to the effect that: (1) Chile's legislation reflects the rights and guarantees provided for in ILO Conventions Nos. 87 and 98 and establishes effective machinery and procedures (Labour Directorate, special tribunals), as well as penalties for non-compliance; (2) in a court case brought in respect of anti-union practices, the judicial authority condemned Correos de Chile to pay a fine of 50 monthly tax units and ordered it to include the trade union in works' committee meetings dealing with general issues affecting the enterprise and to hold meetings with the union's Executive Board in accordance with normal consultation procedures; (3) the enterprise will be included in the list of enterprises and union organizations found guilty of unfair or anti-union practices that is to be published in the second half of 2006; the complainant union has been informed accordingly; (4) when the union officials lodged their complaint, the Labour Directorate suggested to them on two occasions that they carry out an investigation and discuss the matter with the enterprise (in so far as the matters had not been referred to the courts), but the union officials said they wished to take up the matter*

with the Labour Director or with the Minister of Labour (who had already met them on 17 October 2005) and preferred not to take advantage of the possibility of mediation available to them; (5) the incidents considered (in the complainant organization's first communication) to be in violation of Conventions Nos. 87 and 98 have been brought before the courts with which the organization had lodged a complaint; and (6) the Government will keep the Committee informed of developments in the proceeding brought before the judicial authority by the complainant trade union.

659. *The Committee notes the position of Correos de Chile regarding the complaint, and specifically that: (1) the enterprise denies having engaged in anti-union practices and states that it has complied fully with all legal requirements and has respected the rights of the workers and of their trade unions; (2) the allegations of the complainant trade union are merely subjective and mistaken observations and allude to circumstances that the union itself has placed before the courts; (3) the complainant organization is one of five trade unions operating in the enterprise, where the level of unionization is around 96 per cent, and represents 255 members; in other words, it is the union with the smallest membership (the largest union has 3,018 members); (4) the enterprise has at all times maintained a climate of dialogue and negotiation and has concluded a number of collective agreements with trade unions; and (5) the decline in the complainant organization's membership is the outcome of decisions that its Executive Board took freely and of its own accord and not of any steps taken by the enterprise. The Committee also notes the enterprise's statement regarding the specific allegations of the complainant union, which will be examined each in turn.*

660. *With regard to the allegation that the authorities have not, as required by law, included Correos de Chile in the list of enterprises and organizations found guilty of unfair or anti-union practices (despite having been found guilty of sidelining the complainant union, refusing to meet its Executive Board for four years and refusing to have any dealings with its President during the 2003 negotiations), the Committee notes the Government's statement that the enterprise will be included in the list to be published in the second half of 2006 and that the complainant union has been informed accordingly. The Committee requests the Government to confirm that the enterprise has now been included in the list.*

661. *The Committee has taken due note of the Government's observations on the provisions and procedures that protect trade union, administrative and judicial rights; it observes that in most instances the trade union has made repeated use of these legal facilities, that in two cases it has obtained rulings condemning the enterprise and that other proceedings are still under way. The Committee observes that the Labour Relations Unit of the Labour Directorate offered the trade union its mediation services on the occasion of its first complaint. The Committee invites the complainant union to request that mediation in order to improve its line of communication with the enterprise and to contribute to resolving the problems. That said, given that the complainant organization alleges a series of actions designed to destroy the trade union, as well as a sharp decline in its membership since 2005 and the dismissal of over 50 union members, and also that the judicial authority has handed down rulings in its favour on two occasions, the Committee considers, without wishing at this stage to pronounce on the substance of the case, that it needs to request specific observations on certain issues raised in the complaint that are examined below and be informed of the outcome of the legal proceedings that have been initiated.*

662. *With regard to the enterprise's alleged refusal to accord the various benefits provided for in clause 39 of the collective agreement, the Committee notes the trade union's statement that the judicial authority of first instance has ruled in its favour with respect to the payment of a contractual bonus. The Committee notes the enterprise's statement that the benefits payable under the existing collective contract with the complainant union have been respected, including the professional category and seniority allowances, and that an*

appeal has been lodged against the ruling referred to by the trade union. According to the enterprise, the union is attempting to revive contractual clauses that relate to benefits that were only ever paid once, or to compensation for causes which predated the agreement and which the payment was supposed to have covered once and for all, and to seek payment of the end-of-negotiation bonus in those instances where they resorted to article 369 of the Labour Code; on the other hand, both the Labour Directorate and the enterprise consider that this bonus should be payable only in respect of the collective bargaining process in which it actually arose and cannot be raised again in subsequent negotiations that end in the application of that same provision of the Labour Code.

663. *The complainant states that it has initiated legal proceedings with respect to its allegations concerning: (1) non-compliance with clauses of the collective contract according certain benefits, and specifically the non-payment of those benefits to new members of the union; (2) non-payment of the professional category allowance scheduled under the collective contract to workers joining the enterprise, while at the same time offering these same workers a "meals allowance" far greater than that scheduled under the collective contract; (3) non-payment of social security contributions provided for in the collective contracts (1994-2001). The Committee requests the Government to inform it of the outcome of the proceeding before the judicial authority.*

664. *With regard to the allegation that 17 workers in the parcels unit and routing centre belonging to the complainant union have not been paid the productivity bonus (under the variable remuneration system) agreed upon by the enterprise and the five trade unions that operate there, the Committee notes the former's statement that the complainant organization is not a party to the collective contract (Appendix 4 of the collective agreement) that was concluded with the most representative trade union and one other, and that the human resources manager offered the complainant trade union the option of modifying the collective contract so as to incorporate the variable remuneration system. The Committee observes that the complainant union has initiated legal proceedings with the judicial authority and requests the Government to inform it of the outcome.*

665. *With regard to the alleged dismissal of more than 50 members of the complainant trade union since 2005 (including Italo Ferraro Moya in August 2005, Patricia Macarena Cortes Monroy in March 2005, Jaime Amor Illanes and five workers from the Financial Control Unit in March–May 2006, whom the enterprise immediately replaced by new workers who were assigned the same functions in the Unit), the Committee notes the enterprise's comments on the restructuring and modernization process that took place in 2002 and on the labour stability agreement (in which the complainant union chose not to participate), as well as its claim that the complainant union is referring to specific instances which have nothing to do with the contract in question and which correspond to the exercise of a right that Chile's labour legislation accords any employer as such. The Committee notes that it has not received specific observations on the dismissal of these workers and requests the Government to send its observations on the matter.*

666. *With regard to the allegation that the enterprise has pressured workers to resign from the complainant organization and has offered to appoint unionized workers to positions of trust or to promote them from low-level line manager to senior management posts (supposedly so that they will cease to be members of the union), the Committee notes the enterprise's specific observations denying that it has any anti-union objective and pointing out that promotions to management posts do not take place indiscriminately but are a reflection of the growth and requirements of the enterprise, and that they are better paid and respect the wishes of the worker. Inasmuch as these are very general allegations, the Committee requests the Government and the complainant to inform it whether any complaints have been lodged with the Labour Directorate on the subject and, in the affirmative, to communicate to it the findings of any investigation undertaken.*

The Committee's recommendations

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

(a) The Committee requests the Government to confirm that Correos de Chile has been included in the list of enterprises and trade union organizations found guilty of unfair or anti-union practices (as required by law).

(b) The Committee requests the Government to inform it of the outcome of the judicial proceedings initiated by the complainant trade union with respect to: (1) non-compliance with clauses of the collective contract according certain benefits, and specifically the non-payment of those benefits to new members of the union; (2) non-payment of the professional category allowance provided for in the collective contract to workers joining the enterprise, while at the same time offering these same workers a "meals allowance" far greater than that scheduled under the collective contract; (3) non-payment of social security contributions provided for in collective contracts (1994–2001); (4) the allegation that the enterprise has not paid 17 parcels unit and routing centre workers belonging to the complainant union the productivity bonus (under the variable remuneration system) agreed upon by the enterprise and the five trade unions that operate there.

(c) The Committee requests the Government to send its observations on the alleged dismissal of more than 50 members of the complainant trade union since 2005 (including Italo Ferraro Moya in August 2005, Patricia Macarena Cortes Monroy in March 2005, Jaime Amor Illanes and five workers from the Financial Control Unit in March–May 2006, whom the enterprise immediately replaced by new workers who were assigned the same functions in the unit).

(d) The Committee invites the complainant union to request the mediation of the Labour Relations Unit of the Labour Directorate in order to improve its line of communication with the enterprise and to contribute to resolving the problems.

(e) The Committee requests the Government and the complainant to inform it whether any complaints have been lodged concerning the (very general) allegations that the enterprise has pressured workers to resign from the trade union and has offered to appoint low-level line managers to senior management posts (supposedly so that they will cease to be members of the union) or to positions of trust.

CASE NO. 2465

INTERIM REPORT

Complaint against the Government of Chile presented by the United Federation of Workers (FUT)

Allegations: Use of police to prevent strikers from demonstrating and arrest of trade unionists; hiring of workers to replace the strikers; establishment of an employer-controlled trade union; anti-union dismissals

668. The complaint is contained in a communication from the United Federation of Workers (FUT) dated 29 November 2005. The organization sent further information and new allegations in communications dated 22 December 2005 and 14 March 2006.

669. The Government sent its observations in a communication dated 28 July 2006.

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

A. The complainant's allegations

671. In a communication dated 29 November 2005, the FUT alleges that Interparking Ltda. (a company that operates the parking meters in the municipalities of Las Condes and Estación Central) has been harassing workers belonging to the National Inter-Enterprise Union of Metallurgy, Communications, Energy and Allied Workers (SME). For example, the company dismissed trade union delegates Claudio Elgueta Valenzuela and Juan Valenzuela and, during the drafting a collective agreement, SME member Gonzalo Orellana. The company was forced to reinstate all three workers.

672. The FUT adds that, once negotiations on the collective agreement collapsed, strike action was approved on 17 November 2005. When an attempt by the Labour Inspectorate to use its good offices failed, the strike became effective on 28 November 2005, with the parking-meter workers demonstrating peacefully in the morning in front of the town hall of Las Condes. Sixteen police officers *(carabineros)* and four radio patrol cars were sent to the scene of the demonstration. It was later revealed by a councillor that the mayor of the municipality and a commissioner had ordered the police to arrest trade union delegate Claudio Elgueta Valenzuela. At 4 p.m. the workers began a peaceful march towards the locations where the parking-meter workers of Las Condes work. Along the way, a police patrol tried to arrest the said trade union delegate on the grounds that the march had not been authorized, and escorted the workers to a shopping centre; there, a police officer checked the identities of the workers and some time after 5.30 p.m. arrested union delegate Claudio Elgueta Valenzuela (a member of the bargaining committee for the draft collective agreement), without producing a warrant. The union delegate was then taken to the 11th Police Station of Las Condes, where he was held pending his appearance in court the next day, supposedly to face a charge dating back to June 2004.

673. The FUT states that the company proceeded to hire strike-breakers and that police officers halted the peaceful demonstration at the scene of the strike, claiming that it had not been authorized by the state authority.

674. In its communication of 22 December 2005, the FUT alleges that article 381 of the Labour Code allows for the replacement of striking workers and the use of strike-breakers and sets a 15-day deadline from the start of a strike for workers to return to work. Interparking Ltda., the company that holds the concession for the parking meters of the communes of Las Condes and Estación Central, replaced all the striking workers belonging to the SME trade union.

675. The FUT also alleges that, on 13 December 2005, the striking workers peacefully occupied office No. 312 (leased by the company) from 7 a.m. onwards. The police, without identifying themselves, first asked to see union official Jorge Murúa Saavedra's identity card and the permit to demonstrate issued by the metropolitan administration of Santiago, and then barred the entrance, prevented access to the scene of the strike and took up positions around the office, while the company refused to negotiate with the trade union.

676. At around 10.30 a.m., the (still hostile) uniformed police officers, again without identifying themselves to the strikers or offering any explanation for their action, decided to break into office No. 312 of Interparking Ltda., first kicking at the door and then striking it violently several times. After completely destroying the door to the office, without saying anything or identifying themselves, they took over the office by force, where they held the occupants for around 30 minutes, handcuffing them and taking their photograph. Once the workers had been detained and handcuffed, the police officer in charge informed union official Jorge Murúa Saavedra that the order to evict the occupiers of the office had been issued over the telephone by Public Prosecutor Gabriela Cruces, for alleged forcible entry, and that once the premises had been inspected Víctor Manuel Vidal, Gonzalo Orellana and Felipe Cofre would be released.

677. These workers will be tried according to Chile's new criminal system, having held a peaceful strike and occupation, which was violated by the uniformed police, employing material means supposedly authorized by a public prosecutor who never visited the scene and who does not qualify as a judge. These workers could possibly be imprisoned for having held a strike.

678. In its communication of 14 March 2006 the FUT alleges that Interparking Ltda. has continued to put pressure on workers belonging to the SME; since 22 December 2005, this trade union has lost all its members, while two company unions have been established, one by former SME members on 13 January 2006 and the other under pressure from Interparking Ltda., which financed and authorized logistical work during working hours for the setting up of a so-called "Metropolitan Union of Parking Meter Workers and Controllers of Interparking Ltda.", which is an employer-controlled union. The greatest cause for concern regarding the establishment of this employer-controlled union is the fact that any worker who is not a member of the union is dismissed.

679. The first worker to be dismissed was Felipe Cofre Arriagada, even though he has immunity under article 221 of the Chilean Labour Code, which states that "workers who take part in the establishment of a company union, a union covering a company plant, or an inter-enterprise union shall enjoy trade union immunity from ten days prior to the holding of the constituent assembly till 30 days after the assembly has been held. The duration of this right may not exceed 40 days." His dismissal is part of the reprisals carried out by the company against the workers who occupied one of its offices peacefully.

680. On 3 February 2006, Víctor Manuel Vidal Bustamante, another worker who participated in the peaceful occupation and who was likewise detained by Chilean police on the orders of the public prosecutor, was also dismissed. The Labour Inspectorate ordered his reinstatement on 9 February 2006, and the company agreed to reinstate him on 10 February 2006. He then participated in the founding of the company union of Interparking Ltda., but was dismissed on two further occasions, until the Labour Inspectorate exerted its authority to fine the company 80 tax units on 22 February 2006. After just a single telephone call, the company reinstated him the next day.

681. Mauricio Contreras Espinoza, a worker belonging to the SME trade union, was also the victim of an anti-trade union dismissal.

682. The company also dismissed SME trade unionists Diego Rojas Araos and Héctor Aedo Faundez, who had participated in the strike held by the SME trade union.

683. Fernando Quezada Guzmán, a former member of the SME trade union and currently a union delegate of the Inter-Enterprise Services Union (SIS), was also the victim of anti-trade union dismissal, being dismissed from Interparking Ltda. on 14 March 2006. Interparking Ltda. also dismissed the President of the Union Parking Meter Workers and Controllers of Interparking Ltda., Juan Javier Quezada Guzmán, and union delegate Juan Valenzuela Navarro on 6 March 2006, and has not given them any work since that date. The Labour Inspectorate imposed the fines provided for by law but the company prefers to pay the fines rather than reinstate the union officials.

B. The Government's reply

684. In its communication dated 28 July 2006, the Government states that the rights referred to in ILO Conventions Nos. 87 and 98 and the right to assemble and demonstrate are recognized in the Constitution and under the national legislation and are effectively safeguarded by a system of inspections carried out by the Labour Directorate. This system makes it possible to ensure compliance, even by force, through administrative and legal procedures. Article 476 of the Labour Code states that labour legislation inspection is the responsibility of the Labour Directorate and is the very basis of this decentralized public service. The Directorate has legal personality and its own assets, and is subject to the supervision of the President of the Republic through the Ministry of Labour and Social Security. Its "essential task" in the area of trade union affairs is to ensure that trade union organizations operate in accordance with the legislation in force and the principles of freedom of association established in ILO Conventions Nos. 87 and 98. It also acts as certifying officer in collective bargaining; during the negotiations themselves it adopts a neutral stance, though it still has the power to prevent unfair practices even though the law courts always have the last word in this field.

685. As to the workers' complaint regarding the actions of the state bodies during the strike held by the workers of Interparking Ltda. on 13 December 2005, the Government states that the right to strike is established under the Chilean legal system as a manifestation of freedom of association. Thus, Title IV of Book III of the Labour Code, which regulates the right to strike, explicitly recognizes it as the right of all Chilean workers.

686. The Committee on Freedom of Association has always held that the right to strike is one of the fundamental rights of workers, in that it is a means of defending their economic interests and one of the "essential means through which workers and their organizations may promote and defend their economic and social interests". This opinion is given expression in Chile's legal system, so long as the right to strike is not abused and does not extend to a disturbance of the public order and to criminal activities.

687. The hiring of replacement personnel is regulated by article 381 of the Labour Code. This prohibits the practice save in exceptional circumstances when specific requirements must be fulfilled which, being an exception to the general rule, must be interpreted in a restrictive manner.

688. As to the allegations, the Labour Directorate states in its report that on 30 August 2005 a group of 51 workers of Parquímetros y Controles Interparking Ltda. initiated a bargaining process in the normal manner at which they presented a draft collective agreement as a group. Since, at the time, there was no collective instrument in force in the company, the provisions of article 320 of the Labour Code were applied. Consequently, the employer responded on 17 October 2005 by contacting the workers' bargaining committee, to which it sent its final offer on 8 November.

689. On 17 November 2005, a vote was held on whether to accept the final offer or to take strike action, as a result of which it was decided to call a strike. The next day the workers' bargaining committee requested the good offices of the authorities, in accordance with article 374bis of the Labour Code. As no agreement was reached, the workers began their strike on 28 November 2005. The strike lasted 18 days, at the end of which, there being no agreement in sight, the workers involved in the collective bargaining process returned to work under the contractual conditions contained in the employer's final offer.

690. In its report the Labour Directorate states that the process unfurled in a context of major conflict, as can been seen from the numerous complaints that were lodged and inspections that took place during the collective bargaining process, with some 14 fines being issued for various labour violations by the labour inspectorates. One of the complaints concerned the illegal dismissal of a worker involved in the collective bargaining process.

691. The events described above are completely in line with the provisions of article 292 of the Labour Code, reaffirmed by the administrative case law of the Labour Inspectorate itself in accordance with its authority, on its own initiative or at the request of an interested party, to rule on the interpretation and scope of labour laws (Legislative Decree No. 2 of 1967, Organic Law of the Labour Directorate). By Order No. 4674/196 issued in accordance with Chilean legislation, and specifically with articles 292, 289, 290 and 291 of the Labour Code and article 23 of the Ministry of Labour and Social Security's Legislative Decree No. 2 of 1967, the National Labour Directorate ruled that "The courts have the authority to determine conduct as anti-trade union, without prejudice to the intervention of the Labour Inspectorate as set out in article 292 of the Labour Code."

692. Labour inspectorates operating under the National Labour Directorate have a duty to report any incidents they consider to constitute anti-trade-union or unfair practices, and there is a legal presumption that the accompanying investigation report is a true reflection of the facts (article 292, paragraph 4, of the Labour Code). A labour inspectorate that reports an anti-union practice may be called upon to appear in court in any legal proceeding that may ensue.

693. Likewise, workers may directly lodge a complaint with an ordinary court of law regarding any incident which they consider to constitute an anti-union practice or anti-union bargaining.

694. Finally, in accordance with article 420(b) of the Labour Code, the mandate of the labour courts comprises "any issues arising from the application of standards on trade union organization and collective bargaining that the law assigns to courts of law with competence in labour matters".

695. It is clear from the foregoing that Chile has a whole series of laws that recognize, promote and protect the rights set out in Conventions Nos. 87 and 98, especially as regards anti-trade union and unfair practices in the course of collective bargaining. Moreover, Act No. 19759 of 2001 listed what are considered unfair and anti-union practices in great detail, increased the amount of fines and granted increased powers to the National Labour Directorate, which it authorized to be a party to court proceedings on such matters. In this regard, Chilean labour law provides for special courts, with exclusive competence in labour matters, which inter alia are empowered to deal with complaints of anti-union practices lodged by the workers themselves or by the Labour Directorate, as well as any questions arising from the application of standards on trade union organization and collective bargaining.

696. Very often, strikes are a symptom of wider and general problems and workers' complaints have their immediate roots in a labour dispute which was not satisfactorily resolved by the parties concerned, and this is apparent in the report of the inspection body referred to here.

697. Following the inspection, the company was issued with 26 fines covering the period from February 2005 to March 2006, and there are 11 ongoing inspections, one of which concerns a complaint alleging anti-union practices.

698. Regarding the complainant organization's reference to the intervention of police officers and the Office of the Public Prosecutor in the strike held by the workers of Interparking Ltda., and specifically the events of 13 December 2005, it should be recalled that the Committee on Freedom of Association states in its *Digest of decisions and principles* [para. 642] that "the Committee has recommended the dismissal of allegations of intervention by the police when the facts showed that such intervention was limited to the maintenance of public order and did not restrict the legitimate exercise of the right to strike".

699. In keeping with the approach of the Committee, the Government of Chile did not use the police or the Office of the Public Prosecutor to break the legitimate strike held by the workers of Interparking Ltda. According to the Labour Directorate, the strike lasted 18 days, after which the workers involved in the collective bargaining process were reinstated in their jobs under the contractual conditions contained in the final offer made by the employer. Therefore, the action taken by the State and its agents did not influence in any way the outcome of the strike or of the collective bargaining process (beyond the good offices of the Labour Directorate requested by the workers' bargaining committee, in accordance with article 374bis of the Labour Code.

700. It should thus be noted that each of the state bodies acted within its mandate under the Constitution and the law, pursuant to the provisions of articles 6 and 7 of the political Constitution of the Republic.

701. Moreover, as regards the actual incidents denounced, the workers met at the entrance of the commercial offices of Interparking Ltda. on 13 December 2005, having obtained the necessary permit from the regional government. According to the Chilean police, police officers reported that a group of 12 individuals employed by Interparking Ltda., who were holding a strike, had congregated at 520, avenida Manquehue in the commune of Las Condes, without creating any kind of disorder or disturbance of the peace. The officer in charge at the scene spoke with the group's spokesperson, who was leading the demonstration. The latter produced a document from the metropolitan administration of Santiago authorizing the demonstration, and also a written undertaking stating that "the participants undertook to take all necessary measures to ensure the normal and peaceful conduct of the demonstration and to avoid any action liable to damage public or private property or seriously to disturb the peace". The signed document contained an undertaking

by the workers to assume responsibility for any damage caused and to provide any assistance that might be required by the courts of law.

702. The police withdrew from the scene as soon as they had checked the above documents and verified that the situation was calm. However, they were subsequently informed that individuals participating in the demonstration had entered the central office of Interparking Ltda. and had locked themselves inside office No. 312 at 520, avenida Manquehue. Returning to the scene, the same officer in charge proceeded to question the company's administrator, who stated that three workers were locked in the commercial office and were preventing other workers and management staff from entering. The administrator said that, when he opened up the premises, a supervisor of the company "had been accosted by various workers who proceeded to lock themselves in, while a steady stream of striking workers were coming and going".

703. The police officers tried to contact individuals who had taken over the company's commercial office directly, but according to the police report the strikers refused to engage in any dialogue. The officer in charge then contacted the Public Prosecutor on duty at the local Public Prosecutor's Office in Las Condes. With the authorization of the Public Prosecutor and the administrator, the police officers then proceeded in accordance with the law and attempted to enter the building at 9.50 a.m. At 11 a.m. they gained entry and, inside, found Felipe Andrés Cofre Arriagada, Gonzalo Alberto Orellana Salazar and Víctor Manuel Vidal Bustamante.

704. The Chilean police stated that, during the occupation, the commercial office of Interparking Ltda. was damaged and property belonging to the company was stolen. The police further stated that, as a result of the occupation of the office by the persons referred to above, the company lost around 600,000 Chilean pesos in uncollected parking meter charges, because all the equipment needed to collect the money was inside the office and the workers inside prevented anyone from removing it.

705. The Public Prosecutor was informed by the police of the incident, and of the fact that the administrator of Interparking Ltda. had denounced the theft of the aforementioned property (batteries).

706. At the same time the police informed the Public Prosecutor that the detainees had been searched but that none of the stolen property had been found on them. The Public Prosecutor then ordered the officers to free the suspects pending summonses being issued and after verifying their addresses. The workers who had been detained were released at 12.45 p.m. on the same day (13 December), having been read their rights and having signed documents to that effect.

707. The police report is in line with the information provided by the Office of the Public Prosecutor. In his report, the Regional Public Prosecutor for the Eastern Metropolitan Region states that the Public Prosecutor limits itself to investigating offences, providing support for criminal proceedings and protecting victims and witnesses, in accordance with article 80A of the Constitution; it does not question, and certainly does not impede, the right to strike or any other workers' right that is recognized by the legislation in force.

708. The incidents denounced by the complainant trade union are related to case RUC No. 0500658262-3 charging Felipe Andrés Cofre Arriagada, Gonzalo Alberto Orellana Salazar and Víctor Manuel Vidal Bustamante with theft and damage to property. The events occurred on 13 December 2005, on the morning of which the deputy Public Prosecutor of the local Public Prosecutor's Office of Las Condes was on duty and was informed by officers of the 17th Chilean police station that a group of workers with a permit issued by the regional authority to hold a peaceful public demonstration had broken

into the commercial office of Interparking Ltda., locked themselves inside and blocked access with various objects. The Chilean police said that this was a flagrant case of causing damage and possible theft and that the administrator of the company had expressly authorized the police to enter the premises. The Public Prosecutor accordingly ordered them, if they had that authorization, to enter the occupied office and, if an offence had been committed and its perpetrators were present, to follow the appropriate procedure. Minutes later the police announced that they had followed the procedure and had arrested three of the individuals present inside the office (Felipe Andrés Cofre Arriagada, Gonzalo Alberto Orellana Salazar and Víctor Manuel Vidal Bustamante) on suspicion of having committed offences involving damage and theft, since the administrator had noted that various pieces of property were missing. These were not recovered and, when searched, the detainees had nothing on them, but they could have been removed by other workers who had left minutes beforehand.

709. It is clear from the above that the Public Prosecutor intervened on the grounds that offences had been committed involving damages and theft, and this is still being investigated since the right to hold a legal strike does not entitle the strikers to commit such offences. No order to evict the individuals was issued, but the suspects were removed from the premises by the police because of the offence they were suspected of having committed.

710. It should also be pointed out that the three suspects were not detained beyond the time necessary for the police to draft their report and that they did not suffer any injuries. They also chose to exercise their right to remain silent and the case is currently ongoing.

711. The Public Prosecutor's report states that it is its constitutional duty to investigate any incident that appears to constitute an offence, and this does not in any way prejudge who is the responsible party. In any investigation, the decision concerning the legal follow-up is based on the information gathered.

712. The Public Prosecutor's report concludes by pointing out that the police acted within their powers, inasmuch as the case involved a flagrant offence under the terms of article 79 et seq. and articles 128 and 129 of the Code of Criminal Procedure. For its part, the Office of the Public Prosecutor, as an independent body with constitutional rank, is expressly authorized to act in the manner described, in accordance with articles 180, 181 and 131 of the said Code.

713. As to the detention of Don Claudio Elgueta Valenzuela, the Eastern Metropolitan Prefecture of the Criminal Investigation Department stated that he was detained under an existing warrant issued by the Sixth Criminal Court of Santiago, and that the police had acted within the law and internal regulations governing the police in such matters, there being no political motive as had been claimed.

714. In conclusion, the Government states that the right to strike is one of the most important expressions of freedom of association and is recognized and protected by the labour legislation in force, but that it is limited by the need to maintain public order. In the case in question, the Office of the Public Prosecutor and the police officers operating under its authority acted within the powers granted to it by the Constitution and the law in investigating a complaint regarding an offence arising from the occupation of premises outside the framework of a legitimate strike by workers of Interparking Ltda. The police action concerned a case of damage and theft which is still being investigated, inasmuch as the right to hold a legal strike does not authorize such unlawful activities. The Government believes that the Committee should also take note of the fact that Claudio Elgueta Valenzuela was arrested by the Chilean Criminal Investigation Department under a warrant issued by a Chilean court prior to the events described.

715. The Government states that it will keep the Committee on Freedom of Association informed of any developments in the cases still under investigation in this matter.

C. The Committee's conclusions

716. *The Committee notes that in the present case the complainant organization has alleged: (1) the presence of police officers at a peaceful demonstration held by striking parking-meter employees of Interparking Ltda. in front of the town hall of Las Condes on the morning of 28 November 2005 and at the march that the workers held in the evening, on which occasion they checked the identity of the workers and arrested union delegate Claudio Elgueta Valenzuela without producing a warrant; (2) the hiring of strike-breakers by the company to replace all the striking workers, under the terms of article 381 of the Labour Code which allows for the replacement of striking workers and sets out a 15-day deadline from the start of the strike for them to return to work; (3) the forced entry by the police into a company office being peacefully occupied by the strikers on 13 December 2005 and their eviction on the order of a Public Prosecutor for allegedly breaking and entering, and the arrest and handcuffing of Felipe Andrés Cofre Arriagada, Gonzalo Alberto Orellana Salazar and Víctor Manuel Vidal Bustamante; (4) the establishment of an employer-controlled union financed by the company and the loss of all its members by the SME trade union which had organized the strike; (5) the dismissal of two workers who took part in the peaceful occupation of the company's office, Felipe Andrés Cofre Arriagada and Víctor Manuel Vidal Bustamante (the latter, after being dismissed on three consecutive occasions and after the company had been fined by the Labour Inspectorate, was reinstated in his job); the dismissal of the trade unionists Mauricio Contreras Espinoza (a former SME member), Diego Rojas Araos and Héctor Aedo Faundez (both of whom participated in the strike); the dismissal of trade union delegate and former SME member Fernando Quesada Guzmán, union official Juan Javier Quesada Guzmán and union delegate Juan Valenzuela Navarro, who have still not been reinstated despite the fact that the Labour Inspectorate ordered their reinstatement and despite the fines imposed on the company.*

717. *The Committee notes the Government's statement to the effect that: (1) the rights provided for by Conventions Nos. 87 and 98 and the right to assemble and demonstrate are embodied in the Constitution and in national legislation, under which a number of administrative and judicial bodies carry out inspection activities to combat unfair and anti-trade union practices, including violations of the right to strike and to bargain collectively; (2) the right to strike may not be abused and extended to cover disturbances of the peace and the commission of offences; (3) article 381 of the Labour Code regulates the hiring of personnel to replace strikers, which is prohibited save in exceptional circumstances, when specific requirements must be fulfilled which, being an exception to the general rule, must be interpreted in a restrictive manner; (4) the bargaining process was initiated by 51 workers of the company and unfurled in a context of major conflict, including the illegal dismissal of a worker involved in the collective bargaining process; between February 2005 and March 2006, the company was fined on 26 occasions and there are 11 ongoing inspections, one of which concerns a complaint alleging anti-union practices; faced with the company's final offer, the workers opted for a strike, which was initiated when the parties could not reach an agreement despite the good offices of the Labour Inspectorate; (5) the strike lasted for 18 days without any agreement being reached, and the workers involved in the collective bargaining process were reinstated under the contractual conditions contained in the final offer made by the employer, without the authorities influencing in any way the outcome of the strike or of the bargaining process (beyond the good offices mentioned above); (6) on 13 December 2005, a group of workers were peacefully exercising their right to demonstrate, having obtained the necessary permit, though subsequently a number of individuals forcibly entered the central office of the company and locked themselves in, barring access to workers and*

management staff and refusing to talk to the police; (7) having obtained the authorization of the Public Prosecutor and the administrator of the company, the police started trying to enter the office at 9.50 a.m., finally succeeding at 11.00 a.m.; once inside, they found Felipe Andrés Cofre Arriagada, Gonzalo Alberto Orellana Salazar and Víctor Manuel Vidal Bustamante; according to the police, the occupation resulted in theft of and damage to company property, in particular, batteries; moreover, since the strikers occupying the premises had prevented anyone from removing equipment that was stored in the office, the company lost 600,000 Chilean pesos in uncollected parking charges; (8) the three individuals referred to did not have any property belonging to the company on them and were released at 12.45 p.m. pending summonses for offences involving theft and damages (although no stolen property was found on them, the Government states that the objects could have been removed by other workers who had left minutes beforehand); in other words, these individuals were removed from the premises because of the offence of which they were suspected and not for having exercised their legal right to strike; (9) both the police and the Public Prosecutor acted within their legal mandate; (10) as to the arrest of Claudio Elgueta Valenzuela (allegedly in connection with a court case dating back to June 2004, according to the complainant organization), this was carried out under a warrant issued by the penal authorities prior to the events denounced in the complaint before the Committee, there being no political motive, as claimed by the complainant organization.

718. *The Committee notes that, as was stated by the Government, the strike took place in a context of major conflict, including the illegal dismissal of a worker involved in the collective bargaining process (later reinstated), the imposition of 26 fines on the company between February 2005 and March 2006 and the existence of 11 ongoing inspections, one of which concerns a complaint alleging anti-union practices. The Committee has stated on various occasions that it does not condone any abuses of the right to strike which lead to criminal or violent acts.*

719. *The Committee can only regret the context in which the collective bargaining process took place in this case, which has involved repeated violations of the law by the company that have been verified by the authorities, possibly in addition to several more dismissals which the complainant organization alleges were of an anti-trade union nature and which have as yet elicited no response from the Government.*

720. *The Committee notes that the complainant organization and the Government have provided differing versions of events surrounding the arrest of the union delegate Claudio Elgueta Valenzuela and the subsequent detention (and release after 1 hour 45 minutes) of strikers Felipe Andrés Cofre Arriagada, Gonzalo Alberto Orellana Salazar and Víctor Manuel Vidal Bustamante for occupying the company's central office; while the allegations refer to the anti-trade union nature of these measures, which were also taken against a background of demonstrations that repeatedly involved the presence and intervention of the police, the Government states that the three trade unionists forcibly entered an office and locked themselves in, with the result that offences involving damage to property and theft occurred which went beyond the legitimate exercise of the right to strike and of which they are accused by the judicial authorities, while union delegate Claudio Elgueta was arrested in connection with criminal proceedings predating the events referred to in the present complaint and under a court warrant. The Committee requests the Government to communicate to it the outcome of legal proceedings against these trade unionists and its observations on the alleged repeated interventions of the police in the demonstration and march held by the strikers on 28 November 2005.*

721. *The Committee observes that the aspects of the case relating to the bargaining process have been superseded, inasmuch as the striking workers returned to their posts 18 days after the start of the strike and accepted the company's final offer. The Committee wishes to point out, however, that in the present case the complainant organization has*

emphasized that the company replaced the striking workers by other workers, under the terms of article 381 of the Labour Code and the Government recognizes that this practice is permitted by law only under exceptional circumstances when specific requirements have been fulfilled.

722. *The Committee draws the Government's attention to the principle previously brought to its notice in Case No. 2141 [see 327th Report, para. 322], according to which 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 of decisions and principles of the Freedom of Association Committee****, fifth (revised) edition, 2006, para. 632]. The Committee recalls that, on examining Case No. 2141, it requested the Government to take the necessary steps to amend the legislation on this matter [see 327th Report, para. 326] and the Committee requests the Government, in consultation with the most representative organizations of workers and employers, to take the necessary measures to amend the legislation so as to ensure that the replacement of strikers is possible only in the case of essential services in the strict sense of the term (those whose interruption could put at risk the life, physical safety or health of all or part of the population) or in the case of an acute national crisis.*

723. *Finally, the Committee requests the Government to send, without delay, specific observations on the latest communication of the complainant organization alleging the anti-trade union dismissal of several trade unionists (some of which at least, according to the allegations, have been deemed illegal by the administrative authorities), and the establishment of an employer-controlled trade union organization financed by the company. The Committee also requests the Government to communicate to it the outcome of the ongoing administrative inquiry into a complaint alleging anti-trade union practices on the part of the company.*

The Committee's recommendations

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

(a) The Committee requests the Government to communicate to it the outcome of legal proceedings against Felipe Andrés Cofre Arriagada, Gonzalo Alberto Orellana Salazar and Víctor Manuel Vidal Bustamante (for offences involving damage and theft) and against the trade union delegate and member of the bargaining committee, Claudio Elgueta Valenzuela (allegedly in connection with a court case dating back to June 2004), as well as its observations on the alleged repeated interventions of the police in the demonstration and march held by the strikers on 28 November 2005.

(b) Requests the Government, in consultation with the most representative organizations of employers and workers, to take the necessary measures to amend the legislation so as to ensure that the replacement of strikers is possible only in the case of essential services in the strict sense of the term (those whose interruption could put at risk the life, physical safety or health of all or part of the population) or in the case of an acute national crisis.

(c) The Committee requests the Government to send, without delay, specific observations on the latest communication of the complainant organization alleging the anti-trade union dismissal of several trade unionists (some of

which at least, according to the allegations, have been deemed illegal by the administrative authorities), and the establishment of an employer-controlled trade union organization financed by the company. The Committee also requests the Government to communicate to it the outcome of the ongoing administrative inquiry into a complaint alleging anti-trade union practices on the part of the company.

CASE NO. 2434

INTERIM REPORT

Complaints 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 Electrica SA* (SINTRAISA)
— 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 *(SINTRAISA), 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)

725. These complaints are contained in communications from the National Association of Telephone and Communications Engineers (ATELCA) of 15 June 2005 and the World

Confederation of Labour (WCL) of 8 August 2005. ATELCA sent additional information on 25 October 2005. The WCL sent appendices in a communication of 14 December 2005. The General Confederation of Labour (CGT) submitted new allegations in communications dated 12 June and 28 July 2006. 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) made new allegations in a communication dated 12 September 2006.

726. The Government sent its observations in communications dated 13 December 2005, 17 and 25 January, 23 February, 27 June and 14 November 2006.

727. 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. The complainants' allegations

728. In their communications of 15 June and 25 October 2005 and of 12 September 2006, ATELCA, SINTRAISA, SINTRACHIVOR and SINTRAISAGEN allege that, under Legislative Act No. 1 of 22 July 2005 (former Bills Nos. 11 of 2004, 034 and 127 of 2004 (Chamber)), article 48 of the Constitution of Colombia on social security was amended such that, upon its approval, all persons will be subject to the scheme established in the general pension system set out in Act No. 100 of 1993. This undermines the right of collective bargaining established in Conventions Nos. 98 and 154, as under section 1 of the new Act, with effect from the entry into force of the Legislative Act in question, pension arrangements other than those set out in the Act cannot be established by accords, collective agreements, awards or legal acts of any kind. In addition, section 2 provides that, except for the scheme applicable to the President of the Republic and members of the forces of order, any exceptional or special scheme will lapse on 31 July 2010. Finally, section 3 provides that the pension rules in force on the date of entry into force of the Legislative Act contained in valid accords, collective agreements, awards or agreements shall remain in force for the term originally agreed, but will, in any case, cease to be valid on 31 July 2010. The complainant organization indicates that, as a consequence of these new arrangements, collective bargaining on social security issues between employers and workers will not be possible, thus denying trade union autonomy and the will of the workers to improve their living conditions in relation to social security.

729. The complainant organization adds that the Government called on the people to vote in a referendum in which the question of pensions reform was included, and the referendum rejected the reform. Legislative Act No. 1 was imposed against the will of the social partners, national trade unions, labour confederations, grass-roots industry and occupational trade unions, but their arguments were not taken into account by Congress.

730. SINTRAISA, SINTRACHIVOR and SINTRAISAGEN filed an appeal contesting the constitutionality of Legislative Act No. 1 with the Constitutional Court which, on 14 June 2006, found that it was not competent to rule on the matter.

731. In its communications of 8 August and 14 December 2005, the WCL alleges that the National Office of the Attorney-General refused to engage in collective bargaining with the National Union of Workers of the Office of the Attorney-General (SINTRAPROAN). In view of this refusal, and after repeated fruitless requests, the trade union entered an action for enforcement in the Quindío Administrative Court. The purpose of this action was to enforce compliance with article 55 of the Constitution, which sets out the right of collective bargaining, Act No. 411 of 1997 approving Convention No. 151 and

Act No. 524 of 1999 approving Convention No. 154. All the foregoing was pursuant to article 53 of the Constitution, which establishes that ILO Conventions form part of domestic legislation. This enforcement action resulted in the ruling of 1 March 2004, denying the right of workers in the Office of the Attorney-General to negotiate fundamental workers' rights through collective bargaining, a decision which was confirmed by the Council of State on 5 March 2005.

732. In its communications of 12 June and 28 July 2006, the CGT adds that, in parallel with the refusal to negotiate with SINTRAPROAN, the Office of the Attorney-General initiated disciplinary proceedings against Carlos Tulio Franco Cuartas, a leader of the trade union organization, with a view to preventing him from carrying out his trade union functions. As a result of this anti-union persecution, Mr Franco Cuartas had to leave his job. Furthermore, Luis Carmelo Cataño Cataño, Carlos Romero Aguilar, Francisco Molina and Silvio Elías Murillo were dismissed despite being covered by trade union immunity. In the case of Mr Murillo, the Chocó Administrative Tribunal ordered his reinstatement, but the employer entity has not given effect to this ruling.

B. The Government's reply

733. With respect to the allegations submitted by ATELCA concerning Legislative Act No. 1 of 22 July 2004, amending article 48 of the Colombian Constitution on social security, the Government indicates that this Legislative Act is a fundamental element of the package of measures adopted to address the serious problems arising in financing pensions liabilities. The Government considers that various aspects warrant consideration by the Committee on Freedom of Association in this case.

734. In the first place, the regulation of conditions for the award of pensions is not strictly a matter of conditions of work, but a post-employment issue 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. These instruments do not regulate pensions issues, which are covered by other instruments also adopted by the Organization. Secondly, the latter Conventions envisage the possibility of States regulating or legislating on pensions-related matters, without in so doing violating the right of collective bargaining.

735. 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. Taking into account that these aspects concern the entire population of a given country, they cannot be regulated by agreement, but by the legislator, who has the power 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. 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 they relate to general matters concerning the living conditions of the population as a whole.

736. The chief objective of any scheme is to ensure the financial sustainability of the social security system, ensuring that all Colombians have an effective right to a pension and reconciling the right to a pension with the State's need to allocate resources to meet its responsibilities towards all Colombians with regard to health, education and other social expenditure. In addition, the aim is 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.

737. The Government indicates that 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 Substantive 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.

738. Article 48 of the Constitution accordingly 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 every person in terms of 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.

739. Thus the social security system, of which the pension scheme is part, is now a system which should cover all inhabitants of the national territory against the contingencies that affect them, in accordance with the principles of universality, progressiveness, effectiveness, efficiency and solidarity, and its organization is a matter for the legislator.

740. According to the Government, the present Bill (the relevant Government reply was sent prior to the adoption of the Legislative Act itself) is perfectly in harmony with the provisions of article 48 of the Constitution and introduces two new criteria, those of equity and the financial sustainability of the system, which are justified because resources are limited and must be distributed in accordance with the needs of the population, and for which mechanisms must be established to ensure that resources are sufficient to give real effect to the right.

741. These principles, moreover, correspond to the spirit of the Constitution which, in its preamble, provides that it is adopted, inter alia, to secure justice and equality for the members of the nation and to guarantee a just political, economic and social order. In addition, article 20 of the Constitution indicates that one of the purposes of the State is to ensure the effective implementation of rights, so that the rights accorded are not merely theoretical, but are effective in practice.

742. 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. All this was aggravated by demographic factors, such as the decline in birth, fertility and mortality rates, combined with increases in life expectancy.

743. Indeed, prior to the adoption of Act No. 100 of 1993, it was estimated that the provision of a pension lasted on average around 15 years, an aspect taken into account in calculating contributions. The estimated period is now 26 years, including the provision of pensions to dependants, which is tending to rise, with the consequent burden on public finances, in view of the additional years for which the pensions already due have to be financed.

744. In the specific case of the ISS, in addition to the demographic effect, the financial imbalance has been exacerbated by the process of the maturing of the average premium scheme. This means that the dependency rate, defined as the ratio between the number of pensioners and the number of contributing insured persons, has increased. This indicator, which was two pensioners for each 100 insured persons in 1980, rose to ten pensioners for

every 100 contributing insured persons in 1993 and to 21 pensioners for every 100 contributing insured persons in the average premium scheme in 2002.

745. The measures adopted in Act No. 100 of 1993 were not sufficient to eliminate the large imbalances which were already occurring in the system. This was compounded by an additional factor working against the financial stability of the ISS and the general system, which was the recession experienced by the Colombian economy in the second half of the 1990s and the beginning of the present century. The high levels of unemployment and informality resulting from the crisis prevented insured persons from paying their contributions and the number of inactive insured persons rose in the dual system.

746. 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.

747. 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).

748. Thus, despite the adoption of Act No. 100 of 1993, an unsustainable situation arose 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.

749. 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.

750. The operating deficit for pension liabilities in the last 12 years rose to 30.5 per cent of GDP, i.e. the equivalent of 60 per cent of total public debt, which was unsustainable in macroeconomic and fiscal terms. The burden on present and future generations was not consistent with their incomes. The amount of the projected pensions deficit over a 50-year time horizon was 207 per cent of GDP in 2000. It was for these reasons that the Government proposed to reform the pensions system, and Congress approved Acts Nos. 797 and 860 of 2003, as a result of which the pension deficit fell to 170.2 per cent of GDP over the same period.

751. However, this figure is not satisfactory. Countries with a similar level of pension liabilities to Colombia are developed or industrialized, and therefore have full access to international financial markets. It should be noted that, although Colombia's level of liabilities in terms of GDP is similar to Japan's, the level of coverage of the population of pensionable age receiving a pension in Colombia is some 23 per cent of people aged 60 or over, while in Japan, the pension system covers 88 per cent of the population over 65 years of age, who also have the highest life expectancy in the world. In other words, a debt that is proportionally similar in terms of GDP is shared among a considerably less representative group of inhabitants in the case of Colombia.

752. In Colombia there are 1 million pensioners, out of 4 million people of pensionable age. There are 11.5 million insured persons, of whom only 5.2 million are active contributors, compared with an economically active population of 20.5 million. This difference can be explained by a relatively low rate of compliance with the system.

753. To make the system sustainable and to some extent reduce the size of the envisaged deficits, the 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. However, 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 this year. For these reasons, the national Government presented and Congress approved Act No. 860 of 2003, which fundamentally changed the transitional arrangements.

754. 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 also in one way or another represent constitutional priorities. Current pension payments correspond to a proportion of the budget that is greater than each of the other sectors included in the budget.

755. For example, with a similar level of national budgetary resources that are used to pay pensions, the education of 8.2 million children in the country would be financed or, in the case of health resources, care for 11.4 million members of the subsidized scheme would be co-financed.

756. The Government indicates that for this reason it is necessary to undertake a reform which ensures fair treatment in terms of pension covering all Colombians, for which it is absolutely essential to limit the possibility to modify pension rules by agreement. The Bill presented to the Congress of the Republic seeks to strengthen the measures adopted in Acts Nos. 797 and 860 of 2003, with one of the principles being that of the financial sustainability of the system.

757. Only in the case of the forces of order, taking into account the characteristics of this group of public servants and the risks to which their members are subject, is it justified to maintain a special scheme.

758. With regard to collective bargaining, the Government indicates that, to achieve harmony in pension matters, Act No. 100 of 1993, in developing the constitutional precept, clearly required respect for acquired rights “in accordance with previous legislative provisions, accords or collective agreements”, but also made it clear that this would be “without prejudice to the right of denunciation which assists the parties and the arbitration tribunal in settling differences between the parties”. The foregoing shows the clear intention that collective agreements and accords should be aligned with the provisions of Act No. 100 of 1993 and the fact 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. However, given that the Constitution guarantees the right to collective bargaining, with the exceptions laid down by law, it was not 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.

759. 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.

760. One of the fundamental elements in designing, implementing and developing a pension system is its economic and financial basis. From this point of view, pension schemes based on collective agreements represented a considerable effort for public and private finances. Indeed, huge resources are being allocated to finance special pension schemes which could be used to extend the coverage of the general social security system and increase social investment or further the development of the country.

761. It is no exaggeration to say that, in the case of the public sector, these agreement-based schemes have in many cases been created without quantifying their final effect, with the result that inequitable schemes have been created which ultimately endanger the very existence of the respective establishments. The private sector is no stranger to this situation. It is evident today how the continued operations of companies in this sector have been affected by the cost of their pension liabilities.

762. In addition, the Government recalls that article 55 of the Constitution provides that "The right of collective bargaining in regulating 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 of 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, although the Constitutional Court initially allowed fairly ample scope concerning the possibility of establishing limits to the right of collective bargaining for reasons of public interest, in recent years it has been more restrictive.

763. 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".

764. In ruling C-408 of 1994, the Court found section 242 of Act No. 100 of 1993 to be valid. Section 242 provides that, "With effect from the entry into force of the present Act, the retirement scheme applicable to new employees in the health sector may not be recognized or agreed to be retroactive." In this way, the Court upheld as valid a legislative restriction of collective bargaining on a specific matter which it considered the prerogative of the legislator, despite the fact that the Attorney-General considered it to be unconstitutional because the right of collective bargaining is inalienable. Later, in ruling C-408 of 1994, the Constitutional Court reiterated that the Constitution allowed reasonable exceptions to collective bargaining.

765. Nevertheless, the broad approach taken by the Constitutional Court in previous cases has been restricted in later rulings. Thus, in ruling C-1504-2000, the Constitutional Court found that an act which imposed a limit on collective bargaining was unconstitutional.

766. Subsequently, in ruling C-1187-2000, it held that the Constitution does not establish limits of a temporal nature on collective bargaining, nor does it order that the term of such bargaining is only for one year, for which reason if the law chooses to restrict the term of a collective agreement or a collective accord, that is contrary to the Constitution. In this ruling, the Court held to be unconstitutional a limitation which consisted basically of obtaining authorization from popularly elected bodies for the purposes of collective bargaining in order to ensure its financial viability.

767. It may be concluded from the above that, while the Constitutional Court initially adopted a fairly broad position in relation to limitations on collective bargaining, it subsequently adopted more restrictive positions, for which reason it is not clear whether it is constitutionally possible to limit the right of collective bargaining of pension benefits through a law. In view of the above, the constitutional rules should be clarified and amended so as to establish that collective agreements or accords cannot be concluded in relation to pensions.

768. Finally, it is necessary to examine whether the Legislative Act implies failure to comply with Colombia's international obligations. In order to be able to assess the constitutional viability of the 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.

769. Convention No. 87 establishes special protection for citizens who associate in trade unions and contains a series of general provisions requiring States to protect this right to organize. None of the provisions examined constitute an impediment to 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.

770. Nor does the Collective Bargaining Convention, 1981 (No. 154), 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 5, paragraph 1, provides that measures adapted to national conditions should be taken to promote collective bargaining. This provision undoubtedly leaves States which have adopted the Convention free to limit the scope of collective bargaining when it concerns compulsory schemes such as pensions, and to allow exceptions which have a major impact on the national budget and equality of workers, in a field as important as retirement pensions.

771. In conclusion, it should be noted that neither of the two 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 system.

772. As regards the allegations made by the WCL and the CGT concerning the refusal of the Office of the Attorney-General to engage in collective bargaining with SINTRAPROAN, the Government indicates that, in communications Nos. 0259 and 1424 of 19 March and 10 November 2003, and 1633 of 16 December 2004, the Office of the Attorney-General replied fully to the claims of the trade union, explaining the scope of section 416 of the

Substantive Labour Code with respect to the limitations placed on trade unions of public servants in submitting claims or concluding collective agreements.

773. The Government indicates that the legal status of public servants encompasses two situations: that of public servants in the executive branch, which is of a legal and statutory nature, and that of official workers, which is of a contractual nature. As the employment relationship of public employees is of a statutory and regulatory nature, it can only be modified by legal provisions of the same standing as those which created it.

774. Under section 414 of the Substantive Labour Code, public employees have the right of association, with the sole exception of members of the national army. However, the functions of these trade unions are limited to advising their members on the defence of their rights, providing legal representation of the interests of trade union members in relation to the authorities, studying the characteristics of the occupation and conditions of employment, and finally submitting respectful petitions. The Constitutional Court held the prohibition imposed by section 416 to be lawful. This restriction is supported by article 55 of the Constitution, which guarantees the right of collective bargaining subject to the exceptions laid down by law, the present Act being one such exception.

775. The Government adds that, in examining the constitutionality of Act No. 411 ratifying Convention No. 151, the Constitutional Court held that the differentiation between official workers and public employees for the purposes of collective bargaining was consistent with the Constitution, indicating that the former enjoy this right in full, while the latter do so in a restricted manner since, although they have the right to seek and achieve agreed solutions in the event of disputes, this may in no way prejudice the power of the authorities to determine terms and conditions of employment unilaterally.

776. The Government indicates that the ruling of the Quindío Administrative Court rejected the action for non-performance instituted by SINTRAPROAN against the failure of the Attorney-General to engage in collective bargaining. In addition, in the ruling of the Council of State which confirms the decision of the Administrative Court, it was concluded that "the Office of the Attorney-General did not have the obligation to engage in a process of collective bargaining to discuss the claims of the trade union, since it could not itself resolve the claims submitted; thus the conduct of the Director of the Office of the Attorney-General is not an unjustified avoidance of a legal duty established in a rule with force of law, and an order for non-performance is thus inadmissible".

777. The Government adds that the impugned administrative authority based its decision on domestic legislation, the Political Constitution and the texts of Conventions Nos. 87 and 98. In this respect, the ruling of the Quindío Administrative Court of 1 March 2004 recalled that the Council of State, in accordance with the interpretation of the Constitutional Court, found that unions of public employees 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. The Council of State specified that such unions can submit claims intended to improve the conditions of work of public employees and to achieve an agreed solution to these concerns, but without affecting the constitutional competence of the authorities to determine unilaterally the functions and emoluments of this category of official. The right of association, and the possibility for public servants to negotiate terms and conditions of employment, are limited by the statutory and regulatory nature of their relationship. The Constitution of 1991 sets out principles relating to the legal status of public expenditure and conditions of work in the official sector and determines responsibilities, under which only the President of the Republic has the power of decision relating to salaries. The Government adds that the Attorney-General, in response to the above information,

indicated that, in accordance with article 1 of the Constitution, it is an obligation to comply with the Constitution and the laws and to respect and obey the authorities, thereby implying unconditional and unlimited compliance with the rulings of judges, in the sense that compliance with judicial decisions is a prerequisite for a welfare State abiding by the rule of law. Consequently, and in accordance with ruling No. 1578 of 14 March of this year, addressed to the Director of the Office of the Regional Attorney of Quindío, the ruling of the court of second instance issued by the Council of State in the appeal lodged by SINTRAPROAN became effective on 23 August 2005.

778. The Government concludes by indicating that, in the light of the Attorney-General's statement, care has always been taken to engage in dialogue with the trade union and discussions have taken place on conditions of work.

779. With regard to the allegations made by the CGT relating to the alleged anti-union persecution suffered by Carlos Tulio Franco Cuartas, founder member and current leader of SINTRAPROAN, the Government indicates that the Office of the Attorney-General, in accordance with national labour law, set in motion the process for the lifting of the trade union immunity of Carlos Tulio Franco Cuartas, with an indication of the real reason for so doing, and that the application was accepted by the competent judicial authorities on 18 October. At that time, the judicial authorities were not able to serve notice upon Mr Franco Cuartas of the acceptance of the application, which is indispensable for him to be able to exercise his right of defence.

780. In accordance with the Political Constitution of Colombia (article 277, paragraphs 5, "Ensure the diligent and efficient discharge of administrative functions" and 6, "Exercise vigilance over the official conduct of those discharging public functions, including elected functions, exercise disciplinary authority with diligence, order the appropriate investigations and impose the respective penalties in accordance with the law") and with section 66 of the Single Disciplinary Code, which provides that "The disciplinary procedures established in this law shall be applied by the corresponding internal control agencies and by the Office of the Attorney-General of the Nation", the Office of the Attorney-General instigated a series of investigations into the public official Carlos Tulio Franco Cuartas for disregarding his official duties, in view of the existence of grounds for the imposition of sanctions in accordance with section 118 of Act No. 200 of 1995. Mr Franco Cuartas acted negligently in failing to discharge the functions allocated to him, including the failure to carry out tasks lawfully assigned to him. Consequently, in accordance with the Political Constitution and the labour legislation, the Office of the Attorney-General applied to the competent authorities for authorization to lift Mr Franco Cuartas' trade union immunity.

781. In the disciplinary investigations instigated against Mr Franco Cuartas, the Office of the Attorney-General acted in accordance with the constitutional and statutory functions assigned to it, and failing to do so on the grounds that a trade union leader was involved would have amounted to failure to comply with the legal precepts requiring such action. The fact of being a trade union leader does not constitute a legal excuse for omitting to comply with domestic disciplinary legislation. The Government emphasizes that, in the same way that the Office of the Attorney-General discharged its functions in accordance with the law, Mr Franco Cuartas exercised his right of defence, lodging administrative appeals against the action taken by the Office of the Attorney-General.

C. The Committee's conclusions

782. *The Committee observes that the present case refers to allegations relating to: (1) the limitation of the right of collective bargaining by virtue of the recent amendment of article 48 of the Constitution relating to social security by Legislative Act No. 1 which*

establishes that, with effect from its entry into force, accords, collective agreements and awards may not be established containing conditions relating to pensions which differ from those established in Act No. 100 of 1993, that all special schemes will lapse on 31 July 2010 and that all pensions-related provisions established in agreements, accords or awards shall be maintained for the agreed time, but that in any case they shall cease to have effect as of 31 July 2010; and (2) the refusal of the National Office of the Attorney-General to engage in collective bargaining with SINTRAPROAN.

783. *With respect to the allegations relating to the limitation placed on 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 in relation to social security, the Committee notes that, according to the complainant organizations, section 1 of the Legislative Act provides that pension arrangements other than those set out in the law cannot be established by accords, collective agreements or awards of any kind; section 2 eliminates as of 31 July 2010 any special scheme, except that of the President of the Republic and members of the forces of order and, under section 3, existing accords or agreements which contain clauses relating to pensions shall remain valid, but shall in any case lapse on 31 July 2010.*

784. *The Committee notes that, according to the complainant organizations, this new system considerably limits the right of collective bargaining of trade union organizations and disregards trade union autonomy and the will of the workers to improve their standards of living. The Committee also notes that, according to the complainant organizations, the amendment to the legislation runs counter to the popular will, which was expressed in a referendum on the subject.*

785. *The Committee notes that, according to the Government, the regulation of pensions is not an issue directly related to conditions of work, as it more properly concerns the post-employment period and, in that sense, does not fall within the purpose of Conventions Nos. 98 and 154, but rather of other Conventions which establish the possibility for States to regulate or legislate on pensions-related issues. The Committee notes that, according to the Government, the question of pensions affects the whole population and for that reason cannot be regulated by agreement. In addition, since the adoption of the 1991 Constitution, the system in which pensions were a consequence of the employment relationship was replaced by one under which social security is a public service guaranteed to everyone, subject to the principles of efficiency, universality and solidarity. The Government also indicates that the State must have the possibility of establishing a universal non-discriminatory scheme which is financially sustainable.*

786. *The Committee notes the explanation provided by the Government concerning the crisis facing the pensions system and the successive measures adopted to alleviate it. It also notes that demographic changes in the country are having a major economic impact on the pensions system.*

787. *The Committee notes that, with regard to the limitation imposed on collective bargaining in particular, the Government indicates that the Constitution establishes in article 55 that collective bargaining may be exercised within the "limitations established by the law", and in that sense it is not contrary to that provision for the legislation to limit the scope of collective bargaining by providing that it may not determine issues relating to pensions. The Committee also notes that the Constitutional Court in its most recent rulings has not supported this limitation of collective bargaining and it was therefore necessary to amend article 48 of the Constitution directly. Finally, the Committee notes that, in its ruling of 14 June 2006, the Constitutional Court declared itself incompetent to rule on the appeal to find Legislative Act No. 1 unconstitutional.*

788. *The Committee observes firstly that, although the adoption by the Government of a new pensions system is outside its competence, it can nevertheless examine the extent to which in so doing the principles of freedom of association, and in particular the right of collective bargaining, have been respected.*

789. *In the first place, the Committee is bound to recall that the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of principles of freedom of association [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 925].*

790. *Notwithstanding that questions concerning social security fall outside of its competence, the Committee observes that the new legislation produces effects on collective bargaining that are both retroactive and affect the future, as section 3 of the Legislative Act establishes that, although accords, agreements or awards concluded prior to its entry into force which establish conditions on pensions are valid, they will in any event lapse on 31 July 2010.*

791. *As regards agreements concluded prior to the entry into force of the legislation, the Committee considers that a legal provision which modifies unilaterally the content of signed collective agreements, or requires that they be renegotiated, is contrary to the principles of collective bargaining, as well as the principle of the acquired rights of the parties.*

792. *In addition, it is necessary to take into account the real nature of collective bargaining, which implies both a give-and-take process and a reasonable certainty that negotiated commitments will be honoured, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members. If these rights, for which concessions on other points have been made, can be cancelled unilaterally, there could be neither reasonable expectation of industrial relations stability, nor sufficient reliance on negotiated agreements [see* ***Digest****, op. cit., para. 941]. Thirdly, the bargaining partners are best equipped to weigh the justification and determine the modalities of such negotiated retirement clauses. In these circumstances, the Committee concludes that agreements previously negotiated should continue to produce all their effects, including those concerning pensions, until their expiry date, including after 31 July 2010. It requests the Government to take appropriate corrective measures, and to keep it informed of developments in this respect.*

793. *With regard to agreements concluded after the entry into force of Legislative Act No. 1, the Committee considers, firstly, that a general pension system does not necessarily preclude collective bargaining. Indeed, although the general system establishes a compulsory minimum guaranteed platform for the population as a whole, there is nothing to prevent a supplementary scheme being established by collective bargaining in addition to the general system. The Committee considers that it is necessary to draw a distinction between private companies and the public sector. In the case of the former, the employer may negotiate a possible award of a supplementary pension with the trade union, taking into account its economic possibilities and prospects.*

794. *The Committee notes that according to the Government, Article 5, paragraph 1, provides that measures adapted to national conditions should be taken to promote collective bargaining. The Government contends that this provision leaves States which have ratified the Convention free to limit the scope of collective bargaining when it concerns compulsory schemes such as pensions, and to allow exceptions which have a major impact on the national budget and equality of workers, in a field as important as retirement*

pensions. In this respect, the Committee considers that, in accordance with the provisions of Convention No. 154, collective bargaining in the public service may be subject to particular methods of application. The Committee is aware that collective bargaining in the public sector calls for verification of the available resources in the various public bodies or undertakings, that such resources are dependent on state budgets, which does not preclude, as stated by the Committee of Experts, the competent budgetary authority from fixing an overall budgetary "package" within the framework of which the parties may negotiate pension clauses. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts [see ***Digest****, op. cit., paras 1037 and 1038].*

795. *In any event, in both the private and the public sectors, the Committee considers that any limitation on collective bargaining by the authorities should be preceded by consultations with employers' and workers' organizations, in order to seek the agreement of both. In this regard, the Committee observes that, according to the complainants' allegations, the reform of the legislation was undertaken despite the opposition of the social partners, expressed in a referendum. The Committee notes that, despite the request that it made to the Government and the complainant organizations in March 2006 to provide additional information on the above referendum, no communication has been received on this subject. In these circumstances, the Committee requests the Government, taking into account 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.*

796. *With regard to the allegations relating to the refusal of the National Office of the Attorney-General to engage in collective bargaining with the SINTRAPROAN, the Committee notes that, despite the petitions presented by the trade union, the Office of the Attorney-General has refused up to now to start negotiations, and that for that reason SINTRAPROAN instigated legal action under article 55 of the Constitution on collective bargaining, and Acts Nos. 411 and 524 approving Conventions Nos. 151 and 154, respectively, which was refused by the Quindío Administrative Court, a decision which was upheld by the Council of State in March 2005.*

797. *The Committee also notes that, according to the Government, there is a difference in Colombian law between official workers and public employees. The former are bound by contract and can bargain collectively, while the latter are bound by statute, which means that their conditions of work are established by law and regulations and in consequence they cannot bargain collectively since that would affect the power of the authorities to determine terms and conditions of employment unilaterally. This category of workers only has the power to submit respectful petitions.*

798. *In this respect, the Committee recalls that it has examined allegations relating to the refusal to bargain collectively in the public sector in Colombia on numerous occasions and that it has considered 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 of 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 of free and voluntary collective bargaining, 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.

799. *With regard to the allegations concerning the persecution through successive disciplinary procedures of Mr Franco Cuartas, founder member and leader of SINTRAPROAN, the Committee notes the Governments' indication that Mr Franco Cuartas failed to discharge the obligations arising out of his official function, which gave rise to disciplinary proceedings. The Committee observes that these disciplinary proceedings occurred in parallel to the action instigated by Mr Franco Cuartas with a view to the establishment of the union and to obtaining the right to collective bargaining for officials in the Office of the Attorney-General. Under these circumstances, and so as to be able to reach its conclusions in full knowledge of the facts, 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. If these allegations are found to be true, the Committee requests the Government to take the necessary measures to reinstate Mr Franco Cuartas and to put an end to disciplinary proceedings against him. The Committee requests the Government to keep it informed in this respect.*

800. *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.*

The Committee's recommendations

801. ***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 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.

CASE NO. 2448

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

Complaints against the Government of Colombia presented by — the World Confederation of Labour (WCL) and — the General Confederation of Labour of Colombia (CGT)

Allegations: The World Confederation of Labour (WCL) alleges that SUPERTIENDAS y Droguerías Olímpica SA is not complying with the collective agreement concluded with SINALTRAOLIMPICA, that Ms María Gilma Barahona Roa has been refused registration as a member of the

executive board of SINUTSERES and that the Cundinamarca branch of the Red Cross is not respecting the package of benefits agreed upon in the collective agreement

802. The Committee last examined this case at its May 2006 meeting (see 342nd Report, approved by the Governing Body at its 297th Session, paras 373–411). The General Confederation of Labour of Colombia (CGT) presented new allegations in communications dated 12 June and 28 July 2006.

803. The Government sent is observations in communications dated 1 September and 26 October 2006.

804. 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), 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

805. At its previous meeting, the Committee made the following recommendations [see 342nd Report, para. 411]:

(a) Regarding the allegations that SUPERTIENDAS y Droguerías Olímpica SA has violated clause 35 of the collective agreement concluded with the trade union organization, the National Union of Workers of SUPERTIENDAS y Droguerías Olímpica SA (SINALTRAOLIMPICA), which sets the wages that must be paid to minors providing packing services outside the company:

(i) the Committee requests the Government to take the necessary measures to ensure that the minor workers are able freely to exercise their trade union rights in order to defend their rights and interests, irrespectively of whether they work directly with SUPERTIENDAS y Droguerías Olímpica SA or are self-employed workers or work for a cooperative;

(ii) the Committee requests the Government to send it a copy of the collective agreement so that it can determine the scope of clause 35.

(b) Regarding the refusal by the authorities to register as a member of the executive committee 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 requests the Government to take the necessary measures for her to be registered without delay.

(c) Regarding the allegations relating to the non-respect by the Red Cross of the package of benefits agreed upon with the Trade Union of Workers of the Red Cross (SINTRACRUZROJA), the Committee requests the Government to keep it informed of the outcome of the administrative labour inquiry into the alleged violation of the collective labour agreement.

B. New allegations

806. In its communications dated 12 June and 28 July 2006, the General Confederation of Labour of Colombia (CGT) indicates that the inquiry opened into the alleged failure by the Red Cross to respect the package of benefits agreed in the collective agreement with SINTRACRUZROJA is still ongoing.

807. The complainant organization states that two trade union organizations are present within the Colombian Red Cross, SINTRACRUZROJA and the Trade Union of National Red Cross Workers (SINTRACRONAL). The CGT alleges that, in the case of SINTRACRONAL, the Red Cross has presented two counterclaims, with the aim of replacing the collective labour agreement currently in force, despite the fact that no list of demands has been presented by the workers. It further alleges that pressure is being exerted on workers who are members of SINTRACRONAL to persuade them to abandon the collective agreement. Moreover, the complainant organization alleges that, although it made a complaint to the Ministry of Labour more than a year ago concerning the failure by the Red Cross to respect the collective agreement, measures in this regard have still not been taken.

C. The Government's reply

808. In its communications dated 1 September and 26 October 2006, the Government indicates the following.

809. With regard to section (a) of the recommendations, concerning the allegations that SUPERTIENDAS y Droguerías Olímpica SA has violated clause 35 of the collective agreement concluded with the trade union organization SINALTRAOLIMPICA, which sets the wages that must be paid to minors providing packing services outside the company, the Government encloses a copy of the collective agreement, which sets out, under article 35, the categories of workers employed within the enterprise. Category I makes reference to contract packers.

810. With regard to the right of association of the minor workers providing services outside SUPERTIENDAS y Droguerías Olímpica SA, the Government encloses the reply sent by the SUPERTIENDAS y Droguerías Olímpica SA enterprise, indicating that the minor workers have established the Minor Workers' Pre-cooperative (COOTRAMENOR), pursuant to Act No. 79 of 1988, which provides for the existence, under the guidance of a sponsoring body, of pre-cooperative groups, which organize in order to perform activities legally permitted within cooperatives, but which are not yet in a position to establish themselves as full organizations. These are civil organizations and are not bound by any labour relationship. As a result the members of such pre-cooperatives may not join trade union organizations. The enterprise adds that the National Union of Workers of SUPERTIENDAS y Droguerías Olímpica SA (SINALTRAOLIMPICA) is an enterprise trade union and that an essential prerequisite for membership, as stipulated by law, is to be an employee of the enterprise in which the trade union is operating.

811. The members of the pre-cooperative are not employees of the enterprise, nor do they work under conditions of subordination with respect to it, meaning that they cannot join the trade union organization. The enterprise adds that, for the same reason, it is impossible for clause 35 of the collective agreement concerning packers to be applied to these workers, since they do not hold a work contract with the enterprise. SUPERTIENDAS y Droguerías Olímpica SA (SINALTRAOLIMPICA) does not entertain a relationship with each member of the pre-cooperative but directly and exclusively with the Minor Workers' Pre-cooperative (COOTRAMENOR). The collective agreement provides that the regulations contained therein shall apply to workers bound to the enterprise by a work contract. According to the enterprise, the workers described in clause 35 of the agreement as contract packers carry out different tasks from the members of COOTRAMENOR who provide packing services outside the enterprise.

812. The Government also states that, pursuant to the provisions under section 383 of the Substantive Labour Code, the minimum age for membership of a trade union is 14.

813. With regard to section (b) of the recommendations, concerning 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)*, due to the fact that the body where she works is in liquidation, in connection with which the Committee requested the Government to take the necessary measures for her to be registered without delay, the Committee notes that, according to the Government, the National Unitary Trade Union of Official Workers and Public Servants of the State (SINUTSERES) has exhausted the available administrative channels and is entitled to go before the administrative disputes court, the body competent to review the legality of actions taken by the public administration.

814. With regard to section (c), relating to the non-respect by the Red Cross of the package of benefits agreed upon with SINTRACRUZROJA, and the new allegations, the Government states that the Territorial Directorate of Cundinamarca, through resolution No. 0002245 of 28 August 2006, took the decision not to impose sanctions on the Red Cross. Appeals have been brought against this decision and these are currently pending.

815. The Government adds that an administrative inquiry is currently being pursued against the Red Cross for alleged violations of the right of association of SINTRACRUZROJA (linked to the Red Cross in Cundinamarca and Bogotá), along with a further legal action before the Eleventh Circuit Labour Court.

816. The Government adds that, according to information from the Executive Director of the Red Cross, Cundinamarca section, no workers have been dismissed or harassed on the grounds of their trade union membership.

D. The Committee's conclusions

817. *The Committee notes the new allegations presented by the CGT, as well as the Government's reply to the pending questions.*

818. *With regard to section (a) of the recommendations, concerning the allegations that SUPERTIENDAS y Droguerías Olímpica SA has violated clause 35 of the collective agreement concluded with the trade union organization SINALTRAOLIMPICA which sets the wages that must be paid to minors providing packing services outside the company, the Committee notes that, according to the Government: (1) minors may join a trade union from the age of 14 onwards, pursuant to section 383 of the Substantive Labour Code; (2) in the case of SUPERTIENDAS y Droguerías Olímpica SA, the minors in question are members of a pre-cooperative, COOTRAMENOR, and hence cannot join an enterprise trade union because they are not in a labour relationship with that enterprise; (3) clause 35 of the collective agreement (copy enclosed by the Government) applies only to contract packers who are employees of SUPERTIENDAS y Droguerías Olímpica SA and who carry out different tasks from the members of COOTRAMENOR who provide packing services outside the enterprise. The Committee must firstly recall that "the Promotion of Cooperatives Recommendation, 2002 (No. 193), calls on governments to ensure that cooperatives are not set up or used for non-compliance with labour law or used to establish disguised employment relationships". Furthermore, mindful of the particular characteristics of cooperatives, the Committee considers that associated labour cooperatives (whose members are their own bosses) cannot be considered, in law or in fact, as "workers' organizations" within the meaning of Convention No. 87, i.e. organizations whose objective it is to promote and defend workers' interests. In these circumstances, referring to Article 2 of Convention No. 87, the Committee recalls that the concept of worker means not only salaried worker but also independent or autonomous worker, and considers 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 Committee on Freedom of Association,*** *fifth edition, 2006, paras 261 and 262]. In these circumstances, and in accordance with the principles set out above, 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.*

819. *With regard to section (b) of the recommendations, concerning 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)*, due to the fact that the body where she works is in liquidation, the Committee notes that, according to the Government, the trade union may go before the administrative courts to appeal against the administrative decision denying it registration. In this regard, the Committee once again stresses that, according to the complainant organization, Ms Barahona Roa has been elected to the post of controller* (fiscal) *on the executive board of a nationwide trade union organization, i.e. with functions whose scope extends beyond defending the interests of workers within the body in liquidation. Secondly, although the legislation stipulates that no new collective agreement may be concluded, Ms Barahona Roa continues to play a fundamental role within the body in liquidation. This role mainly consists of defending workers' interests during the liquidation process. Finally, the Committee recalls that, in accordance with Article 3 of Convention No. 87, the workers have the right to elect their representatives in full freedom. In these circumstances, 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.*

820. *With regard to section (c), relating to the non-respect by the Red Cross of the package of benefits agreed upon with SINTRACRUZROJA, the Committee notes the information from the Government to the effect that, within the framework of the inquiry that was currently under way into this matter, the administrative authority imposed no sanctions on the Red Cross, although appeal proceedings have been brought against this decision and are currently pending. The Committee requests the Government to keep it informed of the final outcome of these appeal proceedings.*

821. *With regard to the new allegations presented by the CGT in relation to the presentation of counterclaims by the Red Cross with the aim of replacing the current collective labour agreement, despite the fact that no list of demands has been presented by the workers, the Committee observes that the Government has not sent its comments on the matter. It is the Committee's understanding, however, that only workers are entitled to initiate collective bargaining and that the mere presentation of a counterclaim by the employer cannot on its own serve to initiate collective bargaining if it has not been preceded by the presentation of a list of demands by the trade union organization.*

822. *With regard to the allegations concerning pressure exerted on members of the SINTRACRONAL organization to persuade them to abandon the collective agreement and the delay by the Ministry of Labour in examining and taking measures in relation to the complaints presented by the trade union organization, the Committee notes the information from the Government to the effect that an administrative inquiry is currently under way at the Red Cross for alleged violations of the right of association, along with a legal action before the Eleventh Circuit Labour Court. The Committee requests the Government to do everything in its power to hasten the administrative investigation and to keep it informed in*

this respect, as well as with regard to the final outcome of the legal action currently being heard.

The Committee's recommendations

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

(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.

CASE NO. 2481

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

Complaint against the Government of Colombia presented by the Colombian Association of Professional Football Players (ACOLFUTPRO)

Allegations: The complainant organization alleges that the Colombian Football Federation

(COLFUTBOL) and the Colombian Football Major League (DIMAYOR), as well as their members, the professional football clubs, are refusing to bargain collectively, have threatened not to employ players who are association members or who exercise their trade union rights, and have sought to punish players who have exercised those rights

824. The present complaint is contained in a communication dated 3 April 2006 from the Colombian Association of Professional Football Players (ACOLFUTPRO). The Fédération Internationale des Footballeurs Professionnels (FIFPRO) on 4 May 2006 gave its support to the complaint presented by ACOLFUTPRO. ACOLFUTPRO presented additional information on 25 May 2006. On 3 November 2006, it sent information concerning the nature of its organization.

825. The Government sent its observations and questioned the receivability of the complaint in a communication dated 14 August 2006.

826. 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), as well as the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154).

A. The complainant's allegations

827. In its communications dated 3 April and 25 May 2006, the ACOLFUTPRO, in its capacity as the sole organization representing professional football players, and as a member of the FIFPRO, presented a complaint against the Government of Colombia alleging a refusal on the part of the Colombian Football Federation (COLFUTBOL) and the Colombian Football Major League (DIMAYOR), a grouping of professional football clubs, to bargain collectively. Specifically, it alleges that a meeting was held on 17 August 2004 between ACOLFUTPRO, COLFUTBOL and DIMAYOR, with the aim of discussing the Player's Statute. At that meeting, the parties recognized their respective status as the representatives of football players and football clubs and discussed a number of matters, including the Player's Statute drafted by COLFUTBOL and its conformity with labour legislation and the provisions of the Fédération Internationale de Football Association, in addition to the joint adoption of a model employment contract to be used by every professional club. Further meetings were held on 8 and 23 February and 7 June 2005, with the same objectives. At the last meeting, the players' representatives requested the employers (the professional clubs) to respect football players' occupational rights, asking also that the Player's Statute drafted by COLFUTBOL conform with national and international laws and regulations. To this end, the employers' representatives proposed that a new Player's Statute be put to ACOLFUTPRO for discussion between the parties, also requesting ACOLFUTPRO to submit a list of demands with a view to concluding a collective agreement, in order to resolve labour-related issues.

828. On 5 July 2005, the football players unanimously approved the text of the list of demands, which ACOLFUTPRO presented to COLFUTBOL and DIMAYOR, as employers' representatives, on 7 July. On 18 July 2005, ACOLFUTPRO proposed that a timetable be agreed upon for discussions of the draft Colombian Player's Statute and the dates for collective bargaining. On 22 August 2005, after various unsuccessful meetings, the chairpersons of COLFUTBOL and DIMAYOR returned the list of demands, arguing that

they themselves were not employers and hence not legally entitled to discuss the demands. However, according to the complainant organization, pursuant to Circular No. O80 of 24 August 2005 from DIMAYOR and COLFUTBOL, these bodies acknowledge that they have been authorized to discuss labour-related matters with workers' representatives. The complainant organization adds that in any case, if DIMAYOR and COLFUTBOL did not consider themselves competent to negotiate a list of demands, they should have transferred it to whomsoever was competent to do so, pursuant to Colombian legislation (section 433 of the Substantive Labour Code). For this reason, ACOLFUTPRO requested the labour authorities to impose sanctions on DIMAYOR and COLFUTBOL. On 30 August 2005, in view of the deadlock in the discussions, and after assemblies had been held at each of the 18 affected football clubs respectively, the workers decided to resort to strike action. At the same time, the complainant organization requested the Ministry of Social Protection to intervene to help restart negotiations. According to the complainant organization, the Government replied, through the Special Labour Inspection, Monitoring and Control Unit of the Ministry of Labour, that it had fulfilled its functions by encouraging meetings to be held with the presidents of the clubs, who were in favour of each club negotiating with its own players. The complainant organization alleges that this attitude implies a failure to recognize ACOLFUTPRO as the workers' representative.

829. Moreover, ACOLFUTPRO alleges that the football players suffered harassment and pressure to dissuade them from participating in the strike, with threats of dismissal and other acts of anti-union discrimination.

830. Finally, in its communication dated 3 November 2006, ACOLFUTPRO sends additional information concerning the nature of the organization, enclosing:

(a) a copy of the statutes of the Colombian Association of Professional Football Players, stating the purpose and aim of the organization, which is "to defend the rights of Colombian professional football players";

(b) a copy of the minutes of an agreement whereby DIMAYOR, COLFUTBOL and ACOLFUTPRO undertake to discuss "in its entirety and in the light of the Constitution and legal standards currently in force, the draft Colombian Player's Statute prepared by the COLFUTBOL Executive Committee, which will enshrine fundamental labour rights as appropriate, and will include the following labour-related headings: 1. General framework for the work contract […]; 2. Obligations […] of clubs and players; 3. Disciplinary procedures […]; 10. Termination of work contract …"

(c) the minutes of an agreement reached at the Special Labour Inspection, Monitoring and Control Unit, in the presence of the Vice-Minister of Labour, in which the following was agreed:

1. The following text is included in the introduction to the Colombian Player's Statute: "the present Statute was agreed between the Colombian Football Federation and the Colombian Association of Professional Football Players (ACOLFUTPRO), as the representative of the professional football players of Colombia".

(d) copies of the powers invested by the players in the abovementioned organization (power of representation), to enable it to represent them in collective bargaining.

831. ACOLFUTPRO sent a new communication dated 19 February 2007, in which it provides further information on the questions examined.

B. The Government's reply

832. In its communication dated 14 August 2006, the Government states that the professional players formed themselves into a civil organization and did not establish a workers' organization, despite the fact that the legislation in force allowed them to do so, thus rendering the complaint irreceivable, since only workers' or employers' organizations may present complaints. The Government adds that ACOLFUTPRO has not been entered in the trade union register and is therefore not competent to engage in collective bargaining, since it may not present lists of demands.

833. The Government adds, moreover, that neither COLFUTBOL nor DIMAYOR can be considered as employers' organizations. These are bodies that regulate aspects of Colombian football and, as such, entertain relations with football clubs but are neither employers, nor employers' groups. They had been authorized by the clubs to prepare a general Player's Statute, but not to engage in collective bargaining over a list of demands. In this regard, the Government encloses a number of letters from football clubs confirming that they have not invested any kind of power of representation either in COLFUTBOL or DIMAYOR to enable these bodies to bargain collectively on their behalf.

834. The Government also encloses copies of the various administrative rulings imposing sanctions on a series of football clubs for non-compliance with Colombian legislation.

C. The Committee's conclusions

835. *The Committee notes the complaint presented by the ACOLFUTPRO, in which it alleges the refusal by the Colombian Football Federation and the DIMAYOR to bargain collectively, despite the presentation of a list of demands, as well as the various requests to the Ministry of Social Protection for sanctions against these bodies and the absence of tangible progress, and the harassment, pressure and threats of dismissal endured by workers to dissuade them from resorting to the strike action agreed upon by ACOLFUTPRO on 30 August 2005 as a result of the refusal to negotiate.*

836. *The Committee also notes the reply from the Government, which argues firstly that the complaint is irreceivable, owing to the fact that ACOLFUTPRO is a civil association and not a properly registered trade union organization, despite the fact that there is nothing to prevent it establishing itself with this status. The Government adds that, for this reason, the organization may also not present a list of demands for the purposes of collective bargaining. The Committee further notes that, according to the Government, neither DIMAYOR nor COLFUTBOL are employers or representatives of football clubs for the purposes of collective bargaining; rather, they have been authorized by those clubs to draft the Colombian Player's Statute.*

837. *The Committee observes that the issues arising in the present case can be summarized as follows: (a) the question of the receivability of the complaint presented by the ACOLFUTPRO, which has been raised by the Government, in light of the fact that it is not registered as a trade union organization and as such cannot be considered as a workers' organization competent to present a complaint to the Committee on Freedom of Association; (b) the refusal by DIMAYOR and COLFUTBOL to bargain collectively with ACOLFUTPRO, owing to the fact that, as a civil association rather than a registered trade union, the latter cannot present lists of demands and because DIMAYOR and COLFUTBOL are not representatives of the employers (the football clubs) but had merely been authorized by the clubs to prepare the Colombian Player's Statute; (c) pressure, threats of dismissal and other acts of discrimination against workers by the football clubs because of their decision to resort to strike action on the grounds of the refusal by DIMAYOR and COLFUTBOL to bargain collectively.*

838. *With regard to the receivability of the complaint, the Committee observes that, whilst ACOLFUTPRO was founded not as a trade union but as a civil association, it is laid down in its statutes that the aim of the association is "to defend the rights of Colombian professional football players". The Committee considers that the status of the professional football players as workers is undeniable. It follows that they must be covered by Conventions Nos. 87 and 98 and, hence, that they must enjoy the right to associate in defence of their interests, even if, given the specific characteristics of their work, the football players have deemed it appropriate to form a civil organization rather than a trade union. This fact does nothing to diminish the status of ACOLFUTPRO as an organization representing football workers. Moreover, the Committee recalls by the same token that "[it] has full freedom to decide whether an organization may be deemed to be an employers' or workers' organization within the meaning of the ILO Constitution, and it does not consider itself bound by any national definition of the term" [see Special Procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association in the* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006].*

839. *In addition, the Committee observes that, from the various documents sent by the complainant organization and the Government, it can be inferred that ACOLFUTPRO's status as the players' representative was acknowledged on a number of occasions by the football clubs, by COLFUTBOL and DIMAYOR, as well as by the Government. Indeed, in the course of a number of meetings and the negotiations over the Player's Statute held with the football clubs, DIMAYOR and COLFUTBOL, ACOLFUTBOL was recognized as a valid interlocutor in its capacity as workers' representative for the purposes of negotiating issues of interest to the players. Moreover, ACOLFUTPRO encloses copies of the powers of representation invested in it by the players for bargaining purposes. In these circumstances, the Committee rejects the arguments put forward by the Government to the effect that ACOLFUTPRO cannot be considered a workers' organization whose purpose is to defend the socio-economic interests of its members.*

840. *With regard to the refusal by COLFUTBOL and DIMAYOR to bargain collectively with ACOLFUTPRO on the grounds that: (1) ACOLFUTPRO, as a civil association, cannot present a list of demands; and (2) neither COLFUTBOL nor DIMAYOR are the football players' real employers or have been authorized by the clubs to represent them for bargaining purposes, the Committee observes that, although football players may fall into a special category of independent worker, with the nature of their work excluding them from the scope of application of the Substantive Labour Code, this is not to say that they are not to be considered as workers, and hence covered by the guarantees enshrined in Conventions Nos. 87 and 98. They must therefore be able to enjoy the right to form the organizations that they deem appropriate, as underlined in previous paragraphs, and these organizations must be able to bargain collectively to defend the interests of the workers who are members of them and who have expressly granted authority to ACOLFUTPRO to negotiate on their behalf.*

841. *In addition, with regard to the refusal by COLFUTBOL and DIMAYOR to bargain collectively on the grounds that, as indicated by the Government, these organizations are not the football players' employers, but rather were mandated by the clubs (the direct employers of the football players) simply to prepare the Colombian Player's Statute, the Committee recalls that the right to engage freely in bargaining with employers over working conditions constitutes an essential element of freedom of association. The Committee believes that if, as stated by the Government, neither COLFUTBOL nor DIMAYOR are the football players' employers, nor are they organizations representing the interests of those employers, ACOLFUTPRO should be able to negotiate directly with each of the interested clubs. In these circumstances, 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.

842. *The Committee observes that the negotiations between DIMAYOR, COLFUTBOL and ACOLFUTPRO over the Colombian Player's Statute, in which the first two organizations were acting under a mandate from the football clubs, have reached deadlock. The Committee requests the parties to make every effort to pursue these negotiations.*

843. *With regard to the allegations concerning pressure, threats of dismissal and other acts of discrimination by the football clubs against workers because of their decision to resort to strike action on the grounds of the refusal by DIMAYOR and COLFUTBOL to bargain collectively, the Committee recalls that no one should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and the persons responsible for such acts should be punished [see* ***Digest****, op. cit., para. 772]. In these circumstances, 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.*

The Committee's recommendations

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

(a) The Committee requests the Government, in conformity with Convention No. 98, to take measures to guarantee the right of ACOLFUTRPO 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.

(b) The Committee requests ACOLFUTPRO, DIMAYOR and COLFUTBOL to make every possible effort to resume negotiations on the Colombian Player's Statute.

(c) 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.

CASE NO. 2493

INTERIM 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 the 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

845. This complaint appears in a communication dated 23 May 2006 from the National Trade Union of Workers in La Previsora SA Insurance Company (SINTRAPREVI).

846. The Government sent its observations in a communication dated 26 October 2006.

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

A. The complainant's allegations

848. In its communication of 23 May 2006, SINTRAPREVI alleges acts of anti-union discrimination within the La Previsora SA insurance company in that the wages of the 577 "official workers" belonging to the trade union organization have not been increased since January 2003, although according to the trade union organization, higher-ranking official workers in the company have received a wage increase of between 3.5 and 4.8 per cent. The complainant organization adds that administrative and legal proceedings were initiated without success. Furthermore, the enterprise has presented seven counter demands with the aim of undermining the existing agreement.

849. Moreover, on 29 June 2005, the enterprise proceeded to approve a "voluntary benefits plan" with the aim of persuading the workers to leave the trade union en masse. According to the complainant organization, the enterprise had already had sanctions imposed on it by the Constitutional Court for similar practices. On 6 July, the voluntary benefits plan was approved and, during the months of January and February 2006, the executives of La Previsora SA promoted the signing of a collective pact, thus inciting employees to leave the trade union organization.

850. Finally, the trade union organization alleges that, on 18 May 2006, a total of 114 officials and official workers of the enterprise were notified that they had lost the benefits established under the Statute governing Executives *(Estatuto del Directivo)*, partially annulled on 16 February 2006 by the Second Section, Subsection A, of the Administrative Disputes Division of the Council of State.

B. The Government's reply

851. In its communication of 26 October 2006, the Government states that, with regard to the wage increase, the trade union organization lodged an *amparo* action (for the protection of constitutional rights) in order to obtain the wage increase but this was not granted, the following ruling being issued in the first and second instances:

> Consequently, the fact that workers of one enterprise have received a wage increase, while others working for the same enterprise have not, does not mean that the latter find themselves in a situation of inequality, given that the complainants are "official workers" covered by Act No. 6 of 1945, Regulatory Decree No. 2127 of the same year, and the collective agreement, while the executives, as they are referred to by the complainants, are public employees appointed by decree, whose wages were set in 2005 in accordance with Decree No. 926 of 30 March of that year.
>
> Therefore, in the case in question, although the complainants believe that they are in a situation of inequality and that their other rights are being infringed, given that the situation arose owing to a collective labour agreement, the trade union organization should initiate a labour dispute with the enterprise, denouncing the agreement within the 60 days prior to its automatic extension, in accordance with the interpretation of article 479 of the Substantive Labour Code contained in Constitutional Court Decision C-1050 of 4 October 2001: "… the effect of the denunciation of the collective agreement by the employer is understood, in terms of the charges making up the complaint and the agreement challenged, to be limited to a unilateral declaration of disagreement regarding the continuation of that agreement, the workers being the ones who determine whether they will initiate a collective dispute by presenting the corresponding list of demands, although the shortcomings of the list of demands cannot be remedied through the *tutela* (protection of constitutional rights) procedure, which may not be employed as a substitute for normal defence procedures."
>
> It therefore makes no sense for the complainants to resort to a *tutela* procedure in order to force the enterprise La Previsora SA to grant the official workers a wage increase on the same terms as those enjoyed by the public employees, because the residual and subsidiary nature of the *tutela* procedure makes it impossible for it to be employed with regard to such issues, especially where the wage increases for the official workers were addressed in the collective agreement.

852. For its part, the enterprise states in a communication attached by the Government, that the trade union organization did not present a list of demands in 2003, 2005 or 2006, and for this reason it was not possible to negotiate wage increases for its members. According to the enterprise, although it denounced the collective agreement on 31 December 2002, with a view to seeking changes to that agreement, the trade union organization did not present a list of demands and negotiation was not possible because only trade union organizations are permitted to initiate the negotiation process. According to the communication issued by La Previsora SA, the enterprise invited the trade union organization, through an informal process, to take part in discussions on wage increases and the changes proposed by the company with a view to improving competitiveness in the private market. According to the enterprise, it was the intransigence of the trade union that prevented any agreement from being reached.

853. As to the voluntary benefits plan, the Government states that the trade union organization has not presented any evidence to support its allegations, and the enterprise denies that it has been planning any such voluntary benefits plan.

854. The collective labour pact, as has been explained on various occasions, is a tool provided for under Colombian labour law and, like a collective agreement, is an instrument or mechanism for collective bargaining, its purpose being to resolve and end collective labour disputes and prevent them from giving rise to strike action. On this subject, in Decision No. SU-342/95, the Constitutional Court ruled that:

> … the Court holds that the freedom of employers to conclude collective pacts which coexist alongside collective agreements, when this is permitted according to the above points, is also limited by constitutional provisions. All of the above allows the Court to establish as a general rule the following: the freedom of employers to regulate labour relations through collective pacts, when those pacts are to coexist with collective agreements within the enterprise, is restricted or limited by the totality of rights, values and principles recognized by the Constitution. In other words, that freedom remains intact and is constitutionally and legally protected but may not be exercised or employed by the employer in such a way as to undermine the fundamental rights of the workers and the trade union organization.

855. The collective labour pact is a legal instrument which, like the collective labour agreement, sets conditions governing the employment contract but which must at no time undermine the rights of unionized workers. In the present case, a group of workers proposed that the enterprise conclude a pact in order to resolve a dispute which had a negative outcome for the workers. This was an initiative on the part of the workers, rather than the enterprise, consistent with 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). In its communication, the enterprise states that some non-unionized workers had been considering the possibility of obtaining majority support that would make it possible to seek a comprehensive solution to the lengthy dispute between the enterprise and the trade union, through the signing of a collective pact covering the majority of the enterprise's workers.

856. As to the abolition, by virtue of a Council of State ruling, of the benefits of 114 officials established under the Statutes governing Executives, the Government states that, since the ruling abolishing the benefits was issued by the Second Section, Subsection A, of the Administrative Disputes Division of the Council of State, the Government is not competent to question it, according to the terms of article 113 of the Political Constitution, which concerns the separation of powers. The enterprise states that all it has done is to comply with the court ruling.

C. The Committee's conclusions

857. *The Committee takes note of the allegations presented by SINTRAPREVI, the Government's reply to those allegations, and the enterprise's communication, also transmitted by the Government.*

858. *The Committee notes that the allegations refer to: (a) anti-union discrimination on the part of the enterprise La Previsora* SA *against 577 official workers belonging to the trade union organization; this discrimination manifested itself in the form of the refusal, since January 2003, to increase wages, despite the fact that, within the enterprise, the wages of other, higher-ranking official workers have been increased; (b) the presentation of counter demands by the enterprise on seven occasions with the aim, according to the complainant organization, of abolishing the benefits gained as a part of the collective agreement in force; (c) the preparation of a voluntary benefits plan with a view to encouraging workers to leave the trade union organization en masse; (d) pressure placed on the workers to sign a non-union collective accord and to leave the trade union organization; and (e) the abolition of the agreed benefits of 114 official workers, established under the Statutes governing Executives, annulled by the Second Section, Subsection A, of the Administrative Disputes Division of the Council of State.*

859. *As to the alleged discrimination against those unionized official workers who have not received a wage increase since January 2003, the Committee notes that, according to the Government and the enterprise, this increase may only be established within the framework of the collective bargaining process, and that the trade union organization has not presented a list of demands since 2002, despite the various invitations issued by the enterprise to do so. The Committee notes that the legal proceedings initiated by the trade union organization did not succeed because the trade union organization has not denounced the collective agreement in force and has not presented a list of demands, both of these steps being necessary for wage negotiations to take place.*

860. *As to the presentation of seven counter demands by the enterprise, the Committee notes that, according to the Government and the enterprise, the intention was to change the substance of the agreement. However, they state that, according to the law, only trade union organizations are entitled to initiate collective bargaining processes and, therefore, should the union not present a list of demands, then the counter demands have no effect. The Committee recalls that the opportunity which employers have, according to the legislation, of presenting proposals for the purposes of collective bargaining – provided these proposals are merely to serve as a basis for the voluntary negotiation to which Convention No. 98 refers – cannot be considered as a violation of the principles applicable in this matter [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *fifth (revised) edition, 2006, para. 931].*

861. *As to the preparation of a voluntary benefits plan with the aim of persuading the workers to leave the trade union en masse, the Committee notes the Government's statement to the effect that the trade union organization has not presented sufficient evidence in this respect and that the enterprise denies the existence of such a plan. This being the case, the Committee requests the complainant organization to provide further information concerning this allegation.*

862. *As to the alleged pressure on workers to sign a non-union collective accord and, consequently, to leave the trade union organization, the Committee notes the Government's explanation concerning the Colombian legal system, which provides for the existence of both collective agreements and collective accords. The latter may be concluded only in cases where the trade union organization present in an enterprise does not represent 30 per cent of the workers. The Committee notes that, according to the enterprise, the non-unionized workers were considering the possibility of obtaining majority support for the conclusion of a collective accord. Taking into account the fact that the complainant organization alleges that pressure was put on unionized workers to sign the collective accord, and noting that according to the legislation, in order to make this possible, the unionized workers would have to leave the trade union, the Committee requests the Government to take the necessary measures to ensure that an investigation is carried out to determine whether, when the signing of the collective accord was being promoted, unionized workers were put under pressure. The Committee requests the Government to keep it informed in this respect.*

863. *As to the allegations concerning the abolition of the benefits of 114 official workers established under the terms of the Statues governing Executives, annulled by the Second Section, Subsection A, of the Administrative Disputes Division of the Council of State, the Committee notes the Government's statement to the effect that this was a judicial ruling and, consequently, it (the Government) is not competent to question that ruling. The enterprise, for its part, states that it is obliged to comply with legal rulings. The Committee notes that, according to the statutes provided by the trade union organization, the benefits in question are granted by a unilateral ruling of the executive board of the enterprise in favour of workers holding management posts in that enterprise. However, the Committee does not have a copy of the Administrative Disputes Division ruling, which would indicate*

the reasons for annulling the statutes. This being the case, the Committee requests the Government to send a copy of the ruling of the Second Section, Subsection A, of the Administrative Disputes Division of the Council of State, so that it may be in full possession of the facts when coming to a decision.

The Committee's recommendations

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

(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 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.

CASE NO. 2495

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

Complaint against the Government of Costa Rica presented by the International Confederation of Free Trade Unions (ICFTU)

Allegations: Armed robbery at the headquarters of the Rerum Novarum Confederation of Workers by two persons, with death threats to five officials and employees and the theft of their personal effects and a computer belonging to the Confederation, after searching through the offices

865. The complaint is contained in a communication from the International Confederation of Free Trade Unions (ICFTU) dated 12 June 2006. The Government sent its observations in a communication dated 14 August 2006.

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

A. The complainant's allegations

867. In its communication of 12 June 2006, the ICFTU reports intimidation and serious threats to the life of employees and officials of the Rerum Novarum Confederation of Workers (CTRN) during a raid on its headquarters.

868. The ICFTU reports that, on 24 May 2006 at 10.00 a.m., the following were in the trade union premises of the CTRN: Tannia González, receptionist; Nieves Granja; Gustavo Hernández, general employee; Alejandro López, secretary of the organization; and Tyronne Esna, secretary for education. Ms González was suddenly pushed into the meeting room by an attacker who had his hand over her mouth and was pressing a revolver to her head, and who ordered the others to lie down on the floor. A revolver was also pushed into Tyronne Esna's mouth.

869. The CTRN officials and employees were tied up with plastic tape and one of the attackers told them to show where the money was, while the other took their belongings: wallets, five mobile telephones, two electronic organizers, gold items, cash, chequebooks and other CTRN documents. They also took the keys to Mr Lopez's and Mr Esna's cars. While they were asking about the safe, they searched the filing cabinets, emptied them and took the files from all the offices. They then moved everyone to one of the bathrooms, where they continued threatening them, telling them that if they talked or said anything they would be killed.

870. The attackers were talking by mobile telephone with someone outside while they were threatening to kill the CTRN officials and employees. They said that they knew the trade union leader, Rodrigo Aguilar, was in Brazil and that there were three other persons. They searched the whole premises and took a computer containing information that is of great value to the CTRN and a complaint to the ILO. After throwing them to the floor, they went off leaving the CTRN officials and employees in the same position for 45 minutes, until they were able to undo their bonds.

B. The Government's reply

871. In its communication of 14 August 2006, the Government indicates that the complainant organization is referring to matters outside the jurisdiction of the ILO, which relate to armed robbery at the trade union premises and alleged threats against officials and workers of the CTRN, which occurred on 24 May 2006. The Government draws attention to the blatant omission by the trade union of any reference to the action that is being taken by the competent authorities to deal with situations such as the present case, and the fact that the Costa Rican authorities operate within the context of the rule of law.

872. The Government considers in this regard that care is required when drawing conclusions. The fact is that criminal acts, committed by gangs and delinquents, occur in all societies, and that the law enforcement agencies in each country are continually engaged in combating such acts. In Costa Rica, all administrative and legal proceedings are concluded when all the various stages have been completed, and not before. Bypassing due process, as laid down by law, in administrative or judicial matters would be unconstitutional. Within the context of the rule of law, Costa Rica guarantees the free exercise of basic human rights, including internationally recognized workers' rights.

873. The Government adds that, as the allegations involve what are presumed to be criminal offences, unrelated to labour matters, article 153 of the Political Constitution provides that it shall be the responsibility of the judicial authorities, in addition to their other constitutional functions, to investigate criminal acts, irrespective of their nature and the status of those involved, to reach final conclusions and to ensure the implementation of their rulings, where necessary with the assistance of the forces of order. The Government attaches a report of the OIJ, dated 30 June 2006, which contains the following indications:

> … in relation to the acts committed in the offices of the Rerum Novarum Confederation of Workers (CTRN), the undersigned wish to inform you that, from the moment that the Unit was notified of the regrettable situation of the staff of this important organization, the case was accorded the attention normally given in such cases, with immediate action being organized with a view to the swift resolution of the case.
>
> Complaint No. 000-06-10756 has been received and the case is being dealt with by Officers Luis Jaramillo Granados and Marco Carrión Hernández, both distinguished investigators in the Armed Robbery Branch of the Property Crimes Section of the Criminal Investigation Department who, in the document with the single reference N'06-010572-042-PE, on 21 June last submitted a report on the action taken up to now to the Public Prosecutor for Armed Robbery of the Department of the Public Prosecutor.
>
> The report indicates that on 24 May, the date on which the staff referred to above in the offices of the Rerum Novarum Confederation of Workers were the victims of armed robbery, officers of the Physical Investigation and Evidence Gathering Section went to the scene of the crime to proceed with the investigation and seek evidence, take photographs and search for fingerprints, on the basis of which they compiled a report on the investigation, the damages suffered and the evidence.
>
> In addition, the five officials who had been the victims of the assault and theft were interviewed, as well as the owners and staff of several shops in the vicinity to determine any possible parallels with other recent crimes. It was found that the two persons who had attacked the premises of the Rerum Novarum Confederation of Workers on that date may have carried out similar robberies in other buildings, in all cases stealing personal computers and the personal effects of the employees or officials, including mobile telephones, watches, cash, etc.
>
> However, despite the interviews and the photographic identification carried out with two CTRN officials, with a view to determining whether any of the suspects could be identified from the Unit's records, no positive identification was obtained.
>
> The staff of the above police unit are still assigned to the investigation, under the direction of the Department of the Public Prosecutor, with a view to identifying those responsible for the crimes. When any results are achieved, they will be reported.

874. The Government reaffirms that it explicitly condemns all criminal acts and applies the law rigorously in all cases in which those who have committed such crimes are identified. In view of the above, the Government calls for the complaint to be set aside.

C. The Committee's conclusions

875. *The Committee observes that in this complaint the ICFTU alleges that the headquarters of the CTRN was raided by two armed persons (who talked to a person outside over a mobile telephone). The attackers tied up and made death threats to two trade union leaders (Mr Alejandro López and Mr Tyronne Esna) and three employees of the CTRN, stealing their personal effects and documents and removing a computer containing information of great value to the CTRN, while they searched and emptied out the filing cabinets in all the offices.*

876. *The Committee notes the Government's statements, according to which: (1) it condemns all criminal acts; (2) although the case concerns armed robbery committed on trade union premises and the alleged intimidation of union officials and workers who were present,*

care should be taken when reaching conclusions, as these were criminal acts committed by gangs and delinquents, which are outside the competence of the ILO; (3) the OIJ reports that two of its investigators (officials from the Armed Robbery Branch of the Property Crimes Section of the Criminal Investigation Department) proceeded to the scene of the crime that very day (24 May 2006) and that they interviewed those present on the trade union premises and carried out the appropriate investigations (searching for prints, taking photographs, etc.); according to the OIJ, the two assailants may have carried out similar attacks in other buildings, stealing computers and personal effects, as in the case of the CTRN; according to the OIJ, two CTRN officials were not able to identify the suspects from the OIJ's (photographic) records; (4) the investigation is continuing under the direction of the Department of the Public Prosecutor.

877. *The Committee deplores the seriousness of the alleged acts, which include death threats against five CTRN officials and employees, the theft of their personal effects, the searching of the filing cabinets in the CTRN offices and the theft of a computer and the organization's files. The Committee considers that it does not yet have at its disposal sufficient grounds to determine with any certainty whether these criminal acts had an anti-trade union purpose or whether, as the Government believes, they could be criminal acts resulting from delinquency. The Committee recalls that cases relating to death threats against trade union members and theft from trade union organizations or members are matters in respect of which it is fully competent and that they require judicial investigations to be carried out with a view to shedding full light, at the earliest date, on the facts and the circumstances in which such actions occurred and, in this way, to the extent possible, determining where responsibilities lie, punishing the guilty parties, preventing the repetition of similar events and returning the stolen property.*

878. *Under these conditions, the Committee, noting the investigations undertaken, expects that they will lead to the identification of the motives behind the crime and of those responsible as soon as possible and that the persons concerned will be severely punished, and it requests the Government to keep it informed of the progress made in the investigations and of any related court rulings.*

The Committee's recommendations

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

(a) The Committee deplores the seriousness of the alleged acts, which include death threats against five CTRN officials and employees, the theft of their personal effects, the searching of the filing cabinets of the CTRN offices and the theft of a computer and the organization's files.

(b) The Committee expects that the investigations undertaken will lead to the identification of the motives behind the crime, those responsible being identified and severely punished, as well as the return of the stolen property, and it requests the Government to keep it informed of the progress made in the investigations and of any related court rulings.

CASE NO. 2471

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

Complaint against the Government of Djibouti presented by the Djibouti Union of Workers (UDT)

Allegations: The complainant organization alleges that the management of the Port of Djibouti is impeding the free exercise of trade union rights through various measures: the dismissal of 11 trade union leaders and activists; the detention of 170 workers and the dismissal of another 25 workers following a solidarity strike; the arrest and preventive detention of 12 workers; repeated harassment of workers by the police and through legal means; the sending of "final warnings before dismissal" to 120 workers who had engaged in the collection of funds to provide financial support for the dismissed workers

880. The complaint is contained in two communications, dated 26 October 2005 and 24 January 2006, as well as in communications of 20 and 24 June 2006, in which the UDT provides further information.

881. In the light of the Government's failure to reply, the Committee has had to defer examination of the case on two occasions. At its November 2006 session [see 343rd Report, para. 10], the Committee issued an urgent appeal to the Government indicating that, in accordance with the procedural rules set out in paragraph 17 of its 127th Report approved by the Governing Body, it could present a report on the substance of the case at its next session, even if the observations or information had not been received in due time. The Government has not yet sent any information.

882. Djibouti 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 organization's allegations

883. The complainant organization alleges that, having been forced to work since 2004 against a background of flagrant violations of labour laws and regulations, as well as abuse of authority by the management of the International Autonomous Port of Djibouti, the port employees decided, through the Union of Port Workers (UTP), to take their case to the competent bodies and the national authorities, in accordance with national law (the labour inspectorate, the responsible ministry and the Office of the President of the Republic).

884. After exhausting all the statutory procedures, and following a general assembly held on 10 September 2005, the UTP issued a strike notice. The complainant organization affirms that the Ministry of Employment attempted to prevent the strike from going ahead, before changing its course of action and inviting the two parties to the negotiating table on the

very day of the strike, on 14 September 2005. However, the incipient social dialogue was rapidly broken off at the instigation of the port management.

885. The complainant organization alleges in particular that: on 24 September 2005, 11 trade union leaders and activists were dismissed; following a solidarity strike held the next day, 170 workers were taken to a detention centre and another 25 workers were dismissed (the list of workers at the Port of Djibouti who were dismissed during the collective dispute is attached to the complaint); 12 workers held in preventive detention for fomenting open insurrection and participating in an illegal assembly were released by a ruling of 2 October 2005; in this regard, the Correctional Chamber of the Djibouti Court of Appeal arbitrarily sentenced the latter workers to suspended prison sentences of up to two months (three of the workers were found guilty of the offence of unlawful demonstration and obstruction of the freedom to work, and the others of threats and assembly on the public thoroughfare liable to disturb the public order). The complainant organization also denounces the "final warnings before dismissal" delivered to 120 workers who collected funds to provide financial support for the dismissed workers and, in general, the measures of police and legal harassment of workers (see the communication of 24 January 2006). The complainant organization requests the Committee to make the necessary recommendations so that the decisions to dismiss the strikers are set aside.

886. In its communication of 24 June 2006, the UDT emphasizes that these violations of freedom of association form part of a policy of savage and inhumane repression by the Government. The latter went a stage further with the arrest of four members of the UDT, who were charged with passing information on to a foreign power and insulting the President of the Republic. They were committed to Gabode prison, where they were detained for almost a month. The complainant organization alleges that these arrests, detentions and prosecutions are arbitrary and contravene the basic rules of criminal procedure. The passports of two of the accused were confiscated.

B. The Committee's conclusions

887. *The Committee regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the allegations of the complainant organization despite the fact that it has been invited on several occasions to make comments and observations on the case, including by means of an urgent appeal. The Committee urges the Government to be more cooperative in the future.*

888. *Under these circumstances, in accordance with the applicable rule of procedure [see 127th Report, para. 17, approved by the Governing Body at its 184th Session], the Committee is bound to submit a report on the substance of the case even without the information it hoped to receive from the Government.*

889. *The Committee reminds the Government that the purpose of the whole procedure established by the International Labour Organization for examining allegations of violations of freedom of association is to ensure respect for trade union rights in law and practice. The Committee is convinced that, while this procedure protects governments against unreasonable accusations, they must recognize the importance for the protection of their own good name of formulating for objective examination detailed replies concerning the allegations brought against them [see First Report of the Committee, para. 31].*

890. *The Committee notes that the present case, against a background of intimidation and increasingly serious violations of trade union rights, concerns measures taken in reprisal for the initiation of a collective dispute in 2004 at the International Autonomous Port of Djibouti: the abusive dismissal of 36 trade union leaders and activists; the detention of 170 workers acting in solidarity with the dismissed workers; the arrest and preventive detention of 12 workers for fomenting open insurrection and participating in an unlawful*

assembly; and threats to dismiss 120 workers who had engaged in the collection of funds to provide financial support to the dismissed workers.

891. *The Committee notes with regret that the Government has not replied to the allegations of abusive dismissal of the trade union leaders and activists. The Committee recalls, in this regard, that the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests and that it 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 522 and 523].*

892. *The Committee draws the Government's attention to the fact that one of the fundamental principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures, and that 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 [see* ***Digest****, op. cit., para. 799].*

893. *The Committee therefore requests the Government to institute an independent inquiry rapidly into the allegations of abusive dismissal of the 36 trade union leaders and activists at the Port of Djibouti and, should the allegations be founded, to take the necessary measures immediately to bring an end to these acts of discrimination and punish those responsible and ensure their reinstatement without loss of pay. The Committee also considers that the Government should ensure that adequate and effective protection is afforded against acts of anti-union discrimination by emphasizing the reinstatement of workers as an effective means of remedy. The Committee recalls that the remedy of reinstatement should be available to those who are victims of anti-union discrimination and that, if reinstatement is not possible, the Government should ensure that the workers concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals [see* ***Digest****, op. cit., paras 837 and 845].*

894. *Furthermore, with regard to the alleged detentions following a solidarity strike, while once again regretting the absence of observations by the Government, the Committee firmly recalls that the arrest and detention of trade unionists and the alleged measures of harassment and intimidation are a grave threat to the free exercise of trade union rights, that the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in a peaceful strike, that no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike and that the Government should take stringent measures to combat such practices [see* ***Digest****, op. cit., paras 671 and 672].*

895. *Finally, the Committee notes with deep concern the allegations regarding the arrest and detention of four members of the UDT, namely, Adan Mohamed, Hassan Cher Hared, Mohamed Ahmed Mohamed and Djibril Ismael Egueh, and their prosecution. The Committee expects that these trade union leaders have been released and that no charges remain pending against them. It urges the Government to provide detailed information in this regard.*

The Committee's recommendations

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

(a) The Committee deeply regrets that, despite the time that has elapsed since the presentation of the complaint, the Government has not replied to the allegations of the complainant organization. The Committee urges the Government to be more cooperative in future.

(b) The Committee requests the Government to institute an independent inquiry rapidly into the allegations of the abusive dismissal of the 36 trade union leaders and activists at the Port of Djibouti. Should these allegations prove to be founded, it requests the Government to take the necessary measures immediately to bring an end to these acts of discrimination and to punish those responsible and ensure the reinstatement of these workers without loss of pay. Where reinstatement is not possible, the Committee requests the Government to ensure that the workers concerned are paid adequate compensation which would represent a sufficiently dissuasive sanction for anti-trade union dismissals.

(c) The Committee expects that the trade union leaders Adan Mohamed, Hassan Cher Hared, Mohamed Ahmed Mohamed and Djibril Ismael Egueh have been released and that no charges remain pending against them. It urges the Government to provide detailed information in this regard.

List of workers at the International Autonomous Port of Djibouti dismissed during the collective dispute
(14–27 September 2005)

Number	File number	Name	Occupational status at time of dismissal	Number of years of service at the port	Position within the union	Occupation	Signature
01	1220	Ali Ibrahim Darar	Active	24	Deputy General Secretary	Head of operations	
02	2108	Wahib Ahmed Dini	Active	8	Second Deputy General Secretary	Container crane operator	
03	1756	Mohamed Ahmed Mohamed	Active	12	Secretary for Legal Affairs	Technician	
04	2142	Mohamed Ali Ahmed	Active	10	Secretary for External Relations	Skipper	
05	1562	Abdourahman Bouh Il Tireh	Active	21	Secretary (Inform/C)	Seagoing technician	
06	2124	Ali Ibrahim Chireh	Active	6	Staff rep. and shop steward	Container crane operator	
07	1705	Yacin Ahmed Robleh	Active	19	Staff rep. and shop steward	Supervisor (Djibouti Dry Port)	
08	1580	Mohamed Abdillahi Dirieh	Active	27	Technical advisor (General Services)	Head of section (Machinery)	
09	1103	Kamil Mohamed Ali	Active	28	Staff representative	Head of Operations Department	
10	1201	Ibrahim Moussa Sultan	Active	26	Staff representative	Head of Accounting Department	
11	1390	Samira Hassan Mohamed	Active	22	Staff representative	Administrative Assistant (Port Management)	
12	1992	Djibril Houssein Walieh	Active	7	Staff representative	Technician	
13	1978	Moustapha Moussa Housein	Active	7	Staff representative	Head of section (Electricity)	
14	1404	Youssouf Houmed Mohamed	On leave	24	Staff representative	Tugboat Master	
15	1703	Ahmed Abdi Waliyeh	Active	17	Staff representative	Billing clerk	
16	2155	Osman Houssein Djama	Active	8	Member	Vessel Planning Officer	
17	2506	Djamal Mohamed Rayaleh	On leave	3	Member	Heavy truck driver	
18	2138	Mohamed Hersi Houssein	Active	7	Member	Heavy truck driver	
19	2571	Aden Moussa Aden	Active	3	Member	Skilled docker	
20	2580	Moussa Doubad	Active	3	Member	Skilled docker	

Number	File number	Name	Occupational status at time of dismissal	Number of years of service at the port	Position within the union	Occupation	Signature
21	2594	Mohamed Ali Abdellah	Active	3	Member	Skilled docker	
22	2624	Ali Hassan Mohamed	Active	3	Member	Skilled docker	
23	2022	Kadidja Abdo	Active	8	Member	Billing clerk	
24	1738	Neima Awad	Active	12	Member	Secretary (Management)	
25	1540	Naguib Ahmed Mohamed	Paraplegic/inactive	20	Member	Pump attendant	
26	1623	Osman Abdillahi Youssouf	Active	–	Member	Technician	
27	2364	Ali Mohamed Ali	Active	4	Member	Security officer	
28	2323	Houssein Barreh Djama	Active	4	Member	Security officer	
29	2007	Djama Ismael Assoweh	Active	7	Member	Technician	
30	2545	Kadir Osman Hassan	Active	4	Member	Technician	
31	2298	Mohamed Hais Mohamed	Active	10	Member	Technician	
32	2186	Farhan Bouh Dafe	Active	6	Member	Technician	
33	1658	Moustapha Abchir Egueh	Active	20	Member	Tugboat captain	
34	2463	Mohamed Abdillahi Omar	Active	7	Member	Senior investigator	
35	–	Koulmiyeh Houssein Ahmed	Active	5	Member	Operations controller	
36	2574	Ali Hassan Kamil	Active	3	Member	Skilled docker	

CASE NO. 2483

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

Complaint against the Government of the Dominican Republic presented by the Association of Teachers' Health Insurance Employees (ASOESEMMA)

Allegations: The complainant organization alleges the anti-union dismissal of the Secretary-General and the Treasurer of the organization, as well as acts of interference and the non-remittance of union dues from its members

897. The complaint is contained in communications from the Association of Teachers' Health Insurance Employees (ASOESEMMA) dated 24 January, 8 April, 6 and 25 May, 15 June, 8 September, 28 November and 21 December 2006. The Government sent its observations in communications dated 10 October 2006 and 19 February 2007.

898. The Dominican Republic 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

899. In its communications dated 24 January, 8 April, 6 and 25 May, 15 June, 8 September and 28 November, ASOESEMMA alleges that the management of the Teachers' Health Insurance Company (SEMMA) has committed a number of violations of Conventions Nos. 87 and 98, such as the transfer of union officials and offers of promotion to association leaders in exchange for giving up their seats on the Executive Committee, as well as hindering the exercise of trade union rights. ASOESEMMA states that, following these anti-union actions and with the aim of breaking up the Executive Board which had been in the process of demanding wage increases and promotions, the management of SEMMA decided to dismiss César Antonio Familia and Rabel Novas, respectively Secretary-General and Treasurer of ASOESEMMA, in November 2005. The trade union leaders in question lodged an administrative appeal against their dismissal with the Higher Administrative Tribunal in September 2006.

900. The complainant organization adds that, following the abovementioned dismissals, the SEMMA authorities committed various acts of interference. Specifically, they tried to interfere in the running of ASOESEMMA operations by seeking to impose their agenda by organizing a meeting and proposing an increase in union members' monthly dues. It also alleges that, against this background of interference, the SEMMA authorities held a poll on 24 May 2006 to elect a so-called ASOESEMMA executive board. ASOESEMMA states

that the administrative labour authority has done no more than attempt mediation and that the employer participated in only one of the four meetings that were called.

901. The complainant organization alleges in addition that the SEMMA management has refused to transfer to ASOESEMMA the sum of money corresponding to the dues levied on union members for March, April and May 2006.

902. Finally, in its communication dated 21 December 2006, the complainant organization reports that the administrative appeal lodged with the Higher Administrative Court in relation to the dismissal of union officials César Antonio Familia and Rabel Novas is still being heard.

B. The Government's reply

903. In its communications of 10 October 2006 and 19 February 2007, the Government recalls that, according to the complainant organization, César Antonio Familia and Rabel Novas, the Secretary-General and Treasurer of ASOESEMMA, were separated from service with SEMMA (their separation from SEMMA was approved by its Board of Directors on 27 March 2006), as a form of harassment because of their status as trade union leaders.

904. The Government reports that SEMMA claims that the separation was quite regular, was approved by the Board of Directors and was in response to the breaches of discipline committed by the two individuals. SEMMA is a public institution, established pursuant to Executive Decree No. 2745 of February 1985, and attached to the Ministry of Education, whose function is to meet the health-care needs of teachers working in the state education sector. Labour relations in public institutions are not governed by the Labour Code. The Government indicates that ASOESEMMA lodged a request with the Ministry of Labour for an inquiry into the circumstances.

905. The Government states that, although labour relations between SEMMA and its employees are not governed by the Labour Code, the Department of Labour decided to send two labour inspectors to attempt to reach an agreement between the parties on 23 May 2006. The labour inspectors visited SEMMA's management in an attempt at reconciliation and issued a written report on 27 May in which various suggestions for settling the dispute were made. In addition to the Labour Inspectorate, the Ministry of Labour, through the Department of Labour, convened the employers and the workers concerned for mediation and/or conciliation, but after more than five meetings it was still not possible to reach agreement.

906. The Government states that, on 26 July 2006, the Director-General for Labour sent a communication to the Ministry of Education recommending the reinstatement of the workers. The recommendation was made in the light of the labour inspectors' report and with a view to achieving a compromise in the dispute. On 26 June 2006, an administrative appeal was lodged against SEMMA. The Government points out that the workers lodged their administrative appeal with the Higher Administrative Court because the labour courts are not competent to hear cases of disputes arising between public institutions and their employees.

907. The Government indicates that, although the Ministry of Labour ought not to be involved in the dispute since the administrative labour authorities are prohibited by law from interfering in legal proceedings, as is the case with the appeal that the workers have lodged with the Administrative Labour Court, the Government understands that the confidence of the parties to the dispute in the Ministry of Labour is such that it is continuing its efforts to seek a solution through mediation and conciliation. Discussions are accordingly being held

with the National Trade Union Council, the central workers' confederation representing ASOESEMMA, in order to resolve the problem. The Government will continue to participate actively in the resolution of this dispute and will inform the Committee at the appropriate time.

908. In its last communication dated 19 February 2007, the Government declares that the Ministry of Labour has actively participated in the proceedings, using the internal and administrative means conferred by the law, such as conciliation and mediation, as well as the intervention of work inspectors and the active participation of the Ministry, with the aim of resolving the conflict. However, after the qualification of the complaint as a judicial interpretation conflict, the Ministry of Labour, as a dependent organ of the executive power, decided not to intervene officially until the tribunals of the Republic render a definitive decision. The Government therefore considers that it should postpone any type of decision until the competent tribunal has ruled.

C. The Committee's conclusions

909. *The Committee observes that in the present case ASOESEMMA alleges that the management of SEMMA has committed a number of violations of Conventions Nos. 87 and 98. Specifically, it alleges the anti-union dismissal in November 2005 of César Antonio Familia and Rabel Novas, ASOESEMMA's Secretary-General and Treasurer, interference by SEMMA in the activities of ASOESEMMA by calling for elections and attempting to impose a timetable for the Association's meeting, and the non-remittance of the dues payable by union members for March, April and May 2006.*

910. *With regard to the alleged anti-union dismissals in November 2005 of César Antonio Familia and Rabel Novas, ASOESEMMA's Secretary-General and Treasurer, the Committee notes the Government's statement that: (1) SEMMA has indicated that the dismissal was regular, was approved by the Board of Directors and was in response to the breaches of discipline committed by the union officials; (2) although labour relations between SEMMA and its employees are not governed by the Labour Code, the Department of Labour decided to send two labour inspectors to attempt to generate an agreement between the parties on 23 May 2006; (3) the Ministry of Labour, through the Department of Labour, convened mediation and conciliation meetings between the parties on more than five occasions, but that no agreement was reached; (4) because the labour courts are not competent to hear cases of disputes arising between public institutions and their employees, the dismissed workers lodged an appeal with the Higher Administrative Court; (5) the Director-General for Labour sent a communication to the Ministry of Education recommending the reinstatement of the union officials in question, and the Government will continue to resolve the dispute through mediation and conciliation.*

911. *In view of the fact that the administrative authority recommended the reinstatement of the dismissed trade union leaders, the Committee requests the Government to continue to promote the reinstatement of the trade union officials César Antonio Familia and Rabel Novas. 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.*

912. *Finally, the Committee observes that the Government's reply does not permit to establish clearly whether the other allegations relating to interference by SEMMA in the activities of ASOESEMMA and the non-remittance of the dues payable by union members for March, April and May 2006 are being examined by the judicial authority. In this regard, 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 ASOESSMA all the union dues withheld during the period indicated in the allegations.

The Committee's recommendations

913. ***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 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 ASOESEMMA 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 ASOESSMA all the union dues withheld during the period indicated in the allegations.

CASE NO. 2423

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

Complaints against the Government of El Salvador presented by

— the Trade Union Federation of Public Service Workers of El Salvador (FESTRASPES)
— the Siglo 21 Trade Union Federation (FS-21)
— the International Confederation of Free Trade Unions (ICFTU) and
— the National Federation of Salvadorian Workers (FENASTRAS)

Allegations: Refusal of the Ministry of Labour to grant legal personality to the Dockworkers' Union of El Salvador (STIPES), the Salvadorian Metal Engineering Workers' Union (SITRASAIMM), the Private Security Workers' Union of El Salvador (SITRASSPES) and the Private Security Services Workers' Union (SITISPRI), and dismissals on account of the formation of these trade unions; dismissals in other enterprises

914. The Committee examined this case at its meeting in May–June 2006, when it presented an interim report to the Governing Body [see 342nd Report, paras 437–498, approved by the Governing Body at its 296th meeting (June 2006)].

915. The Government subsequently sent additional observations in communications dated 20 June and 6 October 2006.

916. 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. Previous examination of the case

917. At its meeting in May–June 2006 the Committee made the following recommendations on the issues that were still pending [see 342nd Report, para. 498]:

(a) The Committee urges the Government to grant legal personality to Dockworkers' Union of El Salvador (STIPES) and the Private Security Workers' Union of El Salvador (SITRASSPES) without delay and firmly trusts that the Ministry of Labour will allow the appeal against the decision of the Ministry of Labour refusing such legal personality. The Committee requests the Government to keep it informed in this regard.

(b) Taking into account the Government's assertions that certain companies do not belong to the metal engineering industry, the Committee requests the complainants to provide their comments in this regard and to clarify the status of metal engineering worker of each of the founders of the Salvadorian Metal Engineering Workers' Union (SITRASAIMM) (except those of Sociedad Metalúrgica Sarti, SA de C.V. whose metal engineering status is recognized by the Government). The Committee requests the Government to inform it of the result of the administrative appeal by SITRASAIMM against the refusal to grant legal personality.

(c) The Committee urges the Government to continue, as it has been doing up to now, to seek the reinstatement of the 34 founders of STIPES, the founder of the Private Security Workers' Union of El Salvador (SITRASSPES), Mr Juan Vidal Ponce and the trade union official of the Education Workers' Union of El Salvador (STEES), Mr Alberto Escobar Orellana and to inform it of the result of the proceedings for the imposition of a fine undertaken by the Ministry of Labour. The Committee also requests the Government to continue to seek the transfer of Santiago Sión and Raúl Deleón Hernández, founders of SITRASSPES, back to the posts which they previously occupied in their companies and suggests to the complainant organizations that they invite Mr Carlos Antonio Cushco Cunza and Mr Ricardo Hernández Cruz, also founders of SITRASSPES, to lodge a complaint about their alleged transfer with the Ministry of Labour so that it can take action in their case. The Committee requests the complainant organizations to submit their comments on the Government's statement that nine of the founders of SITRASAIMM were dismissed in June 2005 while the trade union's application for legal personality was submitted on 9 August 2005, thus suggesting that those dismissals were not related to the formation of the trade union.

(d) The Committee requests the Government to send its observations on the alleged dismissal of the founders of SITRASAIMM, Mr Manuel de Jesús Ramírez and Mr Israel Ernesto Avila on 1 September 2005, i.e. after the application for legal personality submitted by the founders of the trade union.

(e) As regards the dismissal of 64 trade unionists in the Hermosa Manufacturing company (among them seven trade union officials designated by name), the Committee notes the Government's statements that the company has ceased operations indefinitely and that the Ministry of Labour is taking steps and carrying out inspections to investigate and try to reach agreement on the failure to implement their labour rights. The Committee requests the Government to ensure that those dismissed received all the legal compensation due and invites the complainant organizations, as requested by the

Government in its reply, to communicate the names of the 57 trade unionists to which the complaint refers (the names of the seven officials are already given in the allegations).

(f) As regards the alleged dismissal of seven trade union officials in the CMT clothing company branch of the General Union of Seamstresses (SGC), the Committee notes that the Labour Inspectorate has sought the reinstatement of the dismissed workers and payment of wages unpaid for reasons imputable to the employer. The Committee requests the Government to continue seeking the reinstatement of the seven trade union officials and payment of the wages due.

(g) The Committee reminds the Government that it may avail itself of ILO technical cooperation for the preparation of future trade union legislation. The Committee considers that, among other things, the new legislation should guarantee the right to form trade unions without restrictions, that proceedings in the case of anti-trade union discrimination should be rapid and effective, and 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 they are employees. This type of check should be carried out in another way, for example by requiring companies to provide the Ministry of Labour with the full list of workers on its payroll so that it can check whether or not the founders are employees.

(h) The Committee requests the Government to send its observations on the communication of FENASTRAS dated 28 April 2006, with regard to the legal personality of the SITISPRI trade union.

B. The Government's reply

918. In its communication dated 20 June 2006, the Government refers to the allegations of the National Federation of Salvadorian Workers (FENASTRAS) dated 28 April 2006 and states that the Ministry of Labour and Social Security, in accordance with the legal procedure laid down in the Labour Code and in the light of its consideration of the case, issued a resolution on 3 April 2006 dismissing the request for legal personality submitted by the Private Security Services Workers' Union (SITISPRI). The administrative resolution cites the following reasons:

– as they themselves state, the founding members of the trade union in the process of being established carry out their activities for, and under the orders of, Protección de Valores, SA de CV and Protecciones Industriales, SA de CV, two companies that provide private security services at the national level; by the very nature of their work, in performing their duties the employees of these companies are inevitably called upon to carry firearms and all kinds of other arms, the main purpose of their job being to protect the physical integrity of people as well as of fixed and moveable assets;

– in its article 7, paragraph 3, the Constitution of the Republic – the primary law governing the juridical system of El Salvador – explicitly prohibits the existence of armed groups; for the Ministry of Labour to grant the said union juridical personality would therefore be a violation of the aforementioned constitutional principle;

– by the very nature of the activities they carry out, private security workers hold positions of trust on two counts: just as their employers trust them to perform the duties requested of them, which are discretionary, so too the beneficiaries of their services place their entire trust in them, whether as users, inhabitants of a residential compound, company executives, public officials or employees, private, state or autonomous institutions, banks, etc.: in other words, all the beneficiaries of their services trust these workers to perform the specific task they have been assigned, which is why they themselves describe themselves as trustworthy; technically, these

workers are defined as "persons who, by virtue of their responsibilities, the delicate nature of their work and the honesty that is demanded of them, enjoy the trust and special support of the owner or management of the company".

919. Article 221 of the Labour Code regulates the possibility of an employee in a position of trust joining a trade union, provided the union's general assembly accepts him or her as a member. This necessarily implies the prior existence of a trade union organization that is not made up of employees in a position of trust and whose legal personality has been recognized by the Ministry of Labour. It can be concluded from the foregoing that, under the existing legislation, employees in a position of trust cannot participate as founding members of a trade union organization, since no union general assembly body yet exists that has the authority to allow them to join.

920. In its communication dated 6 October 2006, the Government refers to the allegations concerning the Dockworkers' Union of El Salvador (STIPES) and states that resolution 16–2005 of the Ministry of Labour and Social Security ruled in favour of the appeal against the resolution that had initially denied the union legal personality.

921. Accordingly, on 7 July 2005 the General Directorate of Labour of the Ministry of Labour and Social Welfare granted the union legal personality and approved its by-laws.

922. As to the denial of legal personality for the Private Security Workers' Union of El Salvador (SITRASSPES), the Government states that Nicolás Pineda Escobar, in his capacity as Vice-Chairman of the provisional Executive Board of the union in the process of being established, lodged an appeal to annul the resolution issued by the Ministry of Labour on 3 October 2005, which denied the aforementioned union legal personality; the appeal was deemed receivable under article 11 of the Constitution and article 1270 of the Code of Civil Proceedings. The Government adds that, since the appeal was dismissed, the Ministry's 3 October 2005 resolution denying the union legal personality for the reasons given, and which have already been communicated to the Committee, was confirmed.

923. Regarding the denial of legal personality for the Salvadorian Metal Engineering Workers' Union (SITRASAIMM), the Government states that José Amilcar Maldonado Castillo, in his capacity as Vice-Chairman of the provisional Executive Board of the union in the process of being established, lodged an appeal to annul the resolution issued by the Ministry of Labour, which denied the aforementioned union legal personality for reasons already communicated to the Committee. The Government adds that on 8 December 2005 the appeal was declared receivable and, in accordance with the law, was communicated to the union in the process of being established and to the companies involved, pursuant to article 11 of the Constitution and article 1270 of the Code of Civil Proceedings; however, neither of the parties concerned responded to the notification before the official deadline.

924. On 21 February 2006 José Amilcar Maldonado Castillo again raised the matter, with a request that documentation concerning 17 individual contracts of people working for Reselcon, SA de CV and four people working for Servicios Talsa, SA de CV, be annexed to the file, in order to show that all 21 people were working in the said companies. In spite of this, the proceedings ended with the appeal being dismissed on account of the parties' failure to respect the deadline, inasmuch as article 1270 of the Code of Civil Proceedings stipulates that the parties have three days from the date of notification in which to respond (the parties were notified on 8 December 2005 and the new documents were submitted on 21 February 2006).

925. The request by the representatives of the trade union to have the resolution denying it legal personality annulled was accordingly dismissed, and the resolution issued by the Ministry

of Labour on 4 October for the reasons given, which have already been communicated to the Committee, was upheld.

926. The Government notes the Committee's recommendation that it continue to seek the reinstatement of the 34 founders of STIPES, the founder of SITRASSPES, Juan Vidal Ponce, and the trade union official of STEES, Alberto Escobar Orellana. The Government provides the following information on the proceedings for the imposition of a fine undertaken by the Ministry of Labour:

– regarding the STIPES trade union, the Ministry of Labour has done everything possible to obtain the voluntary compliance of the private operators that are guilty of legal offences against the founders of the Dockworkers' Union of El Salvador (STIPES): Servicios Técnicos del Pacífico, SA de CV; Representaciones Marítimas, SA de CV; Operadores Portuarios Salvadoreños, SA de CV; O & M Mantenimiento y Servicios, SA de CV; and Operadora General, SA de CV. Despite this and despite the efforts of the labour inspectorate to get the enterprises to reverse their illegal decision, i.e. reinstate the founders of STIPES in their previous jobs, it has proved impossible to have the workers reinstated and the procedure has now moved on to the initiation of proceedings to impose an appropriate fine; the Committee will be informed as soon as a decision has been handed down;

– regarding STEES, the company concerned has already been fined for infringing article 248 of the Labour Code by dismissing Alberto Escobar Orellana, Second Disputes Secretary of the General Executive Board of the Education Workers' Union of El Salvador, and article 29 of the Labour Code by failing to pay the abovementioned worker his salary, for reasons attributable to the employer;

– regarding the violation of the labour rights of the founders of the Private Security Workers' Union of El Salvador (SITRASSPES), the Government states that, in the case of the workers of Guardianes, SA de CV, a further inspection that was carried out was able to verify that Santiago Sión, a founding member of the trade union in the process of being established, was not transferred from the La Majada (Sonsonate) Cooperative to San Salvador, but was reinstated in his previous job in the same department of Sonsonate, and that his salary had not been cut; it was therefore considered that there was no infringement of the law. As to Raúl Delcón Hernández, who was transferred from his place of work for having allegedly participated in the founding of the said union, a further inspection carried out at Guardianes, SA de CV, established that the company had corrected the infringement of which it was guilty and the worker concerned had been reinstated in his previous job;

– regarding Manuel de Jesús Ramírez of Servicios Talsa, SA de CV, and Israel Ernesto Avila of Reselcon, SA de CV, founding members of SITRASAIM who were dismissed on 1 September 2005, it was established that they had not lodged any complaint or initiated any proceedings;

– regarding Hermosa Manufacturing, SA de CV, the Ministry of Labour has exhausted all possible channels (persuasion, recommendations, legal action) to bring about a favourable solution for the workers who lost their jobs as a result of the company ceasing operations indefinitely. It had proved to be a legal impossibility for the Ministry to resolve the problem, since although the company's legal representative has been imprisoned he still does not have enough fixed or movable assets to pay the compensation, salaries and other benefits that the workers are owed. Consequently, the case has been brought before the courts and it will be for the labour tribunals to settle the individual labour disputes between Hermosa Manufacturing, SA de CV and its workers. At no point has the Ministry of Labour taken sides in the matter of the

workers' rights, including those of the union officials; rather, it has employed every legal means available to it to find a solution to the company's problems; and

– regarding CMT, SA de CV, the company has been duly fined for infringing the law, namely (1) article 248 of the Labour Code for having dismissed workers and trade union officials (María Rosa Beltrán, Secretary-General; Blanca Araceli Fuentes Castro, Proceedings Secretary; Dora Alicia Rivas Osegueda, Finance Secretary; Morena Escobar de Paulino, Disputes Secretary; Eva Lorena Umaña Pacheco, Security and Social Welfare Secretary; and Teresa Martínez Guerra, Organization and Statistics Secretary – all members of the Section Executive Board for CMT, SA de CV), (2) article 29, section 2 of the Labour Code, for the company's failure to pay the workers and trade union officials the salaries owed to them, and (3) article 29, section 2 of the Labour Code, in respect of salaries that remain unpaid for reasons attributable to the employer.

C. The Committee's conclusions

927. *The Committee observes that the allegations still pending refer to the following matters: refusal by the Ministry of Labour to grant legal personality to the Dockworkers' Union of El Salvador (STIPES), the Salvadorian Metal Engineering Workers' Union (SITRASAIMM), the Private Security Workers' Union of El Salvador (SITRASSPES) and the Private Security Workers' Union (SITISPRI), and reprisals for the formation of these trade unions (34 dismissals in the case of STIPES, 18 dismissals in the case of SITRASAIMM and two dismissals and five transfers in the case of SITRASSPES); dismissal of Alberto Escobar Orellana, an official of the Education Workers' Union of El Salvador (STEES); dismissal of 64 members or officials of the trade union branch operating in Hermosa Manufacturing, SA de CV; and dismissal of seven trade union officials at the CMT, SA de CV, clothing company, all members of the General Union of Seamstresses.*

Allegations regarding the refusal to grant trade unions legal personality

928. *The Committee notes with satisfaction that on 7 July 2005 the Ministry of Labour and Social Security ruled in favour of the appeal lodged by the STIPES trade union against the resolution which initially denied it legal personality.*

929. *The Committee regrets, however, 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.*

930. *With regard to the other allegations concerning the refusal to grant legal personality to the private security sector trade union SITISPRI, the Committee notes the Government's statement that: (1) the workers concerned are engaged in positions of trust vis-à-vis their employers and the users of security services; article 221 of the Labour Code stipulates that an employee in a position of trust can only join a trade union if the union's general assembly accepts him or her as a member, thereby implying that a trade union organization already exists that is not made up of employees in a position of trust; (2) the Constitution of El Salvador prohibits the existence of armed groups (article 7, 3.º) and employees of private security companies to carry firearms. The Committee observes that the Government has invoked similar reasons in other cases of refusal to grant legal*

personality to trade unions of private security workers (for example, the case cited in the previous paragraph concerning SITRASSPES) and that it has already had occasion to reject those reasons on the grounds that the only possible exceptions to the right to establish trade unions provided for in Article 9 of Convention No. 87 concern members of the armed forces and the police. The Committee urges the Government to grant the SITISPRI trade union legal personality and to keep it informed in this respect.

931. *The Committee further observes that the complainant organizations have not sent the information that was requested concerning the reasons given by the Government for not granting SITRASAIMM legal personality and takes note of the Government's statement that the appeal against the refusal to grant legal personality was dismissed by the Ministry of Labour, mainly because the trade union in the process of being established did not respect the three-day deadline laid down in the Code of Civil Proceedings, as the Ministry had requested, when it submitted documents concerning the individual labour contracts of 17 people (the documents were submitted but only after the deadline). 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 was denied legal personality on such grounds. The Committee recalls that, although the founders of a trade union should comply with the modalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 276]. The Committee requests 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.*

Dismissal of founders of trade union organizations and other trade unionists

932. *The Committee takes note of the Government's statement that proceedings for the imposition of fines have been undertaken in connection with the dismissal by several companies of 34 founding members of the STIPES trade union, as a consequence of its failure to obtain their reinstatement in their previous jobs, despite constant efforts by the Ministry of Labour. The Committee requests the Government to keep it informed in this respect and to pursue its efforts to see that these trade unionists are reinstated in their jobs or to impose sufficiently dissuasive fines if they are not reinstated.*

933. *The Committee notes that a fine was imposed on the employer who dismissed Alberto Escobar Orellana, a union official of STEES (education sector), for dismissing him and for not paying him the salaries due to him. The Committee requests the Government to ensure that the salaries and other benefits due to this official are paid and to pursue its efforts to have him reinstated in his job and impose further fines in accordance with national legislation if he is not reinstated.*

934. *The Committee notes with satisfaction the Government's statement that the founding members of SITRASSPES referred to in the complaints, Santiago Sión and Raúl Delcón Hernández, were eventually reinstated in their previous jobs and that the infringement of the law has thus been corrected. The Committee requests the Government to pursue its efforts to have Juan Vidal Ponce (founding member of SITRASSPES) reinstated in his job.*

935. *The Committee also takes note of the Government's statement, in connection with the allegations concerning Hermosa Manufacturing, SA de CV, that the company's legal representative has been imprisoned and does not have sufficient assets to pay the salaries, compensation and other benefits owed to the dismissed workers (64 trade unionists,*

including seven union officials), and that, since the Ministry of Labour has exhausted all the legal and other channels available to it, the case has been brought before the courts. The Committee requests the Government to keep it informed in this respect.

936. *Regarding the alleged dismissal of seven union officials of the CMT clothing company branch of the General Union of Seamstresses (SGC), the Committee notes that, according to the Government, the Ministry of Labour imposed the fines provided for by law on the company for its dismissal of union officials (whose reinstatement the Ministry had endeavoured to bring about) and also for the non-payment of the salaries due to them. The Committee requests the Government to pursue its efforts to have these officials reinstated in their jobs, to continue imposing fines and to ensure that the salaries and other legal benefits due are paid.*

937. *Regarding the alleged dismissal of the founders of SITRASAIMM, Manuel de Jesús Ramírez and Israel Ernesto Avila, on 1 September 2005, i.e. after the founders of the union had submitted a request for legal personality, the Committee invites the complainant organizations to lodge a complaint with the Ministry of Labour, which the Government says they have not yet done.*

938. *Finally, 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.*

The Committee's recommendations

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

(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 SINTRASAIMM 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.

CASE NO. 2460

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

Complaint against the Government of the United States presented by — the United Electrical, Radio and Machine Workers of America (UE) supported by — Public Services International (PSI)

Allegations: The complainants allege that the legislation of North Carolina expressly prohibits the making of any collective agreement between cities, towns, municipalities or the State and any labour or trade union in the public sector, thus violating ILO principles on collective bargaining. They also allege that the Government violates ILO freedom of association principles by frustrating the very purpose of forming workers' organizations

940. The complaint is contained in a communication from the United Electrical, Radio and Machine Workers of America (UE) and UE Local 150, dated 7 December 2005 and 8 September 2006. In a communication dated 1 February 2006, PSI associated itself to the complaint.

941. The Government replied in communications dated 3 November 2006 and 25 January 2007.

942. The United States has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), nor the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), nor the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainants' allegations

943. In its communication of 7 December 2005, the UE and UE Local 150 indicate that the UE is an independent, rank and file, national union representing approximately 30,000 workers with a variety of jobs in manufacturing, the public sector, and the private, non-profit sector. UE Local 150, a constituent unit of UE, represents many hard-working public servants across the State of North Carolina. The vast majority of UE Local 150 members are women and people of colour who toil in some of the most difficult, low-wage, public sector jobs in the State (janitors, refuse-disposal workers, housekeepers, groundskeepers, medical technicians, bus drivers and other vital municipal and state employees).

944. The complainants allege blatant violations of workers' right to collectively bargain in North Carolina and, as such, a failure by the United States to uphold its obligations arising from its membership in the ILO to protect the fundamental rights which are the subjects of Conventions Nos. 87, 98 and 151.

945. The complainants specify that the Committee is competent to review this complaint as the UE is a national workers' organization which has a direct interest in the matter and the violations alleged in this complaint directly infringe upon the fundamental rights of freedom of association and collective bargaining; as a member State, the United States has an obligation to enforce the core labour standards within its borders.

946. According to the complainants, North Carolina General Statute (NCGS) §95-98 declares any agreement or contract between the government of any city, town, county, other municipality or the State of North Carolina and "any labour union, trade union or labour organization, as bargaining agent for any public employees" to be illegal and null and void. This statute directly violates principles of international law guaranteeing the right to collective bargaining as embodied in Conventions Nos. 98 and 151, and consequently infringes upon the right to organize freely as embodied in Convention No. 87 by making the intended benefits of worker organization unattainable.

947. According to the complainants, the United States Government has failed to adequately protect workers' rights in North Carolina. Under the US Constitution, the US Congress clearly has the authority to regulate the relationship between states, as employers, and their employees. Indeed, beginning in 1997, some members of the US Congress introduced a bill that would guarantee collective bargaining rights for state and municipal public safety workers. However, to this date, Congress has failed to enact any law that would ensure that public sector workers in North Carolina can exercise their most basic human rights outlined in Conventions Nos. 87, 98 and 151. Like Congress, the federal courts have rejected workers' pleas to strike down NCGS §95-98. The United States Government's failure to prevent North Carolina and other states from violating public sector workers' basic rights embodied in the fundamental international principles of freedom of association and the right to negotiate through collective bargaining – rights which the United States is bound to protect regardless of whether it has ratified Convention Nos. 87 and 98 – dramatically impacts the lives and working conditions of workers represented by the UE.

948. In the first place, the complainants allege that the Government's failure to ensure compliance with the fundamental principles of freedom of association and the right to collectively bargain has resulted in grievous working conditions and promoted race and sex discrimination in the workplace. The failure to comply with Conventions Nos. 87, 98 and 151 has stripped public sector workers in North Carolina of their basic human rights of free association and has translated into miserable working conditions for many public sector workers in North Carolina, who report health and safety violations in their workplace, unconscionable wages, unreasonable and unsafe hours of work, extreme understaffing, unreasonable forced overtime, favouritism, and disrespectful treatment from superiors, amongst other complaints. All of these problems are compounded by inconsistent grievance procedures devoid of any notion of due process. Moreover, all of these complaints could be addressed through the collective bargaining process. However, the prohibition of collective bargaining agreements in North Carolina has prevented public sector workers from experiencing the basic dignity associated with having a say in establishing one's conditions of work, as well as the increased authority derived from speaking with a collective voice. But perhaps the most disturbing result of North Carolina's long-term ban on collective bargaining in the public sector is the unmistakable prevalence of widespread race and sex discrimination. Employees complain of unequal treatment for racial minorities and women in hiring, promotions, discharges and wage rates. The State's own comprehensive reports determined that these complaints are accurate. For example, African Americans are disproportionately under-represented in the state government workforce, especially in management and professional positions. Not surprisingly, African Americans and women are over-represented in the lowest paying jobs

and have largely been unable to break through the State's "glass ceiling". Public sector employees also report widespread racial and sexual harassment.

949. In essence, according to the complainants, NCGS §95-98 acts as a state-mandated impediment to eliminating race and sex discrimination. Collective bargaining would provide public sector employees numerous tools to counter the continuing racism and sexism in their workplaces. From establishing truly objective criteria for employment decisions to developing workable and anti-harassment mechanisms, the collective bargaining process would offer public sector workers a voice in changing the current system to eradicate the widespread institutional racism and sexism.

950. In the second place, the complainants allege that the North Carolina law violates principles embodied in ILO Conventions Nos. 98 and 151, principles concerning fundamental rights which are binding on member States regardless of whether the Conventions were ratified. In contrast to encouragement and promotion of collective bargaining, as provided in Conventions Nos. 98 and 151, North Carolina's statutory prohibition of public sector collective bargaining wholly precludes any "negotiation of terms and conditions of employment". Moreover, the prohibition applies to all employees in the public sector, thus going beyond the Conventions' allowable exceptions. North Carolina's sweeping prohibition of public sector collective bargaining agreements constitutes a blatant and egregious violation of Conventions Nos. 98 and 151.

951. Thirdly, the complainants consider that the North Carolina statutory prohibition of collective bargaining agreements violates principles of international law embodied in Convention No. 87 by frustrating the very purpose of forming workers' organizations. When workers lose the right to collectively negotiate and form agreements regarding terms of employment with their employers, they are denied the intended benefit of employee unions. Hence, their right to freedom of association becomes a hollow right. The undeniable interdependence of the right of freedom of association and the right to engage in collective bargaining was recognized in the preliminary work for the adoption of Convention No. 87. The report from the 30th Session of the International Labour Conference indicates that "one of the main objects of the guarantee of freedom of association" is to foster favourable conditions for "freely concluded collective agreements" to emerge [Report VII, International Labour Conference, 30th Session, Geneva, 1947 p. 52]. Likewise, when Human Rights Watch assessed the situation of workers' rights in the United States, it recognized that effective protection of the right to freedom of association was impossible when collective bargaining is prohibited. In its report, *Unfair advantage: Workers' freedom of association in the United States under international human rights standards*, Human Rights Watch made note that public sector workers generally enjoyed protection against dismissal for associational activities. The report stressed, however, that "the problem for public workers in states where collective bargaining is prohibited is … the futility of an effort to organize". Thus, while public sector workers in North Carolina have technically been free to join labour organizations since 1969, the prohibition of collective bargaining agreements has largely undermined workers' main objective in exercising their freedom to associate in the workplace – collective bargaining. As such, the North Carolina prohibition of collective bargaining violates workers' rights under Convention No. 87.

952. Fourthly, the complainants allege that the North Carolina statutory prohibition of collective bargaining agreements conflicts with explicit recommendations made by the CFA in respect of the relevant Conventions. Making extensive reference to the Committee's case law, the complainants noted that NCGS §95-98, directly contravenes the basic principles of Convention No. 98. Rather than utilize the machinery of the state to encourage the use of collective bargaining agreements as Convention No. 98 mandates, North Carolina has used its machinery to prohibit the use of collective bargaining agreements.

953. Fifthly, the complainants allege that the federal Government of the United States has refused to exercise its authority over the states to ensure that North Carolina law comports to the core labour standards. Although the United States has not ratified Conventions Nos. 87, 98 or 151, it is obligated to "respect, to promote and to realize, in good faith and in accordance with the Constitution" the principles relating to the fundamental rights of freedom of association and the right to collective bargaining simply from its membership of the International Labour Organization by conformity with the Declaration on Fundamental Principles and Rights at Work. By refusing to ensure that North Carolina law complies with basic international standards, the United States Government has failed to fulfil this obligation. United States federal courts have failed to protect workers' rights and have upheld NCGS §95-98. Domestic courts in the United States have not yet ruled on the validity of the Statute in the context of its compliance with principles of international law and treaties to which the United States is a party.

954. The complainants add in this respect that in *Atkins* v. *City of Charlotte,* 296 F.Supp. 1068 (WDNC 1969) workers employed by the City of Charlotte, North Carolina challenged the constitutionality of NCGS §§95-97, 95-98 and 95-99. Section 95-97 prohibited government employees from becoming members of labour unions. Section 95-99 addressed the penalty for violations of the statutes. The District Court for the Western District of North Carolina declared that federal courts have authority to review state statutes addressing public employees' rights to unionize and engage in collective bargaining. The court struck down §§95-97 and 95-99. However, the court upheld §95-98 reasoning that states are free to refuse to enter into collective bargaining agreements and, by extension, they are entitled to statutorily forbid such agreements. In 1974, the US District Court for the Middle District of North Carolina (MDNC) also considered a challenge to §95-98 by a public sector worker. The case, *Winsto–Salem/Forsyth County Unit of North Carolina Association of Educators* v. *Phillips*, 381 F.Supp 644 (MDNC 1974), presented the issue of whether the prohibition against collective bargaining agreements constituted a violation of the rights of freedom of association guaranteed by the First Amendment to the US Constitution. The court held that despite any detrimental effects the statute might have on workers' ability to associate, the Government is under no constitutional obligation to talk to or contract with any organization. In the *Atkins* and *Phillips* decisions, the United States Government gave state governments free reign to ban collective bargaining agreements. By failing to take any legislative regulatory, or judicial actions against North Carolina Statute §95-98, the United States Government is not merely acknowledging the state's right, as an employer, to reject proposals by employee unions for an agreement; it is stamping its approval of state laws which outlaw the very agreements that, as a member State of the ILO, it has an affirmative obligation to encourage. The United States Government is hiding behind its federal system in an attempt to shirk its obligations that arise from membership in the ILO.

955. The complainant adds that the decision by the US Supreme Court in *Garcia*, 469 US528,555-56 (1985) overruling a contrary decision in *National League of Cities* v. *Usery* 426 US833 (1976) established that the US Congress has the constitutional authority to impose minimum wage and overtime protections for employees of the states. The CFA noted this in Case No. 1557, wherein it was observed that *Garcia* "supports the notion that the federal Government may intervene in matters concerning state and local government employees" [291st Report 1993, para. 273]. In the abovementioned case, the CFA would not take a position as to whether Congress had the constitutional power to impose regulations on states concerning protections for the right to collectively bargain. The CFA's refusal to decide issues of US constitutional law did not deter it from its mission to determine whether the principles of freedom of association were complied with, in law and fact. The CFA concluded that except for "public servants engaged in the administration of

the State", no employee, although employed by the government, may be denied the guarantees of Convention No. 98 [op. cit., para. 281].

956. In conclusion, the complainants state that by permitting the State of North Carolina to ban public sector workers from entering collective bargaining agreements, the Government of the United States has failed to uphold its most basic obligations as a member of the ILO. The refusal to respect North Carolina public sector workers' right to bargain collectively and freedom of association has resulted in serious workplace abuses, including pervasive discrimination. They therefore requested that the Committee on Freedom of Association utilize all available means to ensure that the United States Government takes immediate and effective action to comply with Conventions Nos. 87, 98 and 151, so that public sector workers in North Carolina can exercise their rights of free association and collective bargaining.

957. In a communication of 8 September 2006, the complainants provided a report compiled by the International Commission for Labor Rights (ICLR) entitled "The Denial of Public Sector Bargaining Rights in the State of North Carolina (US): Assessment and Report" (June 2006). The report reflected the ICLR's analysis of North Carolina's obligations relating to public sector workers' collective bargaining rights under domestic and international law. In preparing the report, the ICLR sent a delegation of international labour experts to North Carolina to engage in extensive fact finding. The complainants submitted the report as additional evidence in support of their complaint. According to the complainants, the report made findings relative to significant violations of internationally recognized labour standards in the public sector in North Carolina, which were strongly correlated to the absence of collective bargaining rights including race and gender-based discrimination in hiring, promotion, pay, the exercise of discipline and termination; systematic breaches of occupational health and safety norms; and arbitrary personnel policies. It made recommendations to the federal Government for the immediate ratification of Conventions Nos. 87 and 98, to the State of North Carolina for the repeal of NCGS §95-98 and to state subdivisions for the institution of "meet and confer" measures that would at a minimum promote negotiation with workers, even if the outcomes were not enforceable, in recognition of the extent to which state subdivisions have their hands tied by the provisions of NCGS §95-98.

B. The Government's reply

958. In a communication dated 3 November 2006, the Government indicates that the United States respects, promotes and realizes the fundamental principles and rights at work that are embodied in the ILO's Constitution, and is in full compliance with any obligations it may have by virtue of membership in the ILO. Public sector workers in North Carolina have the right under the US Constitution to join labour unions or employee associations, if they choose, and they have the right to participate in the democratic processes under which the terms and conditions of their employment are set. Moreover, public sector workers in North Carolina are covered – as are public sector workers throughout the United States – by a safety net of federal and state laws and practices that secure their right to be free form workplace discrimination, unsafe and unhealthful workplaces, and substandard pay and conditions of employment.

959. The United States has not ratified ILO Conventions Nos. 87, 98 and 151 and therefore is not bound by their terms. The Committee on Freedom of Association acknowledged this fundamental principle as recently as 2003 in Case No. 2227, paragraph 599. (The United States has no international law obligations pursuant to Conventions it does not ratify, including Conventions Nos. 87 and 98.) In a similar vein, and contrary to the complainants' assertion, the United States has no formal obligations under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The ILO

Declaration is a non-binding statement of principles, is not a treaty, and gives rise to no legal obligations [see Committee on Freedom of Association Case No. 2227, para. 599]. The United States Government, however, 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's Constitution.

960. In the first place, the Government emphasizes that public employees in North Carolina have the right to form and join unions. Public sector employees perform a wide variety of jobs: blue-collar and white-collar jobs, jobs in law enforcement and defence, technical and professional jobs and many others. What sets public sector employees apart from their private sector counterparts is, of course, the special character of their employer. With respect to public employment, the employer is the whole people, who speak by means of the laws that are enacted by their representatives. Despite the special nature of public sector workers in the United States, individuals employed at all levels of the Government have the right to form and join unions because the First Amendment to the US Constitution guarantees the associational rights of all persons. This fundamental principle is well settled in US jurisprudence and has specifically been recognized in North Carolina, as the complainants concede. Thus, in *Atkins* v. *City of Charlotte*, a three-judge panel of federal district court judges held that the US Constitution's guarantee of freedom of association protects the rights of North Carolina public employees to form and join labour unions. Because the US Constitution's provisions supersede conflicting state laws by virtue of the supremacy clause of article VI, North Carolina is not free to abridge this fundamental right by enacting contrary state legislation. As a practical matter, this means that the North Carolina law cannot and does not impede the rights of state and local government employees to form and join unions or employee associations. Thus, US law and practice with respect to North Carolina is completely consistent with the principles underlying Convention No. 87.

961. The court in *Atkins* noted, however, that there is nothing in the US Constitution, including the First Amendment's right to associate freely, that compels a party to enter into a contract with any other party. As a result, the court upheld the validity of North Carolina General Statute (NCGS) §95-98, saying that the State of North Carolina was free to decide through the people's democratically elected representatives whether to enter into such agreements. Another panel of federal district court judges further explained that the North Carolina legislature's policy choice forbidding public sector collective bargaining agreements was an entirely appropriate way of balancing the citizenry's competing interests. See *Winston–Salem/Forsyth County Unit, NC Association of Educators* v. *Phillips,* 381 F.Supp. 644 (MDNC 1974). In the court's words:

> [T]o the extent that the public employees gain power through recognition and collective bargaining, other interest groups with a right to a voice in the running of the government may be left out of vital political decisions. Thus, the granting of collective bargaining rights to public employees involves important matters fundamental to our democratic form of government. The setting of goals and making policy decisions are rights inuring to each citizen. All citizens have the right to associate in groups in order to advocate their special interests to the government. It is something entirely different to grant any one interest group special status and access to the decision-making process. [381 F.Supp. p. 647.]

962. In the second place, the Government notes that public employee unions in North Carolina may address, through the legislative process, the issues that collective bargaining typically addresses. Although public employee unions in North Carolina may not enter into contracts with state agencies, they may address the issues that collective bargaining typically addresses through the legislative process. While the *Phillips* court permitted pubic-sector collective bargaining issues in North Carolina to be resolved in the legislative

arena, a federal appeals court made it clear that public sector employees have a right under the US Constitution to participate through their unions in the law-making process [see *Hickory Fire Fighters Association* v. *City of Hickory*, 656 F.2d 917 (fourth Cir. 1981)]. More specifically, the court held that the prohibition on collective bargaining in NCGS §95-98 does not prevent North Carolina's public sector employees, unions, or employee associations from engaging in collective activities to address, through the legislative process, the issues that collective bargaining typically addresses, namely compensation, benefits, conditions and other incidents of employment.

963. According to the Government, the existence and activities of public employee organizations in North Carolina support the Government's position and help rebut the charge that it has somehow violated international labour standards and "stripped public sector workers in North Carolina of the basic human rights of free association" as the complainants contend. Public sector employees and their representatives, in fact, are actively engaged in the democratic processes through which the terms and conditions of their work are established. UE Local 150's web site, for example, indicates that it represents public employees throughout the state, that it builds chapters in each workplace, that it brings workers together to discuss problems and solutions, and that it charges dues to its members. The union also has taken credit for securing the largest pay increase in 15 years for state employees "because of our intense lobbying efforts with the legislature", and it has taken credit for raising concerns through "meet and confer" forums with public employers, for obtaining a fairer grievance procedure for state employees, and for confirming state employees' right to organize.

964. Local 150 is not the only North Carolina "public employees' organization", as that term is defined in Convention No. 151. The State Employees Association of North Carolina (SEANC) is, according to its web site, "a unified body of 55,000 active and retired state employees" whose priority is to protect and enhance state employees' rights and benefits. It claims to have achieved many notable successes in the legislative field, including pay rises, a comprehensive compensation system, an accelerated pay plan for low-paid workers, health care and retirement benefits, and layoff protections, among other things. In addition, SEANC lists repeal of §95-98 among its top ten policy objectives for 2006. [1] Finally, SEANC entered into a partnership with the Service Employees International Union in 2004 to increase its effectiveness and political power. According to the SEIU, it agreed to the partnership in order to learn how the SEANC had built "such a large, successful public employee organization" so that "its leaders can apply what they learn to build similarly large and successful organizations of public employees in other [similar states]".

965. The Government adds that public sector employment in the United States takes place at the federal, state and local levels, with thousands of discrete governmental units administering or influencing public sector labour relations. The roots of this decentralized and diverse system are embedded in the US Constitution, which established a federal system of government under which the national Government exercises only those powers the Constitution gives it; all other powers are reserved to the 50 states or to the people themselves. The states, in turn, may delegate their powers to local units of government, such as cities, counties or municipalities. The regulation of labour relations in the United States respects the constitutionally mandated distribution of power between the national and state governments. When Congress in 1935 enacted the country's primary collective

[1] Legislation has been introduced in each of the last two North Carolina legislatures that would have, if enacted, permitted state and local governmental units to enter into collective bargaining agreements with labour organizations that represent certain public safety officers. See H.B.929, 2005 Session (NC 2005); H.B.1095, 2003 Session (NC 2003). Neither of these bills was enacted into law.

bargaining law, the National Labor Relations Act, it specifically excluded state and local government employers from the law's scope, thereby deferring to principles of federalism [see 29 USC §152(2)]. Since that time, legislation occasionally has been introduced to allow federal oversight of collective bargaining at the state level, but it has never enjoyed majority support in either house of Congress and has not been enacted into law, in part because questions remain about the propriety of the federal Government intruding into the authority of state governments to enter into their own contracts. Respecting the states' autonomy to develop labour laws and policies for their own employees, the federal Government nevertheless actively encourages and promotes sound collective bargaining practices at both the federal and state levels. regardless of the level, though, public sector union membership in the United States is flourishing. In fact, public sector employees are far more likely to join unions than are private sector employees. The Department of Labor's Bureau of Labor Statistics estimate that of the country's 15.7 million wage and salary employees who were union members in 2005, 7.4 million worked for some level of government, accounting for 36.5 per cent of the public sector workforce. In the private sector, 7.8 per cent of the workforce is unionized.

966. At the forefront of the federal Government's efforts to encourage and promote sound collective bargaining practices is the Federal Mediation and Conciliation Service (FMCS). Created in 1947 when Congress enacted the Labor–Management Relations Act, the FMCS is charged with promoting sound, stable relations through mediation and conflict resolution services [see 29 USC §172]. To accomplish its mission, the FMCS makes available a number of services for use in the public sector at both the federal and state levels. For example, the FMCS helps resolve disputes in the federal, state and local sectors by offering several types of mediation services, including collective bargaining mediation. These services include making FMCS mediators available to the parties directly, designing methods and strategies for improving conflict resolution, and providing training through its Institute for Conflict Management. In 1978, Congress expanded the FMCS's mission by directing it to encourage and support joint labour–management committees that would, among other things, involve workers in decisions affecting their jobs, including improving communications on subjects of mutual interest and concern [see 29 USC §175a(a)(1)]. Congress funds this initiative through annual appropriations, and the FMCS, in turn, distributes grants to committees that are developing innovative joint approaches to workplace problems. During the most recent fiscal year, for example, the FMCS distributed grants to committees in Ohio and California that are addressing public sector health-care benefits issues, and to a school system in Florida that is using a labour–management partnership to improve school performance.

967. The Government adds that the North Carolina law, NCGS §95-98, does not, as the complainants suggest, open the gates for discrimination, unsafe or unhealthful work, or substandard pay because the US Constitution, as well as federal and state laws, prohibit such practices and provide meaningful remedies for aggrieved persons and their representatives. The US Constitution's equal protection clause of the Fourteenth Amendment prohibits governments from treating people differently on the basis of characteristics, such as race or sex, for which no distinction can be legally justified. In a similar way, §1981(a) of the Civil Rights Act of 1866, 42 USC §1981, guarantees that all persons "shall have the same right in every State and Territory … to make and enforce contracts … as is enjoyed by white citizens". Section 1983 of the Civil Rights Act of 1871 gives teeth to these guarantees by providing that a public official who acts under colour of law to deprive an individual of "any rights, privileges or immunities secured by the Constitution and laws", shall be legally liable to the injured party [42 USC §1983]. Another important federal anti-discrimination law, Title VII of the Civil Rights Act of 1964, makes it unlawful for state or local government employers, among others, to

discriminate in any aspect of employment with respect to race, colour, religion, sex or national origin [see 42 USC §2000e–2(a)].

968. Federal law specifically prohibits discrimination in programmes – including state and local programmes – that receive federal funding. For example, Title VI of the Civil Rights Act, 42 USC §2000d, prohibits discrimination on the basis of race, colour, or national origin in federally assisted programmes or activities in general. Similarly, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, prohibits discrimination based on sex in the administration of education programmes at institutions that receive federal funding, thus covering employees at most public schools and universities. In addition, the Workforce Investment Act of 1998 prohibits discrimination in federally funded job training programmes and activities on the basis of race, colour, religion, sex, national origin, age, disability or political affiliation or belief [see 29 USC. §2938(a)(2)]. The federal Government, as the provider of funds, has the authority to enforce these laws by investigating complaints and seeking appropriate relief through litigation, if necessary. Individuals also retain the right to file their own private lawsuits to redress acts of discrimination in such programmes. Moreover, the Employment Litigation Section of the US Department of Justice's Civil Rights Division enforces important provisions of federal law that prohibit employment discrimination by state and local government employers. It does so by filing suit in cases in which government employers have engaged in a pattern of practices of denying employment or promotional opportunities to a class of individuals, or by filing suit in cases involving individual allegations of discrimination that are referred to the Justice Department by the US Equal Employment Opportunity Commission after an investigation. The federal Government, through the Equal Employment Opportunity Commission, also issues guidelines to help state and local government employers, among others, comply with federal anti-discrimination laws. Before publishing such guidelines in the US Code of Federal Regulations, the Commission seeks comments from interested parties, including public sector workers and labour unions. The Commission also has long encouraged employers, unions and others to express their views on important issues through meetings, telephone calls or correspondence with Commission officials and employees. For example, it met several years ago with more than 18,000 individuals and groups pursuant to a presidential directive, in order to obtain feedback on how the agency was implementing its various responsibilities.

969. North Carolina law and practice are consistent with federal protection against employment discrimination. The North Carolina Constitution, for example, provides that no person shall "be subjected to discrimination by the State because of race, colour, religion or national origin" (article I, §19). State law makes this point even clearer with respect to public employment by providing that all state departments, agencies and political subdivisions are required to "give equal opportunity for employment and compensation, without regard to race, religion colour, creed, national origin, sex, age or handicapping condition" [NCGS §126-16]; they also are prohibited from retaliating against any employee who has alleged such discrimination [NCGS §126-17]. North Carolina state courts are empowered to compel enforcement of the non-discrimination provisions of the State's Constitution and laws [see, e.g., NCGS §7A-245]. In addition to pursuing federal and state remedies for discrimination noted above, public sector employees in North Carolina may pursue a state or local grievance procedure, an alternative dispute resolution procedure, or they may appeal directly to the State Personnel Commission for relief [NCGS §126-34]. On a broader level, the State Personnel Commission is required to submit an annual report to the legislature that includes information concerning workforce demographics as well as the status of each government unit's state-mandated "Equal Opportunity Plan", which, by law, must include "goals and programmes that provide positive measures to assure equitable and fair representation of North Carolina's citizens" [NCGS §126-19].

970. Although the complainants cite two reports from the Office of State Personnel as evidence of state mechanisms for ensuring equal opportunity, the Government believes that precisely the opposite is true: the reports brought to light – as they were intended to do – important information on workforce demographics and trends so that officials could make informed decisions about how the state human resource programmes could be improved. Contrary to the complainants' allegation that the State's reports confirmed the accuracy of the allegations of discrimination, the State quite carefully indicated that it had *not* drawn any conclusions about the causes of the demographics or trends it identified.

971. With respect to employee pay, federal law prohibits unequal or substandard pay and provides appropriate means of redress for individuals and their representatives. For example, the Equal Pay Act, 29 USC §206(d), requires employers to pay equal wages to men and women who perform equal work that requires equal skill, effort and responsibility and is performed under similar working conditions. Similarly, the Fair Labor Standards Act, 29 USC §201, assures that employee pay meets certain minimum wage and overtime national standards. The minimum wage is currently set at $5.15 per hour for all hours worked, and overtime pay is set at 150 per cent of the regular rate of pay for all hours worked in a workweek that exceed 40 [see 29 USC §206 (minimum wage); 29 USC §207 (overtime)]. The Equal Pay Act and the Fair Labor Standards Act each cover state and local government employees, among others, and each authorizes the federal Government to seek appropriate relief in court on behalf of individual employees [see 29 USC §203(e); 29 USC §216(c)].

972. At the state level, North Carolina has established, by law, the policy that compensation of state employees is to be sufficient to encourage excellence and maintain competitiveness in the labour markets [NCGS §126-7(a)]. To that end, the State has adopted a "comprehensive compensation system" that includes provisions for annual salary increases, cost-of-living raises, and performance bonuses [NCGS §126-7(bI)], which are to be distributed fairly [NCGS §126-7(c)(7)]. To assure proper oversight of the system, the State Personnel Director reports annually to the State Personnel Commission, the Governor and the legislature; the State Personnel Director also recommends to the legislature, for its approval, sanctions against deficient state departments, agencies and institutions [NCGS §126-7(c)(9)].

973. Finally, federal and state efforts secure the right of North Carolina's public sector workers to safe and healthy worksites. The federal Occupational Safety and Health Act attempts "to assure so far as possible every working man and woman in the nation safe and healthful working conditions" by, among other things, encouraging states to develop plans for assuring that workplaces in the state are safe and healthful [29 USC §651(b); 29 USC §651(b)(11)]. Such plans, when submitted to the federal Occupational Safety and Health Administration, must contain "satisfactory assurances that such State will … establish and maintain an effective and comprehensive occupational safety and health programme applicable to all employees of public agencies of the State and its political subdivisions" [29 USC §667(c)(6)].

974. To obtain federal approval of its plan, the State's programme for state and local government employees must have, among other things, standards that are at least as effective as the standards that apply to private employers [29 CFR §1952.11(b)(3)]. The programme also must contain provisions requiring periodic and complaint-driven workplace inspections, notification to employees of their rights, protections against retaliation for exercising statutory rights, access to information on workplace exposure to toxic materials or harmful physical agents and procedures for restraining or eliminating imminent danger [29 CFR §1952.11(b)(3)].

975. The State of North Carolina submitted and obtained approval of its plan for enforcing state workplace safety and health standards [see 29 CFR §1952.154 (approval effective 10 December 1996)]. Before the US Department of Labor's Assistant Secretary for Occupational Safety and Health approved North Carolina's plan, he evaluated actual operations for at least one year and solicited comments from the public; only then did he determine that the state programme is "at least as effective as the Federal programme in providing safe and healthful employment and places of employment" and approve the plan [29 CFR §1952.154(a)].

976. The State's plan, with certain exceptions not relevant to this case, covers all activities of employers and all places of employment in North Carolina. To ensure that its own workers enjoy safe and healthful working conditions, the State requires its agencies to develop written safety and health programmes, establish education and training programmes and include employees on safety and health committees; the State also encourages employees to raise safety and health complaints and it investigates complaints and accidents.

977. In conclusion, the Government states that it remains firmly committed to the principles and rights set forth in the ILO Constitution and the Declaration of Philadelphia. While the people of North Carolina, through their elected representatives, have decided that their state and local governments may not enter into collective bargaining agreements, North Carolina's public employees and their unions retain the right of freedom of association and the right to participate in democratic processes at the local, state and federal levels by engaging their governments in free and open discussions about public sector work–life issues and about collective bargaining itself. Thus, there is no ground upon which to question the Government's commitment to the fundamental principles upon which ILO membership is based.

978. In a communication dated 25 January 2007, the Government adds supplemental observations concerning the report by the International Commission for Labour Rights (ICLR) that the complainants submitted as additional evidence in support of their complaint in their communication of 8 September 2006. The Government stated that the ICLR report repeated issues raised in the complainants' original communication; the Government had already addressed these issues in its original reply. The Government adds that it takes very seriously allegations of all workplace abuses, including those raised by the ICLR in its report, namely, allegations of discrimination on the basis of race or sex, allegations of unsafe or unhealthy workplace conditions and allegations that pay does not meet certain minimum standards. Although certain allegations in the unsworn statements that the ICLR provided may appear to raise serious issues, US law is designed to determine whether, in fact, such allegations are true and to provide redress in appropriate cases. Neither the ICLR nor the complainants have credibly shown that legal redress was not available. In light of the comprehensive system for protecting workplace rights that the Government outlined in its original observations – a system whose processes and remedies the complainants have not shown to be unavailable or without substance – the Committee on Freedom of Association should not give any weight to statements suggesting that additional processes or remedies are necessary.

C. The Committee's conclusions

979. *The Committee notes that the present case concerns allegations that the legislation of North Carolina expressly prohibits the making of any collective agreement between cities, towns, municipalities or the state and any labour or trade union in the public sector, thus violating ILO principles on collective bargaining. It is also alleged that the Government violates ILO freedom of association principles by frustrating the very purpose of forming workers' organizations.*

980. *The Committee observes that the North Carolina General Statute (NCGS) §95-98 declares any agreement or contract between the government of any city, town, county, or other municipality, or the State of North Carolina and "any labour union, trade union or labour organization, as bargaining agent for any public employees" to be illegal and null and void. According to the complainants, this provision violates the principles embodied in Conventions Nos. 98 and 151 relative to the right to engage in collective bargaining, as well as freedom of association principles embodied in Convention No. 87, by making the intended benefits of worker organization unattainable; the federal Government has violated the above principles by failing to enact any law that would ensure that public sector workers in that State can exercise their rights to organize with a view to engaging in collective bargaining.*

981. *The Committee notes that according to the complainants, the failure to ensure compliance with freedom of association principles in North Carolina has resulted in grievous working conditions for many public sector workers who report health and safety violations in their workplace, unconscionable wages, unreasonable and unsafe hours of work, extreme under-staffing, unreasonable forced overtime, favouritism, and disrespectful treatment from superiors, as well as inconsistent grievance procedures devoid of any notion of due process. All these problems could have been addressed through the collective bargaining process. Moreover, according to the complainants, the ban on collective bargaining in the public sector has led to the unmistakable prevalence of widespread race and sex discrimination in the workplace, in particular, unequal treatment of racial minorities and women in hiring, promotions, discharges and wage rates, as well as racial and sexual harassment. Collective bargaining could offer public sector employees numerous tools to counter racism and sexism in their workplaces, from establishing truly objective criteria for employment decisions, to developing workable anti-harassment mechanisms. The complaint concerns in particular the members of UE Local 150 which consist in their vast majority of women and people of colour in some of the most difficult, low-wage public sector jobs (janitors, refuse disposal workers, housekeepers, groundskeepers, medical technicians, bus drivers, etc.).*

982. *The complainants allege that the federal Government has refused to exercise its authority over the states to ensure that North Carolina law comports to fundamental principles embodied in Conventions Nos. 87, 98 and 151. Although these Conventions have not been ratified by the United States, the complainants rely on the ILO Declaration on Fundamental Principles and Rights at Work in support of the argument that the Government is obligated to respect, promote and realize the principles embodied in these Conventions regardless of ratification.*

983. *The Committee notes that the complainants make reference to the case law of United States federal courts which has upheld the NCGS §95-98, reasoning that states as employers are free to refuse to enter into collective bargaining agreements, and by extension, are entitled to statutorily forbid such agreements [Atkins* v. *City of Charlotte, 296 F.Supp. 1068 (WDNC. 1969)]; moreover, these judgements hold that despite any detrimental effects NCGS §95-98 might have on workers' ability to associate (a right guaranteed by the First Amendment to the US Constitution), the Government is under no constitutional obligation to talk to or contract with any organization [Winston-Salem/Forsyth County Unit of North Carolina Association of Educators* v. *Phillips, 381 F. Supp. 644 (MDNC. 1974)]. According to the complainants, by failing to take any legislative, regulatory or judicial action against NCGS §95-98, the Government is stamping its approval of state laws which outlaw the very agreements that as a member State of the ILO, it has an affirmative obligation to encourage and promote, hiding behind its federal system in an attempt to shirk its obligations arising from ILO membership. The complainants add in this respect, that the US Supreme Court established in Garcia*

[469 US528, 555-56 (1985)] that the US Congress has the constitutional authority to impose minimum wage and overtime protections for employees of the states and thus the Government cannot claim that it has no authority to intervene in this regard.

984. *The Committee notes that in its reply, the Government emphasizes that it respects, promotes and realizes the fundamental principles and rights at work that are embodied in the ILO Constitution and is in full compliance with any obligations it may have by virtue of membership in the ILO. Making reference to the Committee's acknowledgment in Case No. 2227 that the United States has no international law obligations pursuant to Conventions it has not ratified, including Conventions Nos. 87 and 98 [332nd Report, para. 599], the Government further notes that it has no formal obligations under the ILO Declaration on Fundamental Principles and Rights at Work which is a non-binding statement of principles. Despite the above, the Government has submitted annual reports under the follow-up mechanism established by the Declaration that demonstrate that it respects, promotes and realizes the fundamental principles and rights at work embodied in the ILO Constitution.*

985. *The Committee recalls, as it had done when examining Case No. 2227 [op. cit., para. 600], that since its creation in 1951, it has been given the task to examine complaints alleging violations of freedom of association whether or not the country concerned has ratified the relevant ILO Conventions. Its mandate is not linked to the 1998 ILO Declaration – which has its own built-in follow-up mechanisms – but rather stems directly from the fundamental aims and purposes set out in the ILO Constitution. The Committee has emphasized in this respect that the function of the International Labour Organization in regard to trade union rights is to contribute to the effectiveness of the general principle of freedom of association and to protect individuals as one of the primary safeguards of peace and social justice [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *fifth edition, 2006, para. 1, and Annex I, para. 13]. It is in this spirit that the Committee intends, as it did in Case No. 2227, to pursue its examination of the present complaint which is limited to an examination uniquely of the collective bargaining situation in North Carolina.*

986. *The Committee notes that according to the Government, public sector employees generally perform a wide variety of jobs, from blue-collar to white-collar jobs, as well as law enforcement and defence; what sets them apart from their private-sector counterparts, is the special character of their employer, which is the whole people, speaking by means of the laws enacted by their representatives. Despite the special nature of public sector workers in the United States, they have the right to form and join unions by virtue of the First Amendment of the US Constitution. This fundamental principle is well settled in US jurisprudence and has been specifically recognized in North Carolina [Atkins* v. *City of Charlotte, 296 F.Supp. 1068 (WDNC. 1969)]. However, there is nothing in the US Constitution, including the First Amendment right to associate freely, that compels a party to enter into a contract with any other party. Therefore, the federal court upheld the validity of NCGS §95-98, saying that the State of North Carolina was free to decide through the people's democratically elected representatives whether to enter into such agreements [Atkins, 296 F.Supp. at 1077]. Another panel of federal district court judges further explained that this ban was an entirely appropriate way of balancing the citizenry's competing interests: "to the extent that the public employees gain power through recognition and collective bargaining, other interest groups with a right to a voice in the running of the government may be left out of vital political decisions. […] All citizens have the right to associate in groups in order to advocate their special interests to the Government. It is something entirely different to grant any one interest group special status and access to the decision-making process." [Winston-Salem/Forsyth County Unit, NC Association of Educators* v. *Phillips, 381 F.Supp.644 (M.D.N.C. 1974) at 647].*

987. *Furthermore, the Committee notes that according to the Government, public sector workers have the right to address through the legislative process, the issues that collective bargaining typically addresses. A federal appeals court found that the prohibition on collective bargaining in NCGS §95-98 "does not extend to a union's advocacy of a particular point of view" [Hickory Fire Fighters Association* v. *City of Hickory, 656 F.2d 917 (4th Cir. 1981) at 921]. Thus, public sector employees are not prevented from engaging in collective activities to address through the legislative process, issues like compensation, benefits, conditions and other incidents of employment. The Government emphasizes that this is indeed the case in North Carolina and that this fact is acknowledged in statements made on the web sites of the local complainant organization (UE Local 150), as well as other public employees' organizations.*

988. *Moreover, the Committee notes that according to the Government, public sector workers in North Carolina are covered – as are public sector workers throughout the United States – by a safety net of federal and state laws and practices that secure their right to be free from workplace discrimination, unsafe and unhealthy workplaces and substandard pay and conditions of employment. The Government makes extensive reference to these laws in its reply. Finally, the Government considers that the statutory ban on collective bargaining has no incidence on trade union membership levels. According to statistical information provided by the Government, public sector employees are more likely to join unions than private sector employees; of the country's 15.7 million wage and salary employees who were union members in 2005, 7.4 million worked for some level of government, accounting for 36.5 per cent of the public sector workforce.*

989. *The Committee recalls the conclusions and recommendations it reached in Case No. 1557 which concerned restrictions on the rights of public sector employees to organize and bargain collectively in the United States [284th Report, paras 758–813 and 291st Report, paras 247–285]. The Committee recalls with regard to North Carolina in particular, that it had stressed that only public servants engaged in the administration of the State may be excluded from the guarantees of the principles embodied in Convention No. 98 and recalled the importance which it attached to the principle that priority should be given to collective bargaining in the fullest sense possible as the means for the settlement of disputes arising in connection with the determination of terms and conditions of employment in the public service [291st Report, para. 281]. The Committee emphasizes that it is imperative that the legislation contain specific provisions clearly and explicitly recognizing the right of organizations of public employees and officials who are not acting in the capacity of agents of the state administration to conclude collective agreements. From the point of view of the principles laid down by the supervisory bodies of the ILO in connection with Convention No. 98, this right could only be denied to officials working in ministries and other comparable government bodies, but not, for example, to persons working in public undertakings or autonomous public institutions. In addition, the mere fact that public servants are white-collar employees is not in itself conclusive of their qualification as employees engaged in the administration of the State; if this were not the case, Convention No. 98 would be deprived of much of its scope. To sum up, all public service workers, with the sole possible exception of the armed forces and the police and public servants directly engaged in the administration of the State, should enjoy collective bargaining rights [**Digest**, op. cit., paras 893 and 892].*

990. *With regard to the finding of the federal court in the Atkins case that the statutory ban on collective bargaining is acceptable under the US Constitution because there is nothing in the Constitution, including the First Amendment right to associate freely, that compels a party to enter into a contract with any other party, the Committee, while recalling the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations, would like to emphasize*

*that the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association. Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining. Nothing in Article 4 of Convention No. 98 places a duty on the government to enforce collective bargaining by compulsory means with a given organization; such an intervention would clearly alter the nature of bargaining [**Digest**, op. cit., paras 925–927 and 934]. Thus, while a legislative provision that would oblige a party to conclude a contract with another party would be contrary to the principle of free and voluntary negotiations, a legislative provision, such as NCGS §95-98, which prohibits public authorities and public employees, even those not engaged in the administration of the State, from concluding an agreement, even if they are willing to do so, is equally contrary to this principle.*

991. *With regard to the Government's argument that the statutory ban on collective bargaining has no impact on trade union membership, the Committee emphasizes that one of the main objectives of workers in exercising their right to organize is to bargain collectively their terms and conditions of employment [Case No. 2292 (US), 343rd Report, para. 796]. It therefore considers that provisions which ban trade unions from engaging in collective bargaining unavoidably frustrate the main objective and activity for which such unions are set up, and this is contrary not only to Article 4 of Convention No. 98 but also Article 3 of Convention No. 87 which provides that trade unions shall have the right to exercise their activities and formulate their programmes in full freedom.*

992. *With regard to the finding of the federal court in the Phillips case that the ban on collective bargaining in the public sector in North Carolina was an appropriate way to balance the citizenry's competing interests by avoiding granting any one interest group special status and access to the government decision-making process, the Committee would like to specify that the principle of collective bargaining allows for negotiations between public servants and the government in its quality as employer and not as the executive; it concerns more specifically the terms and conditions of employment of public servants and would not necessarily include questions of public policy which might concern the citizenry more generally. In this regard, the Committee recalls the view of the Fact-finding and Conciliation Commission on Freedom of Association that "there are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation". It is equally clear that certain other matters are primarily or essentially questions relating to conditions of employment and that such matters should not be regarded as falling outside the scope of collective bargaining conducted in an atmosphere of mutual good faith and trust [**Digest,** op. cit., para. 920].*

993. *With regard to the Government's arguments that negotiations can validly be banned in the public sector because the employer of public sector employees is the whole people and public sector employees may address through the legislative process the issues that collective bargaining typically addresses, the Committee emphasizes that it is the government authorities that exercise the functions of employer of public sector employees and that measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers, including the government in its quality of employer, or employers' and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements [**Digest,** op. cit., para. 880]. Legislative intervention is not a substitute for free and voluntary negotiations over the terms and conditions of employment of public employees who are not engaged in the administration of the State.*

994. *This having been said, the Committee has also endorsed the point of view expressed by the Committee of Experts in its 1994 General Survey in accordance with which the special characteristics of the public service require some flexibility in the application of the principle of the autonomy of the parties to collective bargaining. Thus, legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer, are compatible with the principle of collective bargaining, provided that it is given a significant role. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts. This is not the case of legislative provisions which impose unilaterally, for example, a specific percentage increase and rule out any possibility of bargaining. The Committee is aware that collective bargaining in the public sector calls for verification of the available resources in the various public bodies or undertakings, that such resources are dependent upon state budgets and that the period of duration of collective agreements in the public sector does not always coincide with the duration of budgetary laws – a situation which can give rise to difficulties. However, it considers that the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants who are not engaged in the administration of the State [see* ***Digest,*** *op. cit., para. 1038].*

995. *In conclusion, the Committee emphasizes that the right to bargain freely with employers, including the government in its quality of employer, with respect to conditions of work of public employees who are not engaged in the administration of the State, constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that employers' and workers' organizations should have the right to organize their activities and to formulate their programmes [****Digest,*** *op. cit., para. 881].*

996. *The Committee finally notes that according to the Government, public sector employment takes place at the federal, state and local levels in a decentralized and diverse system which is embedded in the US Constitution under which the federal Government exercises only those powers the Constitution gives it; all other powers are reserved to the states or the people themselves. The states, in turn, may delegate their powers to local units of government, such as cities, counties, or municipalities. The regulation of labour relations in the United States respects the constitutionally mandated distribution of power between the national and state governments. When Congress in 1935 enacted the country's primary collective bargaining law, the National Labor Relations Act, it specifically excluded state and local government employers from the law's scope, thereby deferring to principles of federalism. Since that time, legislation occasionally has been introduced to allow federal oversight of collective bargaining at the state level, but it has never enjoyed majority support in either House of Congress and has not been enacted into law, in part because questions remain about the propriety of the federal Government intruding into the authority of state governments to enter into their own contracts. Respecting the states' autonomy in this field, the federal Government nevertheless actively encourages and promotes sound collective bargaining practices at both the federal and state levels, in*

particular through the Federal Mediation and Conciliation Service which makes available a number of services for use in the public sector at both the federal and state levels (mediation including collective bargaining mediation, joint labour–management committees, etc.).

997. *The Committee notes that it always takes account of national circumstances, such as the history of labour relations and the social and economic context, but the freedom of association principles apply uniformly and consistently among countries [**Digest,** op. cit., para. 10]. Thus, while noting the issues arising from the federal structure of the country, the Committee is bound to observe that the ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government [**Digest,** op. cit., para. 17]. Moreover, the Committee recalls the Government's indication in Case No. 1557 that the Supreme Court ruling in the Garcia case "supports the notion that the federal Government may intervene in matters concerning state and local government employees" [291st Report, para. 273].*

998. *The Committee recalls that in Case No. 1557 it had taken note of plans to establish a National Partnership Council entrusted with developing and promoting a new framework for labour–management relations in the federal Government, and had recommended that the underlying principles discussed in that joint body serve as useful guidelines for the establishment of a collective bargaining framework appropriate to state and local conditions, including in North Carolina [291st Report, para. 281]. The Committee regrets that it never received information on the follow-up to this recommendation. It requests the Government to promote the establishment of a collective bargaining framework in the public sector in North Carolina – with the participation of representatives of the state and local administration and public employees' trade unions, and the technical assistance of the Office if so desired – and to take steps aimed at bringing the state legislation, in particular, through the repeal of NCGS §95-98, into conformity with freedom of association principles, thus ensuring effective recognition of the right of collective bargaining throughout the country's territory. The Committee requests to be kept informed of developments in this respect.*

The Committee's recommendation

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

> ***The Committee requests the Government to promote the establishment of a collective bargaining framework in the public sector in North Carolina – with the participation of representatives of the state and local administration and public employees' trade unions, and the technical assistance of the Office if so desired – and to take steps aimed at bringing the state legislation, in particular, through the repeal of NCGS §95-98, into conformity with freedom of association principles, thus ensuring effective recognition of the right of collective bargaining throughout the country's territory. The Committee requests to be kept informed of developments in this respect.***

CASE NO. 2502

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

Complaint against the Government of Greece presented by the Greek Federation of Bank Employee Unions (OTOE)

Allegation: The complainant alleges that the Government unilaterally modified collective agreements concerning the pension funds of bank employees

1000. The complaint is contained in a communication from the Greek Federation of Bank Employee Unions (OTOE) dated 20 May 2006.

1001. The Government replied in communications dated 29 September 2006 and 7 March 2007.

1002. Greece 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

1003. In its communication of 20 May 2006, the OTOE alleges that Act No. 3371/2005 allows for the unilateral cancellation of collective agreements concerning bank employees' supplementary pension schemes. These supplementary pension schemes were composed of 13 private funds set up by virtue of collective agreements. As a result of the Act, the unilateral cancellation of the agreement by virtue of which the pension funds were set up entails the automatic transfer of all movable and immovable assets of the funds to the public social security scheme; the loss of all control by the workers over the administration of the funds' property; and the retroactive loss of certain entitlements for those employees who were insured after 1 January 1993. Finally, an amendment introduced by Act No. 3455/2006 to article 62(6) of Act No. 3371, allows for the dissolution of the funds even if a dispute in this regard is pending before the courts.

1004. More specifically, the complainant indicates that the supplementary pensions of bank employees were provided by 13 private funds which were set up and functioned in accordance with collective agreements reached between each bank and the relevant employees' associations. Act No. 3371/2005 provides for the possibility of each party to a collective agreement by virtue of which a pension fund was established, to cancel unilaterally the agreement. This decision (to cancel the agreement) has been taken by some banks but not by the associations of employees who have no interest to proceed to such a cancellation. The result of the cancellation has been the transfer of all moveable and immoveable assets of the funds to a public social security scheme. This transfer is not in the interest of the employees because in this way, the funds' private property will become public property and consequently, the employees will not have a say in the administration of the funds' property.

1005. The obligations and financial contributions of employers/banks are moreover taken over by a new public social security scheme which is substituted for the previous private pension fund. The exact amount of the financial contributions of the employers into the new scheme has been left to be determined in a future legislative act, on the basis of an economic study, which might also lead to a violation of the vested rights of bank employees.

1006. According to the complainant, Act No. 3371/2005 runs contrary to fundamental principles of freedom of association as it interferes with the freely formed will of the two founders of the pension funds, i.e. the banks and the association of employees working in them. Not only does it allow for the unilateral denunciation of collective agreements and the dissolution of the pension funds established on the basis of these agreements, it also leads to the abolition of the private social security system which existed in the banking sector and renders it public.

1007. Furthermore, a specific date was chosen for determining the transition towards this new social security system, specifically, 1 January 1993. On the basis of this date, bank employees are divided into two categories of beneficiaries: those who joined the scheme before 1 January 1993 and those who joined afterwards. The latter are less protected than the former, according to Act No. 3371/2005, because their pension fund contributions shall increase but their pensions shall diminish. According to the complainant, this is discriminatory as there is no reason for one group to suffer more unfavourable treatment in relation to another. Moreover, there is no justification for the selection of the particular date of 1 January 1993 as a ground for such differentiation. This discriminatory treatment is moreover retroactive and goes 12 years back, violating vested pension rights acquired after 1 January 1993.

1008. Finally, following the enactment of this Act, employees' associations and trade unions lodged appeals before the courts against some banks. Consequently, a new Act, No. 3455/2006, was enacted to amend an article of the previous Act No. 3371/2005 (article 62(6)). According to the initial provisions of Act No. 3371/2005, eventual legal disputes between banks and bank employees did not allow for the dissolution of the funds until the dispute was definitely settled. On the contrary, the new Act, No. 3455/2006, provides that the funds can be dissolved even if there are pending trials. By so doing, the Government violated, according to the complainant, the fundamental right of access to justice.

B. The Government's reply

1009. In a communication dated 29 September 2006, the Government indicated that the provisions of Act No. 3371/2005 (*Official Gazette* 178A') and, in particular, its Chapter G (articles 57–69) concerning "social insurance issues of the staff of financial institutions" aim to restructure the main and supplementary pension funds of the staff of financial institutions and are included in the general regulations made to reform the social insurance system by virtue of Acts Nos. 1902/1990, 2084/1992, 2676/1999 and 3029/2002. State intervention in this specific field has been regarded as necessary so that the multiple inequalities among bank employees due to the fragmentation of their social security bodies as well as the deterioration of the rate of pensioners to insured persons, which directly affects the sustainability of these bodies, could be dealt with. Moreover, in accordance with the provisions of the Greek Constitution, any regulation of social insurance issues is permissible if it is justified by reason of general public interest.

1010. The establishment of a special legal framework is seen as an effective solution for the integration of bank employees into wider groups of insured persons. Within this framework, the integration of the staff of financial institutions into the Single Fund for the

Social Insurance of Bank Employees (ETAT) which operates as a public body corporate, has been carried out following the dissolution of supplementary pension funds, with which bank employees were insured (article 62). The ETAT aims to: (a) compensate for the difference between the amount of pensions calculated on the basis of the terms and conditions of the (previously existing) pension funds of the financial institutions and the pensions as presently calculated by the "Special Supplementary Fund for Employees' Insurance" (ETEAM); this applies to employees insured by 31 December 1992; (b) grant early retirement pensions to those insured until 31 December 1992 in conformity with the terms and conditions of the previously existing pension funds; thus, the terms and conditions for the retirement of those insured until 31 December 1992 are not affected by the Act; (c) grant higher pensions in relation to those granted by ETEAM to those employees who were insured after 1 January 1993 only for the period during which they contributed amounts higher than those required by law for the ETEAM.

1011. The Government adds that, within the framework of the constitutional obligation of the State to intervene with a view to safeguarding the general interest and protecting the rights of the members and pensioners of supplementary pension funds of financial institutions, it is provided that in case of prolonged litigation between employers and employees and in the absence of a joint decision with regard to the dissolution of the funds through private agreement, the ETAT will undertake to manage and settle any affairs of the supplementary pension funds at the request of the representative of either the employer or the employees of the fund (article 62(6)). In these cases, the fund in question is not dissolved and its property is not seized as long as the litigation is under way. The terms and conditions under which the ETAT will manage the funds in question will be determined by presidential decree to be issued upon proposal by the Ministers of Economy and Finance and of Employment and Social Protection.

1012. Finally, with regard to the complainant's argument that the above violates collective bargaining rights of the bank employees, the Government indicates that article 2, paragraph 3, of Act No. 1876/1990 concerning "free collective bargaining and other provisions", which constitutes the main Act on collective bargaining in the country stipulates that matters relating to pensions are excluded from the scope of application of collective labour agreements. Matters relating to pensions, which are not covered by collective labour agreements, also comprise the change, directly or indirectly, in the rate of insurance contributions paid by employees and employers, the transfer from one to the other of the total or part of the financial burden relative to the payment of regular contributions or contributions for the recognition of previous service, as well as the setting up of a special fund or account for the granting of temporary pensions or lump sums at the expense of employers (article 43, paragraph 3, of Act No. 1902/1990).

1013. In a communication dated 7 March 2007, the Government adds that, according to article 22, paragraph 5, of the Constitution, the State shall care for the social security of working people and is competent to regulate relevant issues. Based on this principle, Act No. 3371/05 which aims at improving workers' social insurance by facilitating the integration into the public social insurance system of the supplementary pension funds of financial institutions does not disregard workers rights, especially because the public social insurance system offers additional guarantees compared to those offered by the supplementary pension funds through the payment of pensions regardless of unforeseen financial circumstances. Finally, the Government adds that a new collective agreement between the Greek banks and the complainant has been concluded for the years 2006–07 and was registered at the Ministry of Employment and Social Protection on 17 December 2006. The collective agreement covers the period from January 2006 to 31 December 2007; it regulates all terms and conditions of employment and therefore confirms the climate of working peace that has been achieved in the sector of banking services.

C. The Committee's conclusions

1014. *The Committee notes that the present case concerns allegations which go beyond social security legislation as such, but rather touch upon the Government's action to unilaterally modify collective agreements concerning the pension funds of bank employees. In particular, the complainant indicates that the supplementary pensions of bank employees were provided until recently by 13 private funds which were set up and functioned in accordance with collective agreements reached between each employer/bank and the relevant employees' associations. The Government enacted a law, Act No. 3371/2005, which made it possible for each party to these collective agreements to denounce/cancel them unilaterally. Moreover, the Act provided that, in case of denunciation/cancellation of the agreements, all moveable and immoveable assets of the funds were automatically transferred to a public social security scheme. As a result of this transfer, the bank employees ceased to have a say in the administration of the funds' property. Moreover, whereas the pensions of those who joined the funds before 31 December 1992 were guaranteed, the pensions of those who joined later would certainly decrease, although their contributions were likely to increase. Furthermore, the complainant expressed the fear that the contributions of employers would decrease, as the Act did not specify the amount of such contributions and left them to be determined in a future legislative act, on the basis of an economic (not actuarial) study. Thus, the employers had an incentive to denounce the collective agreements while the employees' associations were opposed to such denunciation.*

1015. *The Committee notes that according to the complainant Act No. 3371/2005 ran contrary to fundamental principles of freedom of association as it interfered with the freely formed will of the two founders of the pension funds (the employers/banks and the association of bank employees). Not only did it allow for the unilateral denunciation of collective agreements, but it also led to the automatic dissolution of the funds established by these agreements and to the abolition of the private social security system which existed in the banking sector, rendering it public. Furthermore, the beneficiaries of the funds were arbitrarily divided into two categories, one of which would suffer unfavourable treatment in relation to the other, although it contributed the same amounts in the past. This discriminatory treatment was moreover retroactive and went back 12 years, violating vested pension rights acquired after 1 January 1993. Finally, a new Act No. 3455/2006 introduced an amendment to Act No. 3371/2005 to ensure that the appeals lodged by the employees' associations before the courts did not prevent the dissolution of the funds.*

1016. *The Committee notes that in its reply, the Government indicated that state intervention was regarded as necessary so that the multiple inequalities among bank employees due to the fragmentation of their social security bodies as well as the deterioration of the rate of pensioners to insured persons, which directly affected the sustainability of these bodies, could be dealt with; thus, the staff of financial institutions was integrated into a wider group of insured persons and a Single Fund for the Social Insurance of Bank Employees (ETAT) was established to manage the transition. The ETAT aims to ensure that the pensions of those bank employees who were insured before 31 December 1992 are paid in their totality (as the pensions granted by the previous scheme are higher than those granted by the new scheme); thus, the vested rights of those insured before 31 December 1992 are not affected; with regard to those insured since 1 January 1993, the ETAT aims to ensure that their pensions are higher than those granted by the new scheme only in relation to the amounts they contributed to the previous scheme until its dissolution.*

1017. *The Committee also notes that, according to the Government, the abovementioned Act provides that, in case of prolonged litigation and in the absence of a joint decision between the parties with regard to the dissolution of the private funds, the ETAT will undertake to manage the funds in conformity with the terms and conditions to be determined by*

presidential decree; nevertheless, the funds in question are not dissolved and their property is not seized as long as the litigation is under way. Finally, with regard to the complainant's argument that the adoption of Act No. 3371/2005 violates the collective bargaining rights of the bank employees, the Government indicates that section 2, paragraph 3, of Act No. 1876/1990 stipulates that matters relating to pensions are excluded from the scope of application of collective labour agreements.

1018. *The Committee emphasizes that state bodies should refrain from intervening to alter the content of freely concluded agreements [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 1001]. The Committee considers that giving by law a special incentive encouraging one of the parties to these agreements to denounce/cancel collective agreements by which pension funds were set up, constitutes interference with the free and voluntary nature of collective bargaining. Moreover, the Committee considers that after the collective agreements by which pension funds were set up were denounced by one of the parties, it pertained to the parties themselves to determine whether and under which terms and conditions the funds would be dissolved and what would become of their assets. Nothing in Convention No. 98 enables the Government to step in and unilaterally determine these issues, much less to unilaterally determine that the assets of a private pension fund, established by collective agreement, would be appropriated and automatically transferred to a public pension scheme. The Committee notes, moreover, that the establishment of the funds through collective bargaining as well as trade union participation in the administration of these funds, constituted a trade union activity with which the Government unduly interfered. The Committee observes that the above are contrary to Article 3 of Convention No. 87 and Article 4 of Convention No. 98, both ratified by Greece.*

1019. *The Committee observes that collective bargaining implies both a give-and-take process and a reasonable certainty that negotiated commitments will be honoured, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members. If these rights, for which concessions on other points have been made, can be cancelled unilaterally, there could be neither reasonable expectation of industrial relations stability, nor sufficient reliance on negotiated agreements [**Digest**, op. cit., para. 941].*

1020. *The Committee notes that the Government justifies its intervention on grounds of public interest, i.e. the Constitutional authorization to regulate social security issues, the need to avoid inequalities among bank employees due to the fragmentation of their social security bodies, the need to address the deterioration of the rate of pensioners to insured persons which affected the sustainability of these bodies, and the fact that the workers' interests are safeguarded because the public social security funds guarantee the payment of pensions regardless of unforeseen financial circumstances. The Committee observes however, from the information before it, that the Government never participated through the public budget in the financing of the pension funds in question. It thus considers that the issues raised by the Government should be up to the members of the funds themselves and do not justify the intervention of the public authorities in their agreements. The Committee recalls that, where intervention by the public authorities is essentially for the purpose of ensuring that the negotiating parties subordinate their interest to the national economic policy pursued by the Government, irrespective of whether they agree with that policy or not, this is not compatible with the generally accepted principles that employers' and workers' organizations should enjoy the right freely to organize their activities and to formulate their programmes, that the public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof, and that*

*the law of the land should not be such as to impair or be so applied as to impair the enjoyment of such right [**Digest**, op. cit., para. 1005].*

1021. *The Committee therefore requests the Government to cease all acts of interference with the collective agreements by which the supplementary pension funds of bank employees were set up. In light of the fact that the supplementary pension funds have already been integrated by the Government into a single public fund by Act No. 3371/2005, the Committee requests the Government to convene the employers or employers' organizations and the workers' organizations concerned to full consultations as soon as possible, in order to ensure that the future of the supplementary pension funds of bank employees and of their assets is determined by mutual agreement of the parties to the collective agreements by which the supplementary pension funds were set up, and to which only they contributed, and to amend Act No. 3371/2005 to reflect the agreement of the parties. The Committee requests to be kept informed of developments in this respect.*

1022. *Finally, with regard to the Government's indication that article 2, paragraph 3, of Act No. 1876/1990 stipulates that matters relating to pensions are excluded from the scope of application of collective labour agreements, 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 [**Digest**, op. cit., para. 913]. Observing that supplementary pension schemes can legitimately be considered as benefits that may be the subject of collective bargaining, the Committee requests the Government to take all necessary measures as soon as possible to amend section 2, paragraph 3, of Act No. 1876/1990 so as to ensure that supplementary pension schemes may be the subject of collective bargaining. The Committee requests to be kept informed of developments in this respect.*

The Committee's recommendations

1023. ***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 cease all acts of interference with the collective agreements by which the supplementary pension funds of bank employees were set up.

(b) In the light of the fact that the supplementary pension funds of bank employees have already been integrated by the Government into a single public fund by Act No. 3371/2005, the Committee requests the Government to convene the employers or employers' organizations and the workers' organizations concerned to full consultations as soon as possible, in order to ensure that the future of the supplementary pension funds of bank employees and of their assets is determined by mutual agreement of the parties to the collective agreements by which the supplementary pension funds were set up, and to which only they contributed, and to amend Act No. 3371/2005 to reflect the agreement of the parties. The Committee requests to be kept informed of developments in this respect.

(c) Observing that supplementary pension schemes can legitimately be considered as benefits that may be the subject of collective bargaining, the Committee requests the Government to take all necessary measures as soon as possible to amend section 2, paragraph 3, of Act No. 1876/1990 so as to ensure that supplementary pension schemes may be the subject of collective bargaining. The Committee requests to be kept informed of developments in this respect.

CASE NO. 2241

INTERIM REPORT

Complaints against the Government of Guatemala presented by — the Trade Union of Workers of Guatemala (UNSITRAGUA) and — the Guatemalan Union of Workers (UGT) supported by — the World Confederation of Labour (WCL) and — the Latin American Central of Workers (CLAT)

Allegations: The complainant organizations allege a number of acts of anti-union discrimination and harassment in the La Comercial SA enterprise, the Higher Electoral Court and the Raphael Landívar University, as well as physical and verbal abuse of trade union members

1024. The Committee last examined this case at its March 2006 meeting, when it presented an interim report to the Governing Body [see 340th Report, approved by the Governing Body at its 295th Session (March 2006), paras 813–830]. The Trade Union of Workers of Guatemala (UNSITRAGUA) presented new allegations in a communication dated 29 May 2006.

1025. The Government sent its observations in communications dated 10 and 29 May and 6 November 2006, and 9 January 2007.

1026. Guatemala has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. Previous examination of the case

1027. At its March 2006 meeting, the Committee made the following recommendations [see 340th Report, para. 830]:

(a) Concerning the allegations regarding the refusal by the enterprise La Comercial S.A. to recognize and to bargain collectively with the union of workers of La Comercial S.A. and the refusal to deduct union dues, and the new allegations presented by

UNSITRAGUA on the appointment of an ad hoc committee of workers with which the signature of an agreement has been simulated, the Committee requests the Government to take the necessary measures to enable the trade union to enter freely into negotiations; to ensure that workers are not subjected to intimidation to accept the collective agreement against their will and to ensure that the collective agreement with the non-unionized workers does not undermine the rights of workers belonging to the trade union. The Committee requests the Government to keep it informed in this respect.

(b) As to the allegations concerning the anti-union harassment of the members of the workers' union of Rafael Landívar University by the university authorities after the trade union had submitted a draft collective agreement on working conditions, the Committee repeats its request to the Government to carry out an investigation without delay to determine those truly responsible for these acts of anti-union harassment and to ensure that they are appropriately punished so that this kind of discrimination is avoided in future within the university. The Committee requests the Government to keep it informed in this respect.

(c) Concerning the allegations of the anti-union dismissal of Mr. Edgar Alfredo Arriola Pérez and Mr. Manuel de Jesús Dionicio Salazar on 23 October 2002 after they applied to join the Workers' Union of the Higher Electoral Court, the Committee requests the Government to take the necessary measures to review the decision of the Higher Electoral Court to dismiss its employees, only six days after they had joined a trade union and to keep it informed in this respect.

(d) The Committee requests the complainants to send information on the employment situation of worker Ulalio Jimenez Esteban, member of the Workers' Trade Union of the Higher Electoral Court and, if he has indeed been dismissed, to send information on the specific reasons advanced for his dismissal. In addition, the Committee requests the Government promptly to send its observations regarding the alleged dismissal of Mr. Victor Manuel Cano Granados and the 15-day suspension of Mr. Pablo Rudolp Menéndez Rodas, who are members of the Workers' Trade Union of the Higher Electoral Court.

B. New allegations from UNSITRAGUA

1028. In its communication dated 29 May 2006, UNSITRAGUA refers to the June 2005 examination of the case, and specifically to recommendation *(c)* of the Committee on Freedom of Association, which is as follows:

> As to the allegation regarding the dismissal of the worker Marco Antonio Estrada López, a member of the Workers' Union of La Comercial S.A., the Committee, noting that the complainant organization states that the judicial authority ordered that he be reinstated in August 2004, requests the Government to ensure that the worker in question is reinstated in his post.

UNSITRAGUA indicates in this regard that the worker in question has not been reinstated. It adds that, although the aforementioned trade union requested the General Labour Inspectorate to declare null and void the collective agreements negotiated between the enterprise and the permanent committee of workers (non-unionized and controlled by management), it has not received a response. At the same time, although the case was submitted to the Tripartite Commission on International Labour Affairs, there has been no follow-up, and the Government continues to disregard the recommendation of the Committee on Freedom of Association requesting it to guarantee the trade union the exercise of the right to collective bargaining.

1029. As to the Committee's recommendation concerning Rafael Landívar University, UNSITRAGUA states that, despite the gravity of the alleged incidents, the Government has so far failed to carry out the investigation called for by the Committee on Freedom of

Association, as there is no genuine willingness to guarantee the exercise of the right to freedom of association in a climate free from any kind of pressure or violence.

1030. Commenting on the Government's statements to the Committee on Freedom of Association concerning the Movimiento Fe y Alegría, examined in March 2006, UNSITRAGUA considers that the judicial authority has been guilty of a miscarriage of justice and that its ruling revoking the reinstatement of workers compounded an infringement of the law. UNSITRAGUA adds that action taken by the trade union prompted the employer to stop using fixed-term contracts for permanent work, but that the employer then proceeded to set up the so-called Fathers' and Mothers' Associations (APAMCE) as civil associations, on the instructions of the Ministry of Education (which provides funding for wages for the Movimiento Fe y Alegría programme), with the aim of employing teachers and administrative staff while formally avoiding any labour relationship with the Asociación Movimiento Fe y Alegría (now the Fundación Movimiento Fe y Alegría) and preventing the workers from joining the trade union. The General Labour Inspectorate, which carried out an entirely objective and impartial investigation into this matter, found that the creation of the so-called APAMCE and the supposed recruitment by these associations of personnel to provide services in Fundación Movimiento Fe y Alegría centres was not only an attempt to conceal the identity of the actual employer but also prevented the workers from joining the trade union; they were even prohibited from communicating with trade union officials. This report has not been transmitted to the trade union by the Ministry of Labour and Social Security.

1031. Since workers from some of the work centres supplied vital information for the abovementioned investigation, and in order to avoid their dismissal by way of reprisal (given that the labour inspectorate cannot provide effective guarantees that workers who denounce violations of their rights will not suffer reprisals), the decision was taken for an ad hoc committee of united workers to request the judicial authority to serve a summons on the APAMCE at the La Esperanza centre. These workers have been threatened with dismissal if they do not withdraw their summons request, and attempts have been made to force them to sign documents putting an end to the dispute, despite the fact that they have been threatened with dismissal and even physical harm; these threats have also been directed at the trade union's officials. There are fears for the personal safety of both the workers bringing this case and of the trade union officials, who have received threats to their safety from an APAMCE manager at the aforementioned education centre.

1032. With regard to the recommendations concerning the Higher Electoral Court, UNSITRAGUA provides information to the effect that Ulalio Jiménez Esteban is still working, but that legal action has been initiated to obtain authorization to dismiss him. To date, the Government has not taken any steps to force the Higher Electoral Court (the employer) to reconsider the dismissal of the workers. As to Víctor Manuel Cano Granados, his case is currently being heard by the Supreme Court of Justice as part of an appeal brought by the worker against the violation of his fundamental rights by the ordinary courts. Pablo Rudolp Menéndez Rodas, for his part, has brought a case alleging reprisals, but this has been suspended as a result of the court's insistence on the Higher Electoral Court being served a summons to appear before it as a defendant, whereas the collective dispute (principal legal action) has been brought against the State of Guatemala; the worker in question is being harassed on the grounds that he is the brother of the union's labour and disputes secretary.

C. The Government's new observations

1033. In its communications dated 10 and 29 May and 6 November 2006, and 9 January 2007, the Government states that the General Labour Inspectorate, as the complainant, dealt with

a case concerning the exercise of freedom of association within the Higher Electoral Court, which according to a list enclosed by the Government has not yet been settled. With regard to the 15-day suspension without pay of Pablo Rudolp Menéndez Rodas (a member of the trade union), on the grounds that he allegedly committed a disciplinary fault on 12 July 2003, the Government states that a case against the Higher Electoral Court in connection with an act of reprisals is being heard by the Fifth Court of Labour and Social Security (the party bringing the case did not cite the Higher Electoral Court, but rather the Office of the Attorney-General). The Government further states that disciplinary faults were committed by Víctor Manuel Cano Granados, as verified by the labour inspectorate, and that he was dismissed with just cause by the Higher Electoral Court. The Government gives a summary of the legal actions brought in connection with this case and states that the ruling of the Supreme Court on an appeal is currently awaiting signature by the judges. As regards Ulalio Jiménez Esteban, his employer (the Higher Electoral Court) reports that he committed disciplinary faults and that, on the basis of a report by the labour inspectorate and other documentary evidence, and following an application to the Labour Court, he was ordered to be removed from his post as a porter. The legal appeals lodged by the worker in question were dismissed.

1034. With regard to the issues concerning Rafael Landívar University, the Government states that, according to the allegations presented by UNSITRAGUA, ever since the draft Collective Agreement on Working Conditions was presented, the employer has been implementing strategies aimed at maintaining an ongoing climate at work of harassment and tension. According to this organization, on 31 August 2002 the Secretary-General of the union, Timoteo Hernández Chávez, was intercepted on his way home by four armed men, who threatened to kill him and robbed him of various belongings, including several audio cassettes with recordings of meetings of the trade union's executive committee. On this matter, the Government states that the Office of the Special Attorney for Crimes against Journalists and Trade Unionists has reported that the case has been dropped, in view of the fact that the complainant, Timoteo Hernández Chávez, said in a statement to the Office of the Attorney that he did not wish to pursue his complaint as he had not recognized the persons who attacked him. As a result, the complaint was referred to the general archive of the Public Prosecutor's Office on the authorization of the competent judge.

D. The Committee's conclusions

1035. *The Committee observes that the allegations pending in the present case refer to a number of acts of anti-union harassment in La Comercial SA, the physical and verbal abuse of members of the Workers' Union of Rafael Landívar University by the university authorities, the dismissal of members of the Trade Union of Employees of the Higher Electoral Court and the 15-day suspension of one member. The Committee also observes that UNSITRAGUA presented additional information and new allegations.*

1036. *With regard to the allegations concerning La Comercial SA, the Committee had requested the Government during its previous examination of the case to take the necessary measures to enable the trade union to enter freely into negotiations; to ensure that workers are not subjected to intimidation to accept the collective agreement against their will; and to ensure that the collective agreement with the non-unionized workers does not undermine the rights of workers belonging to the trade union. The Committee regrets that the Government has not supplied its observations regarding these matters and observes that, according to UNSITRAGUA, the Government has disregarded the Committee's conclusions and these issues have not been followed up by the Tripartite Commission on International Labour Affairs. The Committee observes that, according to UNSITRAGUA, Marco Antonio Estrada López (whose reinstatement had been ordered by the judicial authority in August 2004 and regarding whom the Committee had requested the*

Government to ensure that he was reinstated in his post [see 337th Report, para. 917(c)]), has not yet been reinstated. The Committee requests the Government to ensure that this trade union member is reinstated in his post (as ordered by the judicial authority) and that the Workers' Union of La Comercial SA is allowed to enter into negotiations with this enterprise without it concluding a collective agreement with non-unionized workers.

1037. *With regard to the allegations concerning Rafael Landívar University (according to the complainants, after the union submitted a draft collective agreement on working conditions, the members of the union were verbally and physically abused and its Secretary-General, Timoteo Hernández Chávez, was attacked by armed men on his way home [see 337th Report, para. 917]), the Committee notes that, according to UNSITRAGUA, the investigation called for by the Committee was not carried out. The Committee also notes the Government's statement to the effect that the Secretary-General of the trade union, Timoteo Hernández Chávez, informed the Special Attorney for Crimes against Journalists and Trade Unionists that he did not wish to pursue his complaint as he had not recognized the persons who assaulted him. The Committee regrets the acts of violence reported in the allegations. It also stresses that a free and independent trade union movement can only develop in a climate that is free from violence, threats and pressure. The Committee requests the Government to carry out without delay an investigation into the physical and verbal abuse of the members of the Workers' Union of Raphael Landívar Universityand and to ensure that those responsible are appropriately punished. It requests the Government to keep it informed in this respect.*

1038. *With regard to the allegations concerning the Higher Electoral Court and the 15-day suspension of wages of Pedro Rudolp Menéndez Rodas, a member of the trade union, the Committee observes that the Government states that the legal proceedings currently under way involve an unresolved incident connected with alleged reprisals (the Office of the Attorney-General of the Nation was cited, rather than the directorate of the Higher Electoral Court). The Committee requests the Government to communicate to it the outcome of the proceedings in connection with the 15-day suspension of wages of trade union member Pedro Rudolp Menéndez Rodas. The Committee further notes that, according to UNSITRAGUA, trade union member Ulalio Jiménez Esteban is working, but that legal action has been initiated to obtain authorization to dismiss him. The Committee also notes that, according to the Government, the legal appeals brought by this worker have been dismissed. With regard to trade union member Víctor Manuel Cano Granados, the Committee notes that, according to UNSITRAGUA, he has brought an appeal against his dismissal before the Supreme Court of Justice and that, according to the Government, the appeal being heard by this court is awaiting signature by the judges. The Committee requests the Government to communicate to it the text of the rulings concerning trade union members Ulalio Jiménez Esteban and Víctor Manuel Cano Granados. At the same time, in view of the absence of information from the Government, the Committee once again requests it to take the necessary steps to ensure that the decision of the employer (the Higher Electoral Court) to dismiss Edgar Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, after they applied to join the Workers' Union of the Higher Electoral Court, is reviewed and, if it is found that the dismissals were based on anti-union motives, to take measures to ensure that they are reinstated in their posts.*

1039. *Finally, the Committee requests the Government to send its observations on the new allegations presented by UNSITRAGUA concerning APAMCE and the Fundación Movimiento Fe y Alegría, as well as threats of dismissal and threats to the physical safety of trade union members.*

The Committee's recommendations

1040. ***In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) With regard to the allegations concerning La Comercial SA, the Committee requests the Government to ensure that trade union member Marco Antonio Estrada López is reinstated in his post (as ordered by the judicial authority) and that the Workers' Union of La Comercial SA is allowed to enter into negotiations with this enterprise without it concluding a collective agreement with non-unionized workers.

(b) With regard to the acts of violence reported at Rafael Landívar University, the Committee regrets these acts. It also stresses that a free and independent trade union movement can only develop in a climate that is free from violence, threats and pressure. The Committee requests the Government to carry out without delay an investigation into the physical and verbal abuse of the members of the Workers' Union of Raphael Landívar University and to ensure that those responsible are appropriately punished. It requests the Government to keep it informed in this respect.

(c) With regard to the allegations concerning the Higher Electoral Court, the Committee requests the Government to communicate to it the text of the rulings handed down in connection with the 15-day suspension of wages of trade union member Pablo Rudolp Menéndez Rodas and with the dismissal of trade union members Víctor Manuel Cano Granados and Ulalio Jiménez Esteban. At the same time, in view of the absence of information from the Government, the Committee once again requests it to take the necessary measures to ensure that the decision of the employer (the Higher Electoral Court) to dismiss Edgar Alfredo Arriola Pérez and Manuel de Jesús Dionisio Salazar, after they applied to join the Workers' Union of the Higher Electoral Court, is reviewed and, if it is found that the dismissals were based on anti-union motives, to take measures to ensure that they are reinstated in their posts.

(d) The Committee requests the Government to send its observations on the new allegations by UNSITRAGUA concerning APAMCE and the Fundación Movimiento Fe y Alegría, as well as threats of dismissal and threats to the physical safety of trade union members.

CASE NO. 2479

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

Complaint against the Government of Mexico presented by the Academic Trade Union of Workers of the Technical Vocational Training College of the State of San Luis Potosí (SATTCONALEP-SLP)

Allegations: The complainant alleges that, following a ruling (later declared null and void) cancelling its registration as a trade union, 41 teachers were dismissed and have not been reinstated

1041. This complaint appears in communications dated 2, 5 and 8 March, 8 May and 23 July 2006 from the Academic Trade Union of Workers of the Technical Vocational Training College of the State of San Luis Potosí (SATTCONALEP-SLP).

1042. The Government sent its observations in a communication dated 3 October 2006.

1043. 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

1044. In its communications dated 2, 5 and 8 March 2006 the SATTCONALEP-SLP states that, on 1 January 2005, the Local Conciliation and Arbitration Board authorized the registration of the trade union organization. It alleges that, ever since then, the college authorities have harassed the teachers who are members of the union. This harassment has involved reducing their teaching hours, threats and actual dismissals. Moreover, the college requested that the union's registration be cancelled on the grounds that its members were not workers but service providers. The complainant organization explains that in 1998 the concept of "teacher" was removed from the college structure and replaced by "service provider", as the professionals concerned, in exercising their skills and abilities, were said to be transmitting their experience. As time went by, the new concept was found to be untenable and a staff of teachers evolved who gradually acquired seniority and a status of subordination and dependency, which are the hallmarks of an employment relationship. The contracts of these teachers are determined unilaterally by the director and renewed each semester.

1045. On 18 August 2005, the very day that the trade union was informed that its registration had been cancelled, the college dismissed 41 teachers who had set up the trade union.

1046. The trade union organization lodged *amparo* proceedings for the protection of constitutional rights (No. 837/2005, Ninth Circuit Collegiate Tribunal) against the Board's ruling cancelling the union's registration, in defence of the teachers' trade union immunity. On 11 February 2006, the court ruled that the contracts between the teachers and the college themselves constituted an employment relationship with the union members. It

therefore ordered the Board to declare its earlier ruling null and void and to issue a new ruling recognizing the union's registration.

1047. In its communications dated 8 May and 23 July 2006, SATTCONALEP-SLP adds that, on 7 April 2006, the Local Conciliation and Arbitration Board recognized its existence. However, the college has not reinstated the 41 dismissed teachers, some of whom are union officials. The complainant adds further that, together with other Mexican unions, it has established the National Federation of Academic Trade Unions of CONALEP (FENSACONALEP).

B. The Government's reply

1048. In its communication dated 3 October 2006, the Government states that the facts denounced by SATTCONALEP-SLP do not constitute a violation of freedom of association. The Government corroborates the union's statement that the Local Conciliation and Arbitration Board of the State of San Luis Potosí complied with the enforcement order of the Second Collegiate Tribunal of the Ninth Circuit which, ruling on a matter of trade union immunity, declared the cancellation of SATTCONALEP-SLP's registration to be null and void.

1049. With regard to the dismissal of 41 teachers, the Government points out that Mexico's legal system contains the necessary provisions and machinery for requesting the reinstatement of dismissed workers and the payment of their corresponding benefits.

C. The Committee's conclusions

1050. *The Committee observes that in the present case the SATTCONALEP-SLP alleges that, since it has been registered as a trade union organization, the college has engaged in discrimination against its members by reducing their teaching hours, threatening them with dismissal and actually dismissing 41 teachers as soon as the union's registration was cancelled by the Local Conciliation and Arbitration Board, which had previously granted it. The Committee notes that, according to the complainant organization, the cancellation of its registration was requested by the college on the grounds that teachers are not workers but service providers.*

1051. *The Committee notes that the Collegiate Tribunal of the Ninth Circuit considered that the contract itself was indicative of the existence of an employment relationship and ordered the Local Conciliation and Arbitration Board to declare its ruling cancelling the registration null and void. The Committee further notes that on 7 April 2006, the Local Conciliation and Arbitration Board recognized the existence of SATTCONALEP-SLP. The Committee notes, however, that the 41 teachers have not been reinstated in their posts and that the Government points out in this respect that Mexico's legal system contains the necessary provisions and machinery for requesting such reinstatement. 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]. In these conditions, given that the 41 teachers of the Technical Vocational Training College of the State of San Luis Potosí who were dismissed on account of their trade union activities following the cancellation of SATTCONALEP-SLP's registration have not yet been reinstated despite the fact that the trade union has been recognized, the Committee requests the Government to take the necessary steps for the said teachers to be reinstated in their posts without delay, with the payment of wages due, to ensure that the members of the trade union organization are not discriminated against by reason of their legitimate trade union activities and to keep it informed in this*

respect. Moreover, the Committee requests the Government to inform it if any proceedings have been instituted in order to reinstate the dismissed workers in conformity with national legislation.

The Committee's recommendation

1052. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:***

Given that the 41 teachers of the Technical Vocational Training College of the State of San Luis Potosí who were dismissed on account of their trade union activities following the cancellation of SATTCONALEP-SLP's registration have not yet been reinstated, despite the fact that the trade union has been recognized, the Committee requests the Government to take the necessary steps for the said teachers to be reinstated in their posts without delay, with the payment of wages due, to ensure that the members of the trade union organization are not discriminated against by reason of their legitimate trade union activities and to keep it informed in this respect. Moreover, the Committee requests the Government to inform it if any proceedings have been instituted in order to reinstate the dismissed workers in conformity with national legislation.

CASE NO. 2454

DEFINITIVE REPORT

Complaint against the Government of Montenegro presented by — the Confederation of Trade Unions of Montenegro (CTUM) supported by — the International Confederation of Free Trade Unions (ICFTU)

Allegations: The complainant alleges that the Ministry of Labour and Social Protection has cancelled the registration of the trade union of the Naval-Technical Overhaul Depot (MTRZ) "Sava Kovacevic" Tivat, which represents civilian staff of the armed forces, a category of workers excluded from the right to organize by the Law on the Army of Yugoslavia and that, as a consequence, these workers do not enjoy the right to bargain collectively

1053. The complaint is contained in a communication dated 18 October 2005 from the Confederation of Trade Unions of Montenegro (CTUM). By a communication dated 4 November 2005, the International Confederation of Trade of Free Trade Unions (ICFTU) associated itself with the complaint.

1054. The Government forwarded its observations in a communication dated 6 September 2006.

1055. Montenegro has neither 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

1056. In its communication dated 18 October 2005, the Confederation of Trade Unions of Montenegro (CTUM) alleges that, on 28 July 2005, the Ministry of Labour and Social Protection (hereafter, the Ministry) cancelled the registration of the trade union of the Naval-Technical Overhaul Depot (MTRZ) "Sava Kovacevic" Tivat, representing civilian staff of the armed forces, which had been registered on 20 July 2005. According to the complainant, the decision to cancel the registration was taken once the Ministry had learnt that the union represented civilian staff in the services of the army, covered by the provisions of the Law on the Army of Yugoslavia. Sections 36 and 149 of this Law impose a ban on trade union activities of the civil persons in the Army of Serbia and Montenegro. As a consequence, these workers did not enjoy the right to bargain collectively and were not able to participate in the process of privatization of the establishment, which might entail the dismissal of a majority of workers. The complainant indicates that, on 24 August 2005, a complaint was lodged against the above decision with an administrative tribunal of the Republic of Montenegro.

B. The Government's reply

1057. In its communication dated 6 September 2006, the Government confirms that the trade union of the MTRZ "Sava Kovacevic" Tivat was registered on 20 July 2005. However, by a letter of 21 July 2005, the MTRZ informed the Ministry that this institution was a military institution, the employees of which have the status of civilians in the army service to which the Law on the Army of Yugoslavia is applicable. In view of this new information, the Ministry took a decision to cancel the registration of the trade union.

1058. The Government further informs that the trade union instituted an administrative procedure before the Administrative Court of the Republic of Montenegro. However, on 28 November 2005, the applicants dropped the submitted action and, on 6 December 2005, the Administrative Court issued an order discontinuing the proceeding. Indeed, following the transfer of the property of the MTRZ "Sava Kovacevic" Tivat from the Ministry of Defence and the Army of Serbia and Montenegro to the Republic of Montenegro, the premises are no longer considered to be military property and the trade union of the MTRZ "Sava Kovacevic" Tivat was registered on 28 November 2005.

1059. The Government further points out that, according to Article 9 of Convention No. 87, "the extent to which the guarantees provided for in [the] Convention shall apply to the armed forces and the police shall be determined by national law and regulations". Therefore, by enforcing the Law on the Army of Yugoslavia and cancelling the trade union's first registration, the Ministry did not violate freedom of association rights. The Government explains that the Ministry is responsible for applying the existing legislation until it is replaced by a new one or is declared unconstitutional. The Ministry has no competence to assess the constitutionality of legislative provisions. The Government considers that the complainants should have initiated the relevant procedure before the Constitutional Court.

1060. Finally, the Government queries whether the complainant in this case, the CTUM, was competent to submit a complaint to the Committee on Freedom of Association on behalf of the trade union of the MTRZ "Sava Kovacevic" Tivat, which is not its member organization, nor its affiliate.

1061. In view of all of the above, the Government considers that this case should not call for further examination.

C. The Committee's conclusions

1062. *The Committee notes that this case concerns the issue of registration of a trade union of civilian workers in the service of the army. More specifically, the Committee notes that, by its communication dated 18 October 2005, the CTUM alleged that, on 28 July 2005, the Ministry had cancelled the registration of the trade union of MTRZ "Sava Kovacevic" Tivat, which represented civilian staff of the armed forces. The decision to cancel the union registration was taken once the Ministry had learnt that the union represented the civilian persons in the services of the army, covered by the provisions of the Law on the Army of Yugoslavia, sections 36 and 149 of which impose a ban on trade union activities of the civil persons in the Army of Serbia and Montenegro.*

1063. *The Committee notes that, in its reply, the Government indicates that: (1) the trade union of the MTRZ "Sava Kovacevic" Tivat is neither a member nor an affiliate of the CTUM, the complainant in this case, therefore the receivability of the complaint is questionable; (2) the trade union of the MTRZ "Sava Kovacevic" Tivat was registered on 28 November 2005; and (3) in any case, workers in the army are excluded from the scope of the Conventions. Therefore, the Government considers that this case should not call for further examination.*

1064. *With regard to the receivability of the complaint, the Committee recalls that its procedures provide that the complaints can be lodged by national workers' organizations directly interested in the matter. Given that the scope of the right to organize is clearly a matter of interest to a national workers' confederation, the Committee considers that the complaint from the CTUM was receivable and further recalls that it was supported by an international workers' organization with consultative status before the ILO (see Special procedures for the examination in the International Labour Organization complaints alleging violations of freedom of association (paragraph 31)).*

1065. *The Committee notes with satisfaction that the trade union of the MTRZ "Sava Kovacevic" Tivat has now been registered and therefore considers that this case does not call for further examination. With regard to the Government's comment concerning the restricted scope of Convention No. 87, however, the Committee would recall that civilians working in the services of the army should have the right to form trade unions [see* ***Digest of decisions and principles of the Freedom of Association Committee,*** *fifth edition, 2006, para. 229].*

The Committee's recommendation

1066. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to decide that this case does not call for further examination.***

CASE NO. 2484

DEFINITIVE REPORT

Complaint against the Government of Norway presented by the Norwegian Electricians and IT Workers' Union (EL and IT Workers' Union)

Allegations: The complainant organization alleges that the Government imposed compulsory arbitration to end a legal strike held in connection with the revision of a wage agreement in the elevator sector

1067. The complaint is contained in a communication dated 4 April 2006 from the Norwegian Electricians and IT Workers' Union (EL and IT Workers' Union).

1068. The Government forwarded its observations in a communication dated 3 October 2006.

1069. 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

1070. By its communication dated 4 April 2006, the EL and IT Workers' Union alleges that the Norwegian Government violated Conventions Nos. 87 and 98 by imposing, by an Act of Parliament dated 18 February 2005, a compulsory arbitration to end a legal strike, which started on 24 August 2004 in connection with the revision of a wage agreement in the elevator sector in spring 2004. The strike involved 481 workers (out of 608 employed).

1071. The complainant explains that under Norwegian labour law, the use of compulsory arbitration and prohibition of the strike has to be approved by a special Act of the 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.

1072. The complainant states that the National Office of Building Technology and Administration (BE), responsible for safety of elevators, concluded, in its letter dated 22 December 2004, that while the strike led to failing maintenance, there was no risk of personal injuries. In its report dated 20 January 2005, the BE stated that the strike had led to inconveniences for an increasing number of persons. It made an assessment of various sectors affected and concluded that public buildings were the most affected. It further pointed out that the lack of reparations and insufficient maintenance would lead, in the long term, to a decrease in the quality of elevators.

1073. When the Government decided to end the strike, it also referred to a letter dated 16 December 2004 from the Norwegian Hospitality Association, which claimed that although responsibility with regard to the security of elevators lays with the owners of

enterprises, many undertakings, such as hotels, were put in a difficult situation and might be forced to close, which would lead to dramatic consequences.

1074. The Norwegian Board of Health pointed out that the strike had led to great inconveniences and a difficult life situation for persons who depended on elevators, especially disabled persons, the elderly and families with small children. The strike had also led to difficult working conditions for employees who were dependent on elevators in their work. Allegedly, this led to serious health problems and an increase in the number of sick leave taken by workers.

1075. In a press release dated 24 January 2005, the Government claimed that the decisive factor for imposing compulsory arbitration was the abovementioned report from the BE. According to the press release, while no accidents had been reported, the lack of competent maintenance was dangerous. The Government claimed that the strike would lead to a permanent decrease in the security level of elevators. The press release also referred to the report of the Norwegian Board of Health. Considering these reports, the allegedly deadlocked situation between the parties to the dispute, and the duration of the strike, the Government made a proposal to the National Assembly to refer the dispute to compulsory arbitration and to end the strike. The proposal explained the relevant ILO Conventions, but concluded that the arbitration would not be in breach of the Conventions. Parliament approved the use of compulsory arbitration by a special Act of 18 February 2005.

1076. The complainant considers that the elevator sector is not an essential service. The question, which should be considered is whether the strike endangered the life, personal safety or health of the whole or part of the population. Norway maintains a high security level for elevators. There were no accidents reported during the strike. The complainant disagrees that poor maintenance could lead to potential danger. Indeed, the National Elevator Control Authority was not on strike and worked as usual. Therefore, the question of the duration of the strike put forward by the Government was irrelevant. Agreeing that the strike had led to inconveniences for users, the complainant considers, however, that these inconveniences did not endanger the life, personal safety or health of the population.

1077. The complainant further disagrees with the Government's qualification of the dispute as deadlocked. It indicates that the parties had several meetings during the strike. The complainant considers that, if the Government was worried about the life and health of the population, it should have tried to establish minimum services instead of using compulsory arbitration to end the strike. Furthermore, despite the absence of an agreement on minimum services, some services were nevertheless provided. In addition, the EL and IT Workers' Union was ready to continue to provide services in hospitals, as well as for disabled and elderly people. Moreover, during the strike, some elevators were repaired by other companies.

B. The Government's reply

1078. In its communication dated 3 October 2006, 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.

1079. 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 18 February 2005 does not violate Conventions Nos. 87 and 98.

1080. The Government indicates that the dispute arose in connection with the 2004 revision of the Elevator Agreement between the EL and IT Workers' Union and the Lift Contractors Association (HLF)/Technical Entrepreneurs Association (TELFO). Ninety members of the EL and IT Workers' Union went on strike on 24 August 2004. The conflict gradually extended, by both strike and lock-out, and, by 1 December 2004, it involved 481 out of 608 lift installers. The conflict affected the functioning of lifts, escalators and rolling hoops. An increasing number of installations were out of order and the conflict caused inconveniences for a number of people. Many old and disabled persons were isolated in their homes. In December, several lift contractors sent out letters to their customers recommending that they stop those lifts that were not supervised by installers during the period of the dispute.

1081. During the dispute, on several occasions, the state mediator consulted the parties. However, his attempts to bring the parties to agreement were unsuccessful. The parties were also invited to a meeting with the Minister of Labour and Social Affairs on 21 December 2004. The Minister urged the parties to find a solution to the deadlocked situation, but to no avail. Despite all these efforts, after five months of unresolved dispute, it seemed clear to the Government that there were fundamental differences in the parties' points of view. Contrary to the complainant's opinion, in the Government's view, the situation between the parties was deadlocked.

1082. At the beginning of January 2005, the Oslo Elevator Control and the Norwegian Elevator Control issued, through the media, a warning of potentially negative consequences due to the lack of supervision and maintenance of elevators. It was emphasized that the Elevator Control did not have sufficient capacity to provide services beyond regular periodic controls and that these controls could not replace the inspections which must be carried out by installers.

1083. A report from the National Office of Building Technology and Administration (BE) of 20 January 2005 stated that, while it was not possible to determine the number of lifts out of order, this number was increasing. As to the question of safety, the BE stated that, while there had not been any accidents reported, it was worried about the lack of supervision and maintenance of lifts and the risk of lift-owners restarting lifts without carrying out adequate inspection first. It also considered that the restarting of elevators by unqualified personnel represented a risk for lift users. The BE underlined that the lack of repairs and maintenance would imply danger of lift stops that could lead to critical situations. According to the Government, the BE found the safety situation severe.

1084. The Norwegian Board of Health reported that the conflict resulted in serious inconveniences and created difficult life conditions for all those dependent on elevators, especially the disabled, elderly people and families with young children. Several people were not able to do their daily tasks, could not get out of their homes and get to their workplaces. While the health authorities had not reported on situations where lifts out of order had caused damage to life and health, they reported severe health strain and an increasing number of sick leave days taken by workers.

1085. After five months of dispute, the situation was still deadlocked. A number of elevators were out of order. The Government could no longer ignore the warnings of various surveillance and control authorities. It therefore decided to propose to solve the five-month long dispute by compulsory arbitration. The Minister of Labour and Social Affairs informed the parties about this decision on 24 January 2005. The Bill was adopted by Parliament and came into force on 18 February 2005. According to the Act, the dispute was referred to the National Wages Board for settlement.

1086. The Government agrees that the elevator sector is not an essential service. However, it considers that the consequences of a strike in this sector might nevertheless become so serious that life, health and personal safety could become endangered. Indeed, the BE concluded that the duration of the dispute entailed such danger. The Government states that contrary to the opinion of the EL and IT Workers' Union, poor maintenance of elevators represented a potential danger. The BE, which is a national surveillance authority in this field, did report on an increasing safety risk connected to the lifts that were still running. It was not possible for the Government to ignore these warnings.

1087. While the Government agrees with the EL and IT Workers' Union that the duration of the strike is not an argument in itself to use compulsory arbitration, it considers that the length of the conflict is an important factor as the situation grew more serious in the course of time. If the conflict had lasted much longer, there would have been an obvious risk that the health of especially many of the isolated elderly and disabled persons would have been endangered, both physically and psychologically.

1088. With regard to the complainant's statement that the Government should have tried to establish an agreement ensuring minimum services instead of using compulsory arbitration to end the whole conflict, the Government indicates that in its understanding of the ILO recommendations concerning minimum services, agreements to that effect should preferably be reached 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.

1089. The Government is therefore convinced that the imposition of compulsory arbitration in the dispute affecting the elevator sector was in conformity with the principles of freedom of association and Conventions Nos. 87 and 98.

C. The Committee's conclusions

1090. *The Committee notes that this case concerns the imposition by the authorities of a compulsory arbitration procedure to end a strike in elevator services. According to the information provided by the complainant and the Government, the strike, which started on 24 August 2004 in connection with the revision of a wage agreement in the elevator sector in spring 2004, was ended by an Act of Parliament dated 18 February 2005.*

1091. *The Committee notes from the information provided by the complainant and the Government that both parties tried to reach an agreement: the complainant states that the parties had several meetings during the strike and according to the Government, the mediator's services were available to the parties and the Minister of Labour and Social Affair met with the parties to urge them to find a mutually acceptable solution. The Committee notes that after five months of inconclusive negotiations, the dispute was referred to the National Wages Board for settlement.*

1092. *The Committee notes that both the complainant and the Government consider that the elevator services are not essential services in the strict sense of the term where strikes can be restricted or prohibited. The Government considers, however, that the duration of the strike and the increasing safety risk noted by the National Office of Building Technology and Administration could not be ignored. The complainant, on the other hand, stated that the Government should have required minimum services instead of imposing compulsory arbitration. The complainant adds that some services had indeed been provided and that it was ready to continue to provide services in hospitals, as well as for disabled and elderly people. On this point, the Government considers that minimum services should have been determined by the parties themselves without its interference in the matter. Furthermore, it doubts that minimum services would have been sufficient.*

1093. *The Committee notes that the dispute was referred to the National Wages Board in February 2005. 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 [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 564]. While the Committee considers that elevator services are not essential in the strict sense of the term, and taking due note that some of the services were provided over the course of the strike, the Committee does recognize that the lasting absence of qualified maintenance of elevators and provision of basic services could potentially create a danger to public health and safety.*

1094. *In these circumstances, the Committee wishes to recall 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 population. Such a minimum service should be confined to operations that are strictly necessary to avoid endangering the life or 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]. While noting the Government's concern that the decision as to the provision of a minimum service should have been made by the parties themselves, the Committee considers that, in the absence of any agreement by the parties in this regard, an independent body could have been set up to impose a minimum service sufficient to address the safety concerns of the Government, while preserving respect for the principles of the right to strike and the voluntary nature of collective bargaining. 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 has considered that disagreements as to the number and nature of the minimum service may be settled by an independent body and recognizes that the minimum service to be provided in cases where the need arises only after a prolonged duration of the strike can only be determined during the dispute. In the present case, the Committee regrets that the Government made no attempt to negotiate a minimum service with the parties concerned and, in the event of a disagreement, to refer the matter for determination by an independent body. The Committee expresses its concern that the Act of 18 February 2005 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 or that facilities operate safely or without interruption and considers that measures should be taken to*

*guarantee that the minimum services avoid danger to public health and safety [see **Digest,** op. cit., paras 607 and 608]. The Committee therefore requests the Government to ensure in the future that, where the prolonged duration of a strike may pose a risk to the public health and safety, consideration will be given to the negotiation or determination of a minimum maintenance service rather than imposing an outright ban on the industrial action through the imposition of compulsory arbitration.*

1095. *As regards the procedure finally used to settle the dispute, the Committee regrets that no information was provided as to the composition of the National Wages Board or as to the outcome of the arbitration procedure. In this respect, and in the event that an intervention would be necessary for safety reasons, the Committee wishes to recall that 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., para. 596]. In addition, the Committee wishes to recall that the parties to the dispute should be given every opportunity to bargain collectively, with the help of independent facilitators and machinery and procedures designed with the foremost objective of promoting collective bargaining. Based on the premise that a negotiated agreement, however unsatisfactory, is to be preferred to an imposed solution, the parties should always retain the option of returning voluntarily to the bargaining table, which implies that whatever disputes settlement mechanism is adopted, it should be possible to suspend the compulsory arbitration process, if the parties wish to resume negotiations.*

The Committee's recommendations

1096. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:***

(a) The Committee requests the Government to ensure in the future that, where the prolonged duration of a strike may pose a risk to the public health and safety, consideration will be given to the negotiation or determination of a minimum maintenance service rather than imposing an outright ban on the industrial action through the imposition of compulsory arbitration.

(b) Furthermore, the Committee considers that in the absence of such an agreement by the parties concerning minimum service, an independent body could be set up to determine the minimum service that can meet the public health and safety concerns, while preserving respect for the principles of the right to strike and the voluntary nature of collective bargaining.

CASE NO. 2474

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

Complaint against the Government of Poland presented by
— the Independent Self-Governing Trade Union (NSZZ) "Solidarnosc" supported by
— the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)

Allegations: The complainant organization alleges interference into trade union internal affairs and anti-union dismissals in two private companies. It further alleges lengthy judicial proceedings concerning cases of alleged violations of labour rights

1097. The complaint is contained in a communication dated 28 February 2006 from the Independent Self-Governing Trade Union (NSZZ) "Solidarnosc". In a communication dated 10 March 2006, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) supported this complaint.

1098. The Government forwarded its observations in a communication dated 6 October 2006.

1099. Poland 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

1100. In its communication dated 28 February 2006, the NSZZ "Solidarnosc" alleges interference into trade union internal affairs and anti-union dismissals in two private companies (UPC Poland Ltd, branch of UPC Holding Services BV, Holland, owned by Liberty Media Holding, United States, and Frito Lay Poland Ltd, branch of PepsiCo International, New York, United States). It further alleges lengthy judicial proceedings concerning cases of alleged violations of labour rights.

1101. By way of background, the complainant explains the procedure for establishing a trade union and the protection against anti-union dismissal afforded by the Polish law. According to section 12 of the Law on Trade Unions of 1991, a trade union is formed by virtue of a resolution passed by at least ten persons who have the right to establish a union. To acquire legal personality, a trade union must be registered with the National Court Register. However, organizational units (such as enterprise-level trade unions), are registered in the regional structures of the NSZZ "Solidarnosc". Once the employer is informed about the establishment of an enterprise trade union, the chairperson of the trade union is granted protection against dismissal. According to section 32 of the Law on Trade Unions, the employer cannot terminate the labour relationship with a trade union leader without the consent of the enterprise trade union committee. According to articles 12, 32 and 35 of the Law on Trade Unions, the employer committing an act of anti-union

discrimination is liable to a fine or imprisonment. The complainant considers that while the above-described legislation is in compliance with international labour standards, in practice, trade union rights continue to be violated and submits its allegations of violations of freedom of association by the management of the two following private enterprises.

UPC Poland Ltd

1102. Mr Marcin Kielbasa, the leader of the NSZZ "Solidarnosc" enterprise-level union, has been employed by UPS Poland Ltd (Warsaw branch) since 1 April 1995. On 1 June 2004, he was promoted to a position of acting Installation and Technical Service Director for a three-month probationary period. After successful completion of this period and positive evaluation he was confirmed in his post.

1103. In July 2004, under the leadership of Mr Kielbasa, the employees of the company decided to establish an enterprise-level trade union of the NSZZ "Solidarnosc". The employer was informed of the above in writing on 15 September 2004. Two weeks after receiving information about the establishment of a trade union, the employer invited the representatives of the NSZZ "Solidarnosc" (Mr Kielbasa and Mr Krzysztof Zgoda, the Director of the Organization Department of the National Commission of the NSZZ "Solidarnosc") for a meeting to be held on 5 October 2004 in order to discuss "further cooperation".

1104. However, on the day of the meeting, Mr Kielbasa was given notice of dismissal on the grounds of structural changes and liquidation of his post. The employer also questioned the legality of the union's establishment. The employer argued that the management had not been properly informed about the establishment of the union, making reference to the need to provide an extract from the registry, information about the number of trade union members and the list of their names.

1105. The NSZZ "Solidarnosc" considers that the Chairperson of the trade union in UPC Poland Ltd was dismissed due to his trade union membership and activities. The complainant argues that the dismissal of Mr Kielbasa was unlawful, as he was dismissed without the consent of the enterprise-level trade union, as provided by the Polish legislation. The complainant further regards the actions of the enterprise management as an expression of a hostile policy towards the trade union and an attempt to eliminate any trade union movement from the enterprise.

1106. As to the argument about the failure to transmit the necessary documents to inform the company management about the union's existence, the complainant considers that all legal requirements imposed by the Law on Trade Unions have been fulfilled. While the Law does not oblige the union to provide any documents, the NSZZ "Solidarnosc" provided the employer with information on the registration of the enterprise trade union in the relevant regional structure of the NSZZ "Solidarnosc" and about the number of its members. From this moment on, the person representing the union is entitled to protection against dismissal.

1107. On 7 October 2004, the NSZZ "Solidarnosc" applied to the National Labour Inspectorate to contest the breach of the labour contract with Mr Kielbasa. In its opinion dated 19 November 2004, the Inspectorate fully supported the argument of the illegal character of the dismissal. According to the Inspectorate, Mr Kielbasa, as trade union representative, was entitled to special protection under the labour law. UPC Poland Ltd was fined for breaching the law. The complainant argues, however, that fines imposed by the Inspectorate are of a very moderate level and therefore only cause a minor inconvenience

to an employer and make it relatively easy for an employer to get rid of a trade union activist.

1108. On 11 October 2004, the NSZZ "Solidarnosc" lodged a complaint with the Regional Public Prosecutor Office accusing the employer of anti-union discrimination. On 6 December 2004, the Regional Public Prosecutor refused to initiate proceedings arguing that given the circumstances, neither section 35 of the Law on Trade Unions (anti-union discrimination) nor article 218 of the Polish Penal Code (infringement of workers' rights) had been violated. On 5 January 2005, Mr Kielbasa appealed this decision, but his appeal was rejected on 15 June 2005.

1109. In November 2004, the Regional Labour Inspector also initiated proceedings against the employer for breach of a labour contract in violation of section 281(3) of the Labour Code.

1110. On 6 October 2004, Mr Kielbasa filed a suit to the District Labour Court in Warsaw with a demand to reinstate him in his post. On 13 October 2005, the District Labour Court decided to transfer the case to the Regional Labour Court in Warsaw. As of the time of the complaint, no date for the hearing of this case had been set. The complainant considers that the hearing will not take place before June 2006.

1111. The complainant considers that the excessive length of proceedings before the Polish courts, especially in cases concerning anti-union dismissals, constitutes in itself a denial of the right to justice and violates the principle of freedom of association. Despite the recent recommendations of the Committee on Freedom of Association in Cases Nos. 2395 and 2291, which also concerned the allegations of lengthy proceedings in courts, the Polish Government and institutions have not addressed this problem.

1112. On 4 November 2004, the NSZZ "Solidarnosc" appealed to the Corporate Communications Director of UPC Holding Services BV in Holland to restore social dialogue in UPC Poland Ltd In its reply, the company stated that the union letter was forwarded to the relevant management of UPC Poland Ltd in Poland and that the latter would communicate with the NSZZ "Solidarnosc". There was no other reaction from the part of UPC despite further appeals of the NSZZ "Solidarnosc".

Frito Lay Poland Ltd

1113. The complainant explains that Frito Lay Poland Ltd (PepsiCo International) employs about 400 workers, 171 of which were members of the enterprise trade union on 30 September 2005. The complainant indicates that the plant has a history of violation of workers' rights. On 18 October 2004, the National Labour Inspectorate found evidence of various violations of workers' rights related to working hours regulation, unpaid overtime and breaches of health and safety measures.

1114. The complainant indicates that from the end of 2004, Mr Slawomir Zagrajek, the leader of the NSZZ "Solidarnosc" at Frito Lay Poland Ltd has been actively involved in a conflict concerning allegations of sexual harassment. At the end of 2004, three women workers, who allegedly had been sexually harassed by one of the enterprise's managers, and five witnesses, were forced to resign under threat of disciplinary dismissal or were dismissed. Mr Zagrajek immediately started procedures aimed at the reinstatement of the dismissed workers and initiated criminal proceedings against the manager concerned. The case gathered a lot of media coverage. In January 2005, the NSZZ "Solidarnosc" organized an international action of solidarity that was joined, among others, by the International Confederation of Free Trade Unions (ICFTU), IUF and the European Federation of Food, Agriculture and Tourism (EFFAT) trade unions.

1115. On 9 December 2005, the Polish tabloid *Super Express* published an article entitled "How to be paid for doing nothing" of a defamatory nature in relation to Mr Zagrajek. The article alleged that the union in Frito Lay Poland Ltd had fewer members than claimed by the Chairperson, who deliberately misled the employer in order to benefit from a full-time salary. On the same day, the management of Frito Lay Poland Ltd requested from each of the members of the NSZZ "Solidarnosc" trade union committee at Frito Lay Poland Ltd to disclose the number of members of the organization.

1116. On 12 December 2005, workers of Frito Lay Poland Ltd were invited to one of the rooms where they were required to fill out a questionnaire concerning their trade union membership in circumstances that allowed easy identification of persons. Before entering the room, each of the workers was asked to present an identification card and to sign the list. Forms with a question "Were you a member of the enterprise-level trade union organization on 30 September 2005?" were filled out in the presence of two persons while no arrangements had been made to ensure the confidentiality and anonymity of the respondents. The fact that these two persons were lawyers hired by the employer created additional pressure and lack of security. The complainant considers that due to the lack of confidentiality, the majority of trade union members gave a negative answer.

1117. Considering that the trade union membership was much lower than claimed by the union, Frito Lay Poland Ltd accused Mr Zagrajek of misleading the employer as to the real number of trade union members and dismissed him. Two weeks after Mr Zagrajek's dismissal, the union membership fell to 60 workers. The complainant alleges that the dismissal of Mr Zagrajek was unlawful as it was done in the absence of consent from the trade union's committee.

1118. On 13 January 2006, a ready-to-fill form letter was distributed among workers. The letter contained the statements "I declare that I do not consider myself a member of the trade union" and "If therefore for any reason the enterprise trade union of the NSZZ "Solidarnosc" still considers me its member, I hereby state that it is my will to resign from my trade union membership as of today". The letter was to be signed and returned to management within five days.

1119. The complainant considers that the acts of the employer to verify trade union membership were clearly aimed at intimidating workers and were contrary to the legislation in force. In this respect, the complainant explains that the Law on Trade Unions provides for a possibility to apply to the court registry to verify the number of trade union members at a particular enterprise in the course of a non-litigious proceeding. As a consequence of the employer's action, the number of trade union members has fallen from about 170 to 60 in the space of two weeks.

1120. Furthermore, the complainant alleges that the management of the enterprise continues to violate freedom of association by persistently refusing to talk with Mr Zagrajek, despite the fact that he continues to chair the enterprise trade union. The employer also makes any contacts with the NSZZ "Solidarnosc" conditional upon the exclusion of Mr Zagrajek's presence.

1121. In conclusion, the complainant alleges that the actions undertaken both by the management of UPC Poland Ltd and Frito Lay Poland Ltd remain unpunished by the Polish Government or any public institution. Extremely slow proceedings make it impossible to enjoy the right to an effective remedy for acts of anti-union discrimination. During the time of proceedings that take on average three years, the dismissed trade unionists do not receive any financial or legal assistance neither from the employer nor from any public institution. The above described cases of anti-union climate in the enterprise, hostile

attitude towards attempts of workers to organize, anti-union discrimination, as well as serious delays in proceedings concerning reinstatement in case of unlawful dismissal and lack of assistance for dismissed trade unionists where such dismissals are used by employers as a tool to eliminate trade unions from the enterprise constitute a serious threat for the rights guaranteed by Convention No. 98. The complainant considers that it is crucial that the Polish Government address the issue of effective protection of freedom of association and implementation of the ILO standards. More specifically, there is an urgent need to address the problem of the employers' widespread lack of respect for regulation concerning special protection of the labour contracts of trade union leaders, as well as of excessively lengthy judicial proceedings concerning labour rights cases. The cases of anti-union discrimination should be subject to profound and detailed debate within the Polish Tripartite Commission. The Government should encourage the employers' organizations to take an explicit position and adopt policies directed at counteracting anti-union discrimination at the company level.

B. The Government's reply

1122. In its communication of 6 October 2006, the Government provides the following details with regard to the protection of trade union leaders afforded by the Polish law. The special protection of the employment relationship of trade union leaders is set out in section 32 of the Law on Trade Unions of 1991. The employer may not unilaterally terminate the employment or change the conditions of employment to the disadvantage of an employee designated as a trade union representative, without the consent of the enterprise trade union committee. This protection comes to effect once the employer is informed of the establishment of a trade union and the designation of its representative. The number of employees covered by the protection depends on the representativeness of the organization concerned. The protection also covers members of the founding committee of a company organization (up to a maximum of three employees) indicated by name in a resolution of the founding committee. In the event that the enterprise trade union has not indicated the protected persons, the protection covers the chairperson of the union or the chairperson of the founding committee.

UPC Poland Ltd

1123. The Government indicates that the case of dismissal of Mr Kielbasa from UPC Poland Ltd was heard by the Presidium of the Tripartite Commission for Social and Economic Affairs on 20 October and 6 November 2004. As a result of the discussions, the President of the Tripartite Commission asked the National Labour Inspectorate to carry out an inspection. According to the findings of the inspection, on 5 October 2004, the employer served Mr Kielbasa with three-months' notice of termination of his employment contract on the basis of section 10(1) of the Act of 13 March 2003 on principles of termination of an employment relationship, due to reasons not attributable to the employee. The reason given for the termination of the contract was restructuring, leading to the liquidation of Mr Kielbasa's position. The dismissal was served by the employer despite the information sent by Mr Krzysztof Zgoda, a member of the Presidium of the NSZZ "Solidarnosc", to the President of UPC Cable Television Ltd informing the company management of the establishment of a union and naming Mr Kielbasa the representative of this union. Despite the fact that the information on the designation of Mr Kielbasa as trade union representative was transmitted to the employer by a member of the Presidium of the National Commission of NSZZ "Solidarnosc" and not by the founding committee of the enterprise trade union, as provided by the legislation in force, the Labour Inspector decided that the information sent to the employer was effective. Considering that the termination of Mr Kielbasa's employment contract was unlawful, the Labour Inspector sent a request in this respect to the employer. At the same time, an application was sent to the court to

provide for a penalty for committing an offence under section 281(3) of the Labour Code (gross violation of the labour legislation). The Labour Inspector also indicated that Mr Kielbasa used his right to lodge an appeal concerning the termination of his employment contract before the Labour Court.

1124. Furthermore, on 18 October 2004, the Warszawa Mokotow District Prosecutor's Office received the information submitted to the Lublin-South District Prosecutor's Office by the Secretary of the East-Central Regional Committee of the NSZZ "Solidarnosc" concerning the allegedly unlawful dismissal of Mr Kielbasa, employed in the position of Installation and Technical Service Manager. According to the complainant, no notice of termination of Mr Kielbasa's labour contract was ever sent to the enterprise trade union committee. His dismissal was therefore in breach of section 35(1), points 1–3, of the Law on Trade Unions.

1125. The Warszawa Mokotow District Prosecutor's Office examined the matter and established the following. In July 2004, the UPC Poland Ltd employees established a trade union organization and on 24 July 2004 it was registered with the East-Central Regional Committee of the NSZZ "Solidarnosc". Mr Kielbasa was elected its Chairperson. On 15 September 2004, the employer was informed of the above by the National Commission of NSZZ "Solidarnosc". The NSZZ "Solidarnosc" enterprise trade union was not obliged to be registered in the National Court Register separately, as, according to the regulations in force and the Charter of the NSZZ "Solidarnosc" the registration with the Regional Committee of the NSZZ "Solidarnosc" suffices. According to the documents submitted by UPC Poland Ltd, structural and organizational changes were planned for 2004 to comply with the decision to provide services related to digital telephony. In this respect, the need to liquidate the positions of regional directors and service and installation managers was considered. On 22 September 2004, UPC Poland Ltd addressed a letter to Mr Kielbasa and Mr Zgoda in which it stated that the union letter of 15 September 2004 sent by fax to the management did not meet formal requirements, therefore, the company was requesting the union to send the documents confirming the establishment of the union at UPC Poland Ltd and indicating the person entitled to represent it. In its letters of 23 and 30 September 2004, the employer once again repeated this request. According to the employer, no such documents were ever provided. At the meeting held on 5 October 2004, the employer was told by Mr Zgoda that the documents the employer was asking for concerned the union's internal affairs. UPC Poland Ltd therefore proceeded to the verification of the registry of trade unions kept by the National Court Register in Warsaw, Lublin and Gdansk. All attested that the enterprise trade union was not registered. The acts of the employer were justified by the fact that in the course of the organizational changes at UPC Poland Ltd, the company Management Board was planning to execute its former decision concerning the termination of the employment contract with Mr Kielbasa, due to the reorganization of UPC operational–technical division. At the same time, that is, from September to October 2004, for the same reason, the employment contracts of 30 UPC employees were terminated and the employment conditions of 280 employees were modified. Based on the above, the Warszawa Mokotow Regional Prosecutor's Office refused to start proceedings against UPC Poland Ltd. The Prosecutor considered that the behaviour of the UPC Management Board bore no features of a prohibited act, as the activities of the members of the Management Board were not characterized by maliciousness or persistent violations of the labour law. It was also stated that there was no evidence that the UPC Management Board discriminated the employee due to his trade union membership or that it hindered trade union activities.

1126. The aggrieved party, Mr Kielbasa, lodged a complaint against the above decision in the statutory period, claiming that the decision contained factual mistakes and that it did not explain all the circumstances significant for the case. The plaintiff claimed in particular

that it was wrongly concluded that after 1 June 2004 he was employed in the position of Service and Installation Manager. Starting from 1 September 2004, he was employed in Warsaw (headquarters) in a position which was only similar by name – Installation and Technical Service Manager – and which was not subject to liquidation, contrary to the posts of service and installation managers. Moreover, according to Mr Kielbasa, the Regional Prosecutor wrongly decided that UPC Poland Ltd did not receive the necessary documents from the trade union, informing about the establishment of a trade union and designating the person covered by the special employment protection. The complainant claimed that the necessary documents were sent and only the list of names of trade union members was not provided. To corroborate this information, the plaintiff enclosed a copy of the fax sent to UPC on 1 October 2004 by the Secretary of the East-Central Region Committee of the NSZZ "Solidarnosc".

1127. The Warsaw Regional Prosecutor did not concur with the complaint and by a letter dated 16 March 2005, sent the complaint to be heard by the Court. In a decision of 17 June 2005, the District Court of Warszawa Mokotow, Third Criminal Department, did not consider Mr Kielbasa's complaint and maintained the decision in force.

1128. The Warsaw Prosecutor of Appeal, using his authority of official supervision, reviewed the files of the Warszawa Mokotow Regional Prosecutor relating to the present case. According to the Warsaw Prosecutor of Appeal, although the decision of the Regional Prosecutor was maintained in force by the Court, its legitimacy raises doubts, in particular due to the fact that the decision was made prematurely, without explaining all the significant circumstances related to the proceedings. On the basis of the analysis of the materials gathered in the course of the control procedures, the Prosecutor of Appeal decided that in that case, preliminary proceedings must be carried out in order to decide whether the termination of the 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. In view of the above, the Prosecutor of Appeal, setting out specific guidelines, had requested the District Prosecutor to immediately begin preliminary proceedings.

1129. On 6 June 2006, at the request of the Warszawa Mokotow District Prosecutor, Warszawa II police headquarters started preliminary proceedings in the case related to offences under section 35(1), point 3, of the Law on Trade Unions (anti-union discrimination) and section 218, point 1, of the Penal Code (malicious breach of employee rights). Currently, the police was gathering additional documents and questioning witnesses.

Frito Lay Poland Ltd

1130. With regard to the case of dismissal of Mr Slawomir Zagrajek, the Chairperson of the trade union at Frito Lay Poland Ltd, the Government indicates the following. On 28 December 2005, the District Prosecutor's Office in Grodzisk Mazowiecki received a communication from the Helsinki Foundation for Human Rights alleging that the management of Frito Lay Poland Ltd hindered the activities of the trade union and violated the provisions of the Act on Protection of Personal Data. Mr Zagrajek also submitted a complaint on the same matters. According to the testimony of Mr Zagrajek, between 9 and 12 December 2005, the managers of Frito Lay Poland Ltd, distributed among the employees a questionnaire on their union membership. The employees completed the questionnaire in the presence of two people, including a notary. Fearing repressive measures, many employees wrote that they were not members of any trade union. With his complaint, Mr Zagrajek enclosed the declarations of the persons who, for fear of repressive measures on behalf of the employer, gave negative answers to the questions. On the basis of the gathered answers, Mr Zagrajek was dismissed for providing false information on the real number of trade union members. Based on the above, the District Prosecutor of

Grodzisk Mazowiecki requested the police headquarters in Grodzisk Mazowiecki to start a relevant investigation.

1131. By virtue of the decision of the District Vice-Prosecutor in Warsaw of 12 January 2006, to avoid the accusation of lack of objectivity by the District Prosecutor in Grodzisk Mazowiecki, the case was transmitted to the Warszawa-Ochota District Prosecutor who was presently carrying out the investigation. In order to verify the number of members of the NSZZ "Solidarnosc" at Frito Lay Poland Ltd, the Prosecutor sent a motion to the regional branch of the NCZZ "Solidarnosc" with a request to provide information on the registration of its enterprise-level trade union. A request was also sent to the Treasurer of the Frito Lay Poland Ltd trade union to provide information related to the number of trade union members on the basis of contributions paid.

1132. On 19 December 2005, Mr Ron Oswald, the General Secretary of the IUF sent a letter to the Polish Prime Minister, describing the situation at Frito Lay Poland Ltd from the point of view of employees and asked the Prime Minister to intervene in order to prevent anti-trade union acts. The Prime Minister transmitted the case to the Minister of Labour and Social Policy. The Minister of Labour analysed the case and requested the National Labour Inspectorate to examine the observance of the labour legislation by Frito Lay Poland Ltd. According to the findings of the National Labour Inspectorate, by a letter dated 9 December 2005, the management of Frito Lay Poland Ltd informed the enterprise trade union of its intention to terminate the employment contract with Mr Zagrajek, the Chairperson of the trade union, and requested the union to approve the dismissal. By a letter dated 11 December 2005, the trade union committee informed the employer of its refusal to approve the dismissal. On 14 December 2005, the employer, despite the lack of trade union approval, served Mr Zagrajek with a letter, informing him of termination of his employment contract without notice under section 52(1) of the Labour Code. The letter mentioned the following reasons for his dismissal: misleading the employer as to the real number of trade union members, abuse of the right to be exempted from duty by not adapting the level of exemption to the number of trade union members and therefore receiving undue salary.

1133. The Government indicates that the legitimacy of termination of the contract of employment may only be decided by the Labour Court. However, the National Labour Inspectorate assured the Minister of Labour that it would continue monitoring the application by Frito Lay Poland Ltd of the labour legislation. In view of the opening by the District Prosecutor in Grodzisk Mazowiecki of relevant judicial proceedings, the Minister of Labour also called upon the Minister of Justice to give it priority.

1134. At the same time, the Minister of Labour applied to the Voivode of Mazowsze, as the President of the Voivodship Social Dialogue Commission, to deal with the matter through the Commission. The Presidium of the Voivodship Social Dialogue Commission discussed the case of Frito Lay Poland Ltd on 2 March, 11 May and 14 July 2006. On 11 May, the Presidium heard the representatives of the management of Frito Lay Poland Ltd and the company trade unions: the NSZZ "Solidarnosc" and the OPZZ Labour Confederacy. The Presidium decided that Mr Jerzy Zielinski, representing the Business Centre Club (employers' union at the Commission), should visit the factory in Grodzisk. The results of the visit were presented during the meeting of the Presidium on 14 July 2006.

1135. In conclusion, the Government states that the Minister of Labour has used all the available legal tools under the national legislation in respect of the allegations of violation of trade union rights at UPC Poland Ltd and Frito Lay Poland Ltd In compliance with the recommendation of the International Labour Office, the Minister of Labour also applied to

the Polish Lewiatan Confederation of Private Employers to comment on the allegations submitted by the NSZZ "Solidarnosc", which were annexed to the Government's reply.

1136. In conclusion, the Government indicates that both cases were now being investigated by the independent courts. At the same time, the Government expressed hope that the situation of the respect of trade union rights in Poland would improve with the approval of a national social agreement, which was being negotiated by the Government and the social partners.

1137. In its reply dated 23 May 2006, the Polish Confederation of Private Employers indicates that it had consulted both UPC Poland Ltd and Frito Lay Poland Ltd. With regard to the first enterprise, a judicial proceeding was still before the Labour Court.

1138. As concerns Frito Lay Poland Ltd, the Confederation considers that the existing legislation fails to provide a direct method of verifying the data supplied by the trade union in connection with the employer's obligations arising from the Trade Unions Act of 1991. This shortcoming can only be rectified by the legislator. In this respect, the Confederation has been considering requesting the competent parliamentary committee to correct the existing law.

1139. As to the particulars of this case, the Confederation indicates that for a number of years, the NSZZ "Solidarnosc" had claimed a membership of over 150. This had put the employer in a position where he was forced to relieve the Chairperson of the trade union committee from his duties while paying him a full remuneration for his work. However, on several occasions, it came to the attention of the management that the number of trade union members was exaggerated and that the union did not represent more than several dozen workers. At that time, the management was unable to assess the credibility of this information and chose not to take any action.

1140. Following the publication, on 9 December 2005, of an article in the *Super Express* daily magazine indicating that Mr Slawomir Zagrajek, the Chairperson of the NSZZ "Solidarnosc" enterprise trade union, had been previously convicted of falsifying documents and dismissed from his two previous places of employment, the employer decided to take action. The editorial office of the *Super Express* informed the company that Mr Zagrajek did not seek a retraction on the article nor did he file a civil lawsuit against the magazine. Once the charges of obtaining remuneration under false pretences and falsifying the number of trade union members became public, the employer requested that the enterprise trade union committee respond and assist it in verifying the actual number of union members. The committee refused stating that it was obliged to keep all personal details of trade union members anonymous.

1141. The employer repeatedly called upon the regional organization of the trade union to help resolve the conflict and kept the NSZZ "Solidarnosc" committee of the Mazowsze region informed of its actions in writing on an ongoing basis. The employer also made multiple telephone calls to representatives of the regional and national organizations of the NSZZ "Solidarnosc" proposing to resolve the problem together. To their regret, the NSZZ "Solidarnosc" representatives consistently declined to cooperate.

1142. On 28 December 2005, Frito Lay Poland Ltd sent an official letter to Mr Ron Oswald, the Secretary-General of the IUF, in which it explained in detail the background of the conflict and the course of events. The employer had never received any reply. According to the Polish Confederation of Employers, Mr Oswald addressed a letter to the President of the Polish Council of Ministers, although neither he nor any other representative of the IUF contacted the employer to ascertain the facts prior to forming his opinion on the subject.

1143. Frito Lay Poland Ltd stressed that the procedure of verification of trade union membership was voluntary and anonymous and was overseen by the local public notary (a person of public trust) and his assistant. The method was designed not to disclose the identities of individual trade union members but rather to determine their total number. Each employee was given a chance to reply to the questionnaire anonymously stating whether or not he or she was a trade union member without revealing his or her identity. The only time the identity of the employees was disclosed was when they collected the questionnaire forms, i.e. immediately before entering the room in which the survey took place. The door check was necessary to keep out non-employees and prevent any single employee from collecting multiple forms. No employer's representatives were present in the room. The layout and the size of the room made it possible to fill out the questionnaire without it being seen. The employees deposited the completed forms in a box. The participation in the verification procedure was voluntary. None of the employees were required to participate and, indeed, a number of employees did not (387 employees out of a total of 418 employed in the company voluntarily took part in the procedure). Only six of them indicated they were trade union members. The outcome left no doubt that the union membership was substantially lower than claimed by Mr Zagrajek. Just three weeks later, the survey outcome was confirmed by another statement of the enterprise trade union committee, which was submitted to the employer on 8 January 2006. According to this statement, as of 31 December 2005, 70 employees were members of the enterprise trade union, and not 171 as previously claimed. In view of the above, the employer disciplinarily discharged the person who continuously violated the law by obtaining remuneration from the employer under false pretences. In addition, on 20 December 2005, the employer reported Mr Zagrajek's violations of section 286(1) of the Criminal Code and section 271(1) of the Code of Criminal Procedure.

1144. The employer stresses that despite repeated efforts, all attempts to discuss the case with the representatives of the NSZZ "Solidarnosc" were turned down. The employer had also invited the representatives of the NSZZ "Solidarnosc" to visit the company at the time of the described procedure of verification so as to allow them to assess whether the procedure was fully voluntary, anonymous and lawful. Regrettably, the union declined the invitation.

1145. The employer further indicates that Mr Zagrajek was not re-elected in his post during the elections held in March 2006. Current relations between the enterprise committee of the NSZZ "Solidarnosc" and the management of Frito Lay Poland Ltd are positive. The new trade union committee regularly meets with the company management. The most recent meetings were held on 14 and 31 March 2006. In their course, the parties decided on the rules for cooperation between trade unions and the company management. The parties also agreed on the appropriation of the Social Fund and discussed the method of collecting trade union dues.

1146. In March 2006, another trade union was established at the enterprise. Both trade unions were treated equally and participated on an equitable basis in resolving issues concerning enterprise employees. The enterprise NSZZ "Solidarnosc" trade union has currently 42 members. Their identities have not been revealed to the employer. The other union has 38 members and their trade union dues are transferred to the union account by the employer.

C. The Committee's conclusions

1147. *The Committee notes that this case concerns alleged violations of freedom of association by the management of two private companies (UPC Poland Ltd and Frito Lay Poland Ltd), namely: acts of interference in trade union affairs and anti-union dismissals. The*

complainant also alleges the excessive length of proceedings examining complaints alleging violations of trade union rights.

1148. *As regards the situation at UPC Poland Ltd, the Committee notes that the Government does not refute the substance of the allegations as presented by the complainant and which can be summarized as follows. Mr Marcin Kielbasa, the leader of the enterprise trade union was dismissed in October 2004. While the complainant maintains that his dismissal was motivated by his trade union activities, the employer claimed that the reason for his dismissal was related to the structural and organizational changes within the enterprise. The Committee also notes that while the National Labour Inspectorate concluded that the dismissal was illegal, due to the fact that there was no prior approval from the enterprise trade union committee, as provided for by the legislation, the Office of the Regional Public Prosecutor refused to give effect to the union complaint and to initiate relevant proceedings. In the Prosecutor's view, the dismissal was the result of the restructuring of the enterprise. When the union contested the Regional Prosecutor's decision, the complaint was referred to the District Court, which maintained the decision of the Regional Prosecutor. Mr Kielbasa filed a suit to the Labour Court in October 2004. However, as of the time of the complaint no hearing date was scheduled. The Committee notes the complainant's allegation that, while a fine for violation of labour legislation was imposed on the employer, following an inspection carried out by the Inspectorate, in general, such fines were relatively moderate and made it easy for an employer to dismiss a trade union leader. The Committee notes the Government's indication that the Warsaw Prosecutor of Appeal reviewed the files of the Regional Public Prosecutor relating to the present case and considered that, although the decision of the Regional Public Prosecutor was maintained by the Court, its legitimacy raises doubts. The Prosecutor of Appeal had therefore requested the relevant District Prosecutor to further investigate this case. On 6 June 2006, the preliminary proceeding began.*

1149. *As regards the situation at Frito Lay Poland Ltd, the Committee notes that the complainant alleges that Mr Slawomir Zagrajek, the leader of the enterprise trade union was accused by the employer of intentionally misinforming the company's management as regards the number of trade union members and was dismissed without the approval of the union committee. The complainant further alleges that the gathering of individual data on trade union membership, on the results of which the employer had later based the decision to dismiss Mr Zagrajek, was conducted in a manner violating confidentiality (on 12 December 2005, workers were requested to fill out a questionnaire concerning their trade union membership in the presence of two persons representing the employer) and had a deterring effect on trade union members. Furthermore, on 13 January 2006, a ready-to-fill form letter was distributed among the employees of the enterprise attesting to their non-membership in the union, to be signed and returned to the enterprise management. According to the complainant, such intimidating acts lead to the dropping of trade union membership from 170 to 60 members in the space of two weeks.*

1150. *The Committee notes that here too, the Government does not challenge the substance of the allegations but indicates that only the Labour Court can make appropriate decisions with regard to the legality of the termination of the employment contract of Mr Zagrajek. The Committee also notes the comments of the Lewiatan Polish Confederation of Private Employers, which include the position of the management of Frito Lay Poland Ltd that they did not violate national legislation, that the procedure of verification of trade union membership was voluntary and anonymous and was a result of reasonable doubts over Mr Zagrajek's claims with regard to the number of trade union members. It further notes the concerns of the Polish Confederation of Private Employers that the current legislation provides no means for verifying trade union membership.*

1151. *The Committee notes the Government's further indication that the National Labour Inspectorate assured the Minister of Labour that it would continue monitoring the application by Frito Lay Poland Ltd of the relevant labour regulations. In view of the opening by the District Prosecutor in Grodzisk Mazowiecki of judicial proceedings in the case of the respect of trade union rights at Frito Lay Poland Ltd, the Minister of Labour also called upon the Minister of Justice to give it priority. The Committee further notes the Government's indication that the Minister of Labour applied to the Voivode of Mazowsze, in his capacity as President of the Voivodship Social Dialogue Commission, to deal with the matter through the Commission. The Presidium of the Voivodship Social Dialogue Commission discussed the case of Frito Lay Poland Ltd on 2 March, 11 May and 14 July 2006 during which the representatives of the management of Frito Lay Poland Ltd and the company trade unions, as well as Mr Jerzy Zielinski, representing the Business Centre Club (employers' union at the Commission) previously mandated to visit the enterprise and provide his impressions, were heard.*

1152. *In conclusion, the Government states that both these cases are now being investigated by independent courts. At the same time, the Committee notes that the Government expresses the hope that the situation of the respect of trade union rights in Poland will improve with the approval of a national social agreement, which was being negotiated by the Government and the social partners.*

1153. *The complainant organization alleges in both cases anti-union dismissals and unjustified delays in the court proceedings for alleged violations of workers' rights. Given the nature of this case, the Committee must emphasize that no person should be prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, para. 771]. One of the fundamental principles of freedom of association is that workers should enjoy adequate protection against 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 guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see **Digest**, op. cit., para. 799].*

1154. *As regards the penalty for anti-union dismissals, which, according to the complainant are insufficient to act as a deterrent, the Committee considers that it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities [see **Digest**, op. cit., para. 791].*

1155. *While taking due note of the Government's statement that Mr Kielbasa's case was currently under review and that the case of Mr Zagrajek and the alleged violations of trade union rights at Frito Lay Poland Ltd are also under investigation, the Committee must also observe that these cases have been pending since October 2004 and December 2005 respectively. The Committee recalls that cases concerning anti-union discrimination contrary to Convention No. 98 should be examined rapidly, so that the necessary remedies can be really effective. An excessive delay in processing cases of anti-union discrimination, and in particular a lengthy delay in concluding the proceedings*

*concerning the reinstatement of the trade union leaders dismissed by the enterprise, constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned. Justice delayed is justice denied [see **Digest**, op. cit., paras 105 and 826]. The Committee expects that the measures now being taken by the Government will effectively speed up the judicial proceedings concerning the dismissal of the two trade union leaders and requests the Government to keep it informed of the progress of the proceedings as well as their final outcome.*

1156. *The Committee observes that the Government has reacted to the concerns raised in respect of the enterprises UPC Poland Ltd and Frito Lay Poland Ltd by referring the issue to the Tripartite Commission for Social and Economic Affairs, as regards the first enterprise and to the Voivodship Social Dialogue Commission, as regards the latter. Expressing its deep concern about the labour relations situation in the companies in question, and taking into account the fact that the Committee had in the past examined two cases concerning Poland involving similar issues (see Cases Nos. 2291 and 2395, 333rd and 337th Reports respectively), 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 would 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.*

1157. *Finally, the Committee observes the concerns raised by the Confederation of Private Employers in respect of the lack of legal provisions for verifying trade union representativeness and requests the Government, in consultation with the social partners, to provide for an impartial and independent method for verifying trade union representativeness in order to avoid the problems that occurred in the case of Frito Lay Poland Ltd.*

The Committee's recommendations

1158. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve 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.

CASE NO. 2486

INTERIM REPORT

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

1159. The complaint is contained in a communication of the National Trade Union Confederation MERIDIAN, dated 22 May 2006. Additional information was submitted by the complainant in a communication dated 1 February 2007.

1160. The Government sent its observations in a communication dated 16 October 2006.

1161. 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. The complainant organization's allegations

1162. In its communication of 22 May 2006, the complainant organization alleges that six miners (Miron Cozma, Constantin Cretan, Romeo Beja, Dorin Lois, Vasile Lupu and Ionel Ciontu), including five trade union representatives, were sentenced to long terms of imprisonment, despite appeals to the Supreme Court. At the time of the complaint, 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.

1163. The complainant organization alleges that, as of 1990, faced with plans to restructure the mining industry, the miners submitted their demands to their trade union organizations, the main one being the adoption of a collective agreement, the defence of jobs and the provision of new jobs in the case of redundancy. One year later, in 1991, the miners' trade

unions were forced to call for a strike in protest against the non-payment of wages. The trade unions obtained an agreement guaranteeing the payment of and increase in wages and the conclusion of the first collective agreement between the trade unions and the employers. However, the commitments made regarding the payment of wages were not honoured.

1164. According to the complainant organization, in September 1991, Miron Cozma, a member of the executive committee of the Jiu Valley miners' trade union, was asked by the union's members to open negotiations with the Prime Minister. When all efforts to open meaningful negotiations failed, the members of the Jiu Valley trade union decided to hold a demonstration in Bucharest, in front of the seat of government. All the statements made by the trade union at the time show that the sole aim of this trade union action was to initiate negotiations with the Government. Once their demands had been met through a protocol signed with the Government, the miners left Bucharest and returned to their homes.

1165. Miron Cozma represented Romania as a member of the Workers' group at the 1994 and 1995 sessions of the International Labour Conference.

1166. The complainant organization alleges that Miron Cozma was arrested in February 1997 on charges of "incitement to undermine the authority of the State", charges that were subsequently altered to "disturbance of public order", for having been the main trade union leader in charge of organizing the march in Bucharest carried out by the miners in September 1991.

1167. In 1998, Miron Cozma was sentenced by the Bucharest Appeal Court to three years in prison (of which a year and a half was suspended), before being released.

1168. On 12 December 1998, following his release, Miron Cozma was re-elected President of the Jiu Valley miners' trade union. Shortly afterwards, the Minister for Industry announced that two mines were to be closed in the Jiu Valley. In his role as trade union leader, Miron Cozma was asked to enter into negotiations with the Ministry.

1169. According to the complainant organization, on 4 January 1999, having failed to obtain any guarantees, the Jiu Vally miners' trade unions voted in favour of strike action, their main demand being an increase in the budget for the mines. On 5 January 1999, the Government announced that, "faced with the ultimatum issued by the Jiu Valley miners' trade unions, the Government of Romania declares that there will be no dialogue under conditions of coercion imposed by the protestors". The strike lasted for 14 days. Throughout that period, the trade union tried to find a solution to the conflict. Having failed to obtain any satisfaction regarding their demands, the miners gathered in front of the mining company headquarters and decided to call on their trade unions to demonstrate in Bucharest, in front of the seat of government. Discussions continued until 18 January but proved to be fruitless. The miners began their march, asking their trade union representatives to lead them to Bucharest. Upon arrival in Tirgu Jiu (the main town in the mining region of the Jiu Valley), the miners and their trade union leaders once again proposed opening negotiations with the Government, in vain. At this time, Miron Cozma, Constantin Cretan, Romeo Beja, Dorin Lois and Ionel Ciontu were leading members of the miners' trade union movement of the Jiu Valley and the Oltenia region. After the march went ahead, negotiations were opened at Cozia.

1170. On 22 January 1999, an agreement known as the "Cozia Agreement" was concluded between the trade union representatives and the Government, with the signature of a three-part protocol. The agreement (one of the signatories to which on the trade union side was Miron Cozma) guaranteed that no sanctions would be imposed on the miners or trade

union leaders; that the two mines in the Jiu Valley would not be closed; and that the necessary subsidies and investment would be provided to maintain sustainable mining activity in the region.

1171. However, the complainant organization alleges that, in early February 1999, noting that these guarantees had not been implemented, the miners and their trade union organization decided, on 9 February, to hold another march on Bucharest. Six days later, on 15 February 1999, the Supreme Court handed down a ruling concerning the charges against Miron Cozma in connection with the events of 1991. He was sentenced to 18 years in prison. This sentence followed an appeal by the prosecutor to the Supreme Court against the three-year sentence handed down in 1997 (18 months of which was suspended).

1172. At the end of February 1999, Miron Cozma, arrested during the trade union demonstrations, was sent back to prison. New proceedings were initiated shortly afterwards, this time in connection with the trade union demonstrations of January 1999.

1173. On 12 December 2003, the Appeal Court heard a new case concerning the trade union demonstrations of January 1999. Miron Cozma was sentenced to ten years in prison, and Constantin Cretan, Romeo Beja, Dorin Lois, Vasile Lupu and Ionel Ciontu to five years in prison. The complainant organization emphasizes that the sections on which the sentences were based were introduced into the Penal Code during the time of the dictator Ceausescu and remained in force after 1989. They include sections dealing with "incitement to undermine the authority of the State" (section 69/162), and "non-respect of an employment contract" (a section which prohibited, de facto, the right to strike under the Ceausescu regime).

1174. An appeal was lodged with the Supreme Court, which later became the High Court of Appeal and Justice, which, after several deferments (see below), handed down a final ruling on 28 September 2005, upholding the prison sentences.

1175. The first hearing of the case before the High Court regarding the events of January 1999 took place on 5 July 2004. On 15 October 2004, a new hearing was held before the same High Court, during which the appeal against the sentences for "undermining the authority of the State" was examined. According to the complainant organization, after a few minutes' deliberation, the panel of three judges decided to defer handing down a ruling until 10 December, on the grounds of an error in procedure in relation to the civil action.

1176. On 15 December 2004, following the presidential election, President Illiescu used his presidential pardon to free around 50 prisoners, including Miron Cozma. On 16 December 2004, Miron Cozma was released from prison by presidential decree.

1177. He was re-arrested on 17 December in the presence of his son by the Timisoara police on the grounds that he was not carrying any identity papers. On the same evening, he was put on a plane and flown to Bucharest to answer questions from the Public Prosecutor's Office regarding organized crime with which his name had been linked. By the time the presidential pardon issued by former President Illiescu had been officially revoked, Miron Cozma was once again in prison.

1178. On 14 June 2005, the Craiova Court decided to annul the revocation of the presidential pardon of December 2004 and ruled that Miron Cozma, who had spent six more months in prison, should be released.

1179. According to the complainant organization, following his release, which was announced on 14 June 2005, Miron Cozma was forbidden from staying in or passing through Bucharest

and Petrosani, a large mining town, for a period of 17 years. He was strictly forbidden to stand for election to any trade union office (with special reference to his own trade union organization), as well as any political or public office. His parental rights were revoked in the light of the charges against him concerning a "crime against the State".

1180. On 12 September 2005, a new case, involving the six trade unionist miners (Miron Cozma, Constantin Cretan, Romeo Beja, Dorin Lois, Vasile Lupu and Ionel Ciontu), began before the High Court in Bucharest. The verdict was handed down on 28 September 2005: the High Court turned down Miron Cozma's appeal and upheld the ten-year sentence handed down in 2003 for "undermining the authority of the State"; Constantin Cretan, Romeo Beja, Dorin Lois, Vasile Lupu and Ionel Ciontu were each sentenced to five years in prison. All the accused, with the exception of Romeo Beja (who had sought refuge abroad), were arrested and imprisoned in the hours that followed.

1181. Miron Cozma, Constantin Cretan, Dorin Lois, Vasile Lupu and Ionel Ciontu have since been imprisoned in Romania, for many years still, in conditions in which their health and safety cannot be guaranteed.

1182. The complainant organization adds that, between 1997 and 1998 and again between 1999 and 2005, Miron Cozma served part of an 18 year sentence. According to the laws in force in Romania, Cozma must serve another two years in prison. The other imprisoned miners (Constantin Cretan, Ionel Ciontu, Dorin Lois and Vasile Lupu) must serve five years in prison. According to the Romanian press, Romeo Beja, who was sentenced in absentia, is currently living abroad.

1183. Miron Cozma is being held in a prison in Timisoara (western Romania). At the beginning of 2006, his request for parole (approved by all the courts) was turned down by an appeal court in a ruling considered by certain eminent legal experts to be illegal. Cozma can lodge a further application for parole in June 2006.

1184. Ionel Ciontu, Dorin Lois and Vasile Lupu are being held in a high-security prison not far from Petrosani, in the Jiu Valley. Ciontu and Lois were, however, held for a long time in Bucharest, with a view to them testifying at an interminable inquiry into the events of 1990, in connection with which none of the trade union leaders have been charged. This prevented their families, whose financial situation was very difficult, from visiting them.

1185. Constantin Cretan, a trade union leader from the mining basin of Oltania, is being held at a prison in Tirgu Jiu. He requested that his imprisonment be suspended for medical reasons (doctors have noted that he suffers from various cardiovascular conditions, as well as from injuries which occurred during an accident in prison when one of his Achilles tendons snapped, and serious glaucoma in one eye). Although the Tirgu Jiu Court first ruled that he could be released temporarily, it then declared itself to "have no competence to rule on such a case". A further session of the Craiova Appeal Court will be held to decide his fate on 22 May 2006.

1186. Finally, the complainant alleges that, on 24 March 2005, when Miron Cozma was still imprisoned in Bucharest, a former fellow inmate stated, on a programme shown on the OTV television channel, that an officer of the Independent Protection and Anti-corruption Service (SIPA) of the Ministry of Justice had asked him to "liquidate" Miron Cozma in exchange for certain personal benefits. This information was taken up by certain elements of the Romanian media, such as the *Gazeta Valea Jiului* (the Jiu Valley Gazette, 25 March 2005).

1187. According to the complainant organization, the trade union leaders Miron Cozma, Constantin Cretan, Romeo Beja, Dorin Lois, Vasile Lupu and Ionel Ciontu were all

arrested, sentenced and imprisoned because they were carrying out their mandates and their trade union activities, as had been decided by a collective vote of the Coordinating Council of the League of Miners' Unions of Jiu Valley (LSMVJ) and the trade union organization of the Oltania basin miners. This constitutes a restriction of the free exercise of the right to organize, as guaranteed by Article 3 of Convention No. 87. In the same way, the withdrawal of civic and parental rights and the ban on holding trade union office in the case of Miron Cozma constitute a restriction of the rights guaranteed by Article 3.

1188. The complainant organization emphasizes that, for almost ten years, the cases brought against the trade union leaders for having carried out the duties conferred upon them by their trade union members, as well as the deferments of legal procedures (deferments which amount to a form of intimidation) have had a negative effect on trade union activity, in particular in the mining industry, an economic sector which is essential to the Romanian economy.

1189. In light of the above, the National Trade Union Confederation MERIDIAN requests the Romanian Government to take immediate steps to release these trade unionists and restore their rights in full.

1190. In a communication dated 1 February 2007, the complainant alleges that on 11 January 2007 the family and colleagues of Ionel Ciontu, who had been in prison for the last 16 months, learned through the press of his death, following serious health problems, in the Jilava (Bucharest) prison hospital. The head of the Barcea Mare prison (in the Hunedoara region, 400 kilometres northwest of Bucharest) informed the Mediafax agency that Ciontu was transferred to the Jilava prison hospital by ambulance on 10 January 2007. Furthermore, Ciontu's widow had indicated that the prison authorities would not disclose the results of the autopsy until 45 days elapsed.

1191. One year ago, in the 19–25 January edition of the weekly publication *Replica*, Ionel Ciontu had maintained innocence and was quoted as saying: "I am a political prisoner. During the legal proceedings), the prosecutor Sasarman offered me four choices: 'stab' Cozma, quit the union, retire, or join the Democrat Party (Editor's Note – the party of President Basescu). There was not a single statement against me in my file; even so, I was convicted."

B. The Government's reply

1192. In a communication dated 16 October 2006, the Government recalls that the Romanian Constitution states that "the law establishes the conditions and limits of the exercise of this right, as well as the guarantees necessary with a view to maintaining services that are essential to society". The exercise of the other rights and freedoms, including freedom of assembly, is still subject to the conditions set out by the Constitution and the law. Convention No. 87 states that "In exercising the rights provided for in this Convention workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land." In a democratic society, it is the authorities that ensure that the law is respected.

1193. The Government recalls that Act No. 168/1999, concerning the settlement of labour disputes, regulates in detail the procedure and conditions under which a strike may be called. If those conditions are not met, the authorities can declare a strike illegal or suspend it. The Act also established that a declaration of strike action by the organizers which violates the conditions provided for by the Act constitutes a violation which may be sanctioned by between three and six months in prison or by a fine (unless it has the characteristics of an offence for which more severe penalties are applicable).

1194. In accordance with the provisions of section 223 of Act No. 53/2003 (promulgating the new Labour Code) with subsequent amendments and additions: (1) elected trade union officers are protected by law against any form of condition, constraint or restriction regarding the exercise of their union mandate; (2) throughout the period of their mandate, as well as for two years after that mandate has come to an end, elected trade union officers cannot be dismissed for motives beyond their control, except in cases where the worker's qualifications do not match the job description or for reasons connected with the fulfilment of the mandate conferred upon them by the employees of the enterprise; (3) other measures protecting trade union leaders are provided for under special laws and under the relevant employment contracts.

1195. Section 10(2) of the Trade Unions Act (No. 54/2003) also prohibits the amendment or cancellation by employers of individual employment contracts of elected trade union officers and rank and file members for reasons connected with trade union activity.

1196. The trade union leaders referred to by the complainant organization were found guilty by the High Court of the offence provided for under section 162 of the Penal Code: "Undermining the authority of the State". The Government recalls that the body in question is the only one competent to establish the circumstances under which the alleged facts were committed and to carry out the necessary inquiries to elucidate the truth.

1197. The Public Ministry (the Public Prosecutor's Office attached to the High Court of Appeal and Justice), which has competence in this matter, provided the Government with the following information: on 26 March 1997, through Instruction No. 57/P/Sp/1992 of the Public Prosecutor's Office attached to the High Court of Appeal and Justice (the Penal and Criminal Prosecution Section), the accused, Miron Cozma, was brought to trial having been placed under preventive arrest for having committed offences under the following provisions of the Penal Code: sections 162 (undermining the authority of the State), 274, 275, 276 (violations of railway safety), 31 (inappropriate participation), and 279 (non-respect of regulations governing arms and munitions).

1198. The document listing the charges refers to the fact that, from 24 to 28 September 1991, Miron Cozma was involved in fomenting acts of violence carried out by several groups of miners against Parliament, the Government and the Presidency. These acts had the potential to weaken the authority of the State. The miners forced railway employees to neglect their duties and to leave their places of work, actions which disrupted railway transport and led to the destruction of a number of safety installations. Moreover, in connection with these circumstances, Miron Cozma was found to be illegally in possession of a pistol and ammunition.

1199. Under file No. 69/P/1999 of the Public Prosecutor's Office attached to the High Court of Appeal and Justice (the Penal and Criminal Prosecution Section), the accused, Miron Cozma, was brought to trial for having committed offences under the following provisions of the Penal Code: sections 25, 271 (incitement to defy legal rulings), 321 (offences against public decency, breach of the peace and disturbance of public order) and 323 (conspiracy to commit offences). The accused Lois Dorin Mihai, Beja Romeo and Casapu Sterian were also brought to trial under the same instruction (in the case of Ionel Ciontu and Vasile Lupu et al. a decision was taken not to press criminal charges).

1200. According to the Government, the accused were found guilty of having represented a group set up with the aim of committing offences, and Miron Cozma incited the miners and the trade union leaders of the LSMVJ to oppose, by violent means and threats, the execution of Ruling No. 486/1999 of the Supreme Court of Justice sentencing Mr Cozma to 18 months in prison for actions and demonstrations which seriously disturbed public order and caused a breach of the peace.

1201. The two instructions were subjected to judicial review, and were upheld through the final decision of the Appeal Court.

1202. During the 2004–06 period, the Public Prosecutor's Office attached to the High Court of Appeal and Justice (the Penal and Criminal Prosecution Section) issued only one press communiqué, dated 17 December 2004 (following the release of Miron Cozma), concerning his supervision in prison.

C. The Committee's conclusions

1203. *The Committee acknowledges that the events referred to in this case took place against a turbulent background.*

1204. *The Committee notes that the complaint alleges that several trade union leaders were arrested on more than one occasion on charges of incitement to undermine the authority of the State and disturb public order, whereas they were in fact carrying out legitimate trade union activities linked to the defence of the workers and strikes within the context of mine closures. The trade union leaders in question were sentenced in September 2005, one to ten years in prison, the other five to five years in prison each.*

1205. *The Committee takes note of the detailed complaint submitted by the National Trade Union Confederation MERIDIAN, which raises several questions concerning: (1) the obligation to negotiate in good faith and to meet existing undertakings; (2) the exercise of the right to strike; (3) the imprisonment of trade union leaders following judicial decisions; (4) the legal procedure followed; and (5) the failure to respect certain individual freedoms. The Committee notes the seriousness of the allegations made by the complainant organization and the latter's allegation that the trade union leaders Miron Cozma, Constantin Cretan, Dorin Lois, Vasile Lupu and Ionel Ciontu are still in prison.*

1206. *The Committee also takes note of the Government's observations concerning the relevant legislative provisions, and notes that new laws and provisions have been adopted since the events of 1991 and 1999. The Government also describes the legal proceedings against the trade unionists referred to in the complaint. It lists the contents of the document produced in 1997 setting out charges in connection with the strike of 1991 (violation of several sections of the Penal Code; acts of violence by miners against Parliament with the potential to weaken the authority of the State, the Government and the Presidency; attempts to force railway employees to neglect their duties and to leave their places of work, actions which disrupted railway transport and led to the destruction of a number of safety installations; illegal possession of a pistol and ammunition on the part of Miron Cozma). The second document setting out charges against Cozma and others including Dorin Mihai Lois, Romeo Beja, Ionel Ciontu and Vasile Lupu, following the strike in 1999, referred to several violations of the Penal Code (incitement to defy judicial decisions, offences against public decency, breaches of the peace and disturbances of public order, conspiracy to commit offences).*

1207. *The Committee considers that, where persons have been sentenced on grounds that have no relation to trade union rights, the matter falls outside its competence. It has, however, emphasized that the question whether a matter relates to criminal law or to the exercise of trade union rights should not be determined unilaterally by the government concerned. This is a question to be determined by the Committee after examining all the available information and, in particular, the text of the judgement. Moreover, the Committee has emphasized that when it requests a government to furnish judgements in judicial proceedings, such a request does not reflect in any way on the integrity or independence of the judiciary. The very essence of judicial procedure is that its results are known, and*

*confidence in its impartiality rests on their being known [see **Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 114 and 113].*

1208. *The Committee notes that, according to the allegations of the complainant organization, the various charges in this case are linked to the trade union activities of Miron Cozma, Constantin Cretan, Romeo Beja, Dorin Lois, Vasile Lupu and Ionel Ciontu, and to the strikes which took place in 1991 and 1999. These charges and the periods of imprisonment which followed were, in part, brought about because the trade unionists had exercised their right to strike. The Committee recalls, firstly, the fundamental importance it attaches to the right of workers to strike. According to the Committee, the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests [see **Digest**, op. cit., para. 531]. Moreover, the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in a peaceful strike; such measures entail serious risks of abuse and are a grave threat to freedom of association [see **Digest**, op. cit., para. 671]. The Committee considers that the demands giving rise to the strikes in question (the strike of 1991 was linked to the non-payment of wages and that of 1999 to the closure of two factories) represent legitimate interests which a trade union organization should be free to defend. However, in order to be legal, a strike must be peaceful, and the Committee notes that the Government refers to the possession of weapons on the part of Miron Cozma and to the violent nature of the demonstrations. Although the Committee believes that allegations of criminal conduct should not be used to harass trade unionists by reason of their union membership or activities [see **Digest**, op. cit., para. 41], the Committee recalls that the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike [see **Digest**, op. cit., para. 667].*

1209. *The Committee is concerned at the fact that the Government has not provided any further explanation with regard to the events described in the complaint, limiting itself to quoting from the document listing charges relating to violations of the Penal Code which led to the current imprisonment of the trade union leaders referred to in the complaint. Moreover, the Committee notes the differences between the versions of events submitted by the complainant organization and the Government. The complainant organization insists that the arrest in February 1999 came in the wake of trade union demonstrations, while the Government states that the arrest was the result of offences committed in protest against the sentencing of Cozma to 18 years in prison. Furthermore, according to the complainant organization, the provisions on which the imprisonment of the trade union leaders was based were introduced into the Penal Code during the rule of the dictator Ceausescu and were kept in force after 1989 (a section on "incitement to undermine the authority of the State", and a section on "non-respect of an employment contract", prohibiting, de facto, the right to strike under the Ceausescu regime). Whatever the case may be, the Committee considers that, even if the arrests came in the wake of a demonstration against the 18 year sentence handed down in the case of Miron Cozma for his trade union activities, in particular, the miners' march on Bucharest in 1991, such actions should be held to be legal unless they turn violent. While noting that the Government refers to offences against public decency, breaches of the peace and disturbances of public order, and conspiracy to commit offences, the Committee is particularly concerned by the severity of the ten- and five-year prison sentences.*

1210. *Under these circumstances, the Committee considers that further information is required in order for it to understand the exact nature of the acts for which the trade unionists were imprisoned. The Committee requests the Government to provide further information concerning the charges relating to the events of 1991, 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, as well as any rulings concerning parole applications.

1211. *Furthermore, the Committee is concerned at the repeated arrests of Miron Cozma (in 1997, 1999, 2004 and 2005), as well as the arrests of the other trade union leaders, and, with regard to the strike of 1991, the belated initiation (six years later) of a case concerning an event which took place at a particularly troubled time in the country's history. The Committee is also concerned at the fact that, having benefited from an amnesty covering the events of 1991, Miron Cozma was arrested immediately after his release, when his pardon was revoked, a decision that was later rejected by a court. Moreover, the Committee is concerned at the withdrawal of a certain number of his fundamental rights. The loss of fundamental rights, namely, the right to stay in or pass through Bucharest and Petrosani, the main mining town, for a period of 17 years, and the ban on standing for election to any trade union office (with special reference to his own trade union organization) and any political or public office, could be justified only with reference to criminal charges unconnected with trade union activities, and are serious enough to impugn the personal integrity of the individual concerned. The Committee recalls that it should be the policy of every government to ensure observance of human rights and especially of the right of all detained or accused persons to receive a fair trial at the earliest possible moment [**Digest**, op. cit., para. 100]. In addition, the Committee is particularly concerned by the complainant's allegations concerning the four choices offered to Ionel Ciontu by the prosecutor Sasarman: to "stab" Cozma, quit the union, retire, or join the Democrat Party (the party of the President). The Committee requests the Government to initiate an investigation into the veracity of this allegation and to keep it informed in this regard. The Committee also requests the Government to open an independent inquiry in order to determine whether correct procedure has indeed been complied with regarding all the accused, and to review the prohibitions imposed upon Miron Cozma. If it is found that their 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.*

1212. *Furthermore, the Committee notes that, according to the complainant organization's allegations, efforts have been made on more than one occasion to resolve the labour disputes in the mining sector and to open a dialogue with the Government. These efforts have either failed, or the Government has not fully respected the agreements concluded. The Committee recalls that both employers and trade unions should negotiate in good faith and make every effort to come to an agreement, and that satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence [**Digest**, op. cit., para. 936]. Moreover, noting that agreements have apparently not always been respected, the Committee emphasizes the importance of the principle that agreements should be binding on the parties [see **Digest**, op. cit., para. 939]. The Committee requests the Government to ensure that these principles are respected in future.*

1213. *The Committee notes that, according to the allegations, there was a plot to murder Miron Cozma, and recalls the general principle that the rights of employers' and workers' 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 [**Digest**, op. cit., para. 44]. The Committee requests the Government to open an inquiry into the veracity of this allegation and to keep it informed of the outcome.*

1214. *Finally, as concerns the death of Ionel Ciontu in the Jilava prison hospital, in Bucharest, the Committee notes that the results of his autopsy have yet to be disclosed and requests the Government to communicate the said results as soon as possible.*

The Committee's recommendations

1215. ***In the light of its foregoing interim conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(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 the Jilava prison hospital, in Bucharest, the Committee requests the Government to communicate the results of his autopsy as soon as possible.

CASE NO. 2509

DEFINITIVE REPORT

Complaint against the Government of Romania presented by — the International Transport Workers' Federation (ITF) and — the Free Trade Union of Metro and Aviation Workers (USLM)

Allegations: The complainant organizations allege infringement of the right to strike

1216. The complaint is contained in a communication dated 30 July 2006 from the International Transport Workers' Federation (ITF) and the Free Trade Union of Metro and Aviation Workers (USLM).

1217. The Government forwarded its observations in a communication dated 3 November 2006.

1218. 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. The complainants' allegations

1219. In their communication dated 30 July 2006, the ITF and its affiliate, the USLM, representing 5,200 metro workers, allege that while the right to strike is recognized in Romania, unreasonable restrictions are placed on this right. In the event of a strike, employees in the transport sector must provide a minimum service of one-third of the normal activity. Strikes may be held only if all means of conciliation have failed. The employer must be given 48 hours' warning. Strikes can only be held to defend the economic interests of the workers and must not be used for political reasons. Strikes are illegal if a collective agreement is in existence, even if the dispute concerns an emerging problem not covered by the existing agreement and the employer refuses to negotiate the new issue with the union. If the strike is declared illegal, the trade union leader can be fired, even if the strike is ended immediately after being declared illegal. The complainants also state that the Committee of Experts on the Application of Conventions and Recommendations had been requesting the Government to amend the provisions of Law No. 168/1999 on Settlement of Labour Disputes restricting the right to strike.

1220. To illustrate their point, the complainants refer to the industrial dispute with SC METROREX SA, which took place at the end of 2005. According to the complainants, in 2005, before the expiration of the existing collective agreement, the USLM approached the management of SC METROREX SA with a request to proceed to negotiation of a new collective agreement for 2005–06. On 3 October 2005, the negotiation began. The union's claims concerned several points, including a 23 per cent wage increase from 1 November 2005; improvement of working conditions; provision of the necessary equipment to ensure public safety; recruitment of additional personnel; and participation of the union in the reorganization of SC METROREX SA, in accordance with the provisions of the collective agreement and the Labour Code.

1221. SC METROREX SA answered that due to lack of funds, it was not in a position to offer any wage increase. As for the other demands, they were conditional to legislation in force and future budgetary constraints. The management proposed to extend the collective agreement in force for 2004–05, to the following year, with negotiations to be held in January 2006, without assuring that wages would be increased.

1222. The USLM leaders declared that they remained open to consider other options in order to resolve the deadlock situation. The union was prepared to give up the 13th month's salary and other bonuses, and proposed that the savings thus created be transposed into a wage increase. However, several rounds of negotiation were fruitless.

1223. On 1 November 2005, both parties gave notice of expiry of the collective agreement. On 2 November, Case No. 6729/02.11.2005 was registered with the Directorate of Labour, Social Solidarity and Family in Bucharest. The conciliation procedure began, in accordance with the provisions of sections 17 and 18 of Law No. 168/1999 on Settlement of Labour Disputes.

1224. Once all possibilities for the settlement of the labour dispute under the procedures provided by the legislation had been exhausted, the USLM council decided to call a warning strike on 7 November 2005 between 4 p.m. and 6 p.m., in conformity with the collective agreement and sections 42(1) and 44 of Law No. 168/1999, concerning the procedure of declaration of strikes.

1225. On the same day, at 6 p.m., the USLM representatives were invited by the Government's Councillor of State for Social Issues to provide the information on the labour dispute. On 8 November 2005, the Secretary of State for Social Dialogue requested the union to submit all documents relating to the dispute. The union submitted these papers, but did not receive any further response. On 9 November 2005, the trade union representatives and the SC METROREX SA representatives met the Minister of Transport for five minutes, but no progress was made. On 11 November 2005, trade union leaders met the Romanian Prime Minister and the Minister of Transport, but the talks failed. Between 11 and 17 November 2005, a dialogue between the union, the company and government representatives took place via media. Some government representatives made statements opposing the upcoming strike and declared that the strike was illegal and politically motivated.

1226. In accordance with the decision made by trade union members, the General Council of the union decided to begin an indefinite strike on 16 November 2005. The strike was to take place daily between 4 a.m. and 4 p.m., providing one-third of the normal metro system service, in conformity with section 66(1) of Law No. 168/1999 on minimum services and the collective agreement.

1227. On 17 November 2005, a few hours before a ruling by the tribunal on the strike was due, the Prime Minister and the Minister of Transport issued a statement via the media to the effect that the metro strike was illegal. The union believes that this statement had decisively influenced the decision of the tribunal to declare the strike illegal.

1228. Despite the letters sent by the ITF, the European Transport Workers' Federation and the USLM to the Romanian President, the Romanian Government and Ministry of Transport urging a fair settlement of the labour dispute, no results were forthcoming.

1229. On 16 and 17 November 2005, the general strike took place. On 17 November, the tribunal declared the metro strike illegal, despite the fact that all legal preliminary requirements were fulfilled. The case was decided in a way that the union believes to be tendentious. Documentation consisting of over 3,500 pages was examined and the ruling was reached in only 30 minutes. The complainants consider that such a short period did not allow for a

proper examination of all documents and information. Indeed, it appeared from its reasoning that the tribunal considered that the trade union should have offered alternative solutions in order to settle its claims. Due to lack of such proposals, the strike was declared illegal. Moreover, the tribunal considered that the trade union had not respected legal provisions relating to the essential requirements of local communities. The warning strike was scheduled to take place between 4 a.m. and 4 p.m., with one-third of the normal activity after 4 p.m. However, the tribunal concluded that such an interruption had a negative impact on metro passengers, creating a disturbance of the entire metro system, which, in turn, entailed damages to the employer, employees and the functioning of the local community.

1230. Finally, the complainants state that while SC METROREX SA and the Ministry of Transport withdrew their claims regarding the legitimacy of the strike, the organizers of the strike remain vulnerable to sanctions as a result of being involved in a strike that has been declared illegal even if the strike was ended immediately after being declared illegal.

B. The Government's reply

1231. In its communication dated 3 November 2006, the Government states that while the fundamental right to strike is guaranteed by article 43 of the Romanian Constitution, this right can be restricted in order to prevent its excessive use. In certain cases, strikes may be restricted by the national legislation. Considering that the interruption of public services such as transport, postal services, services responsible for maintaining public order and health institutions, leads to great difficulties for the consumers, strikes in these services are regulated under a special legal framework.

1232. According to section 66(1) of Law No. 168/1999 on Settlement of Labour Disputes:

> … in the sanitary and social assistance units, telecommunications, radio and public television units, in the railway transport units, including the units for railway guards, in the units ensuring the common means of conveyance and the sanitation of localities, as well as the supply of the population with gas, electrical power, heat and water, the strike shall be allowed provided that the organizers of the strike ensure the essential services, no less than one-third of the normal activity, satisfying the minimum life requirements of the local communities.

According to sections 58, 59 and 60 of the same Law:

> If the unit considers that the strike has been declared or is continued in breach of the law, it may address the tribunal […] with a request to end the strike. The tribunal shall establish a time limit for the settlement of the application for the cessation of the strike, which cannot be longer than three days from the date of its registration […]. The tribunal shall examine the application […] and deliver immediately a judgement by which, as the case may be: (a) it rejects the application of the unit; (b) it admits the application of the unit and orders the cessation of unlawful strike. The judgements delivered by the tribunal shall be final.

The tribunal decision can be appealed before the Court of Appeal.

1233. The Government further states its understanding that the right to strike is not an absolute right and refers in this regard to Article 8 of the International Covenant on Economic, Social and Cultural Rights and to the decisions of the Committee on Freedom of Association, which considered that the right to strike can be restricted and even prohibited in the public service or in essential services in so far as a strike could cause serious hardship to the national community and provided that the limitations are accompanied by certain compensatory guarantees.

1234. With regard to the complainants' claim that the tribunal decision was tendentious, the Government indicates that by virtue of section 2(3) of Law No. 303/2004 on the Status of Judges and Prosecutors and section 124 of the Constitution, judges are independent and impartial and are subject only to the law. According to the above Law, judges shall ensure equal application of the legislation, respect rights and freedoms of persons and ensure non-discriminatory treatment of all parties in the judicial proceedings. Moreover, interested parties can appeal judicial decisions in accordance with the legislation in force. With regard to the settlement of labour disputes, Law No. 168/1999 provides for the following. Section 4 provides for the definition of "conflicts of interests": they are industrial conflicts in respect of working conditions concerning professional, social or economic interests of the employees, emerged during negotiation of a collective agreement. According to section 12 of this Law:

> The conflicts of interests may start in the following situations: (a) the unit refuses to start the negotiation of a collective agreement, provided that it does not have a collective agreement concluded or the previous collective agreement was expired; (b) the unit does not accept the claims formulated by the employees; (c) the unit refuses without reasons to sign the collective agreement, although the negotiations have been finalized; (d) the unit does not fulfil the obligations provided by law to begin the annual obligatory negotiations regarding wages, working time and conditions of work.

1235. The Government states that on 2 November 2005, the Ministry of Labour, Social Solidarity and Family (MTSSF) registered the dispute of interest (No. 6729/02) at SC METROREX SA. On 4 November 2005, in accordance with sections 17 and 18 of Law No. 168/1999, the conciliation procedure registered by the USLM with the Directorate of Labour, Social Solidarity and Family in Bucharest had begun. This procedure, carried out by the representative of the MTSSF did not settle the dispute and was followed by a strike. The declaration of the strike as illegal ceased the conflict of interest.

1236. The Government solicited information from the enterprise, which confirmed the events as presented by the complainant and further stated that according to the minute No. M.01/475 of 17 January 2006, a collective agreement for 2006–07 was concluded by the parties, the parties agreed to cease the labour conflict and to renounce any existing action or pending cases in relation to the November 2005 and January 2006 strikes declared by the USLM.

C. The Committee's conclusions

1237. *The Committee notes that this case concerns allegations referring to the legislative restriction of the right to strike of transport workers. The basis of this complaint is the declaration on 17 November 2005 of the strike of 16 November 2005 by the USLM to be illegal despite the fact that it was called after all avenues of negotiation had been exhausted and in compliance with all the conditions stipulated by the legislation, including the provision of minimum services. According to the complainants, the tribunal considered this case inadequately as it considered urban transport an essential service and based its decision on the consideration of whether the union had provided alternative solutions to the conflict. In addition, the tribunal decision appears to have been influenced by statements made by the Government. The complainants further state that while the employer is no longer pursuing the illegality of the union's claims, the organizers of the strike remain vulnerable to sanctions as a result of being involved in a strike that had been declared illegal.*

1238. *The complainant further alleges that the legislation violates the principles of freedom of association by restricting strikes to cases where the economic interests of the workers are being defended and prohibiting strikes for political reasons. They further contest the provisions that make strikes illegal if a collective agreement is in existence, even if the*

dispute concerns an emerging problem not covered by the existing agreement and the employer refuses to negotiate the new issue with the union, as well as the restrictions concerning strike notice.

1239. *The Committee notes the Government's statement that while the right to strike is guaranteed under the Constitution, it can be restricted in certain services, including public services, such as transport. Workers of transport services can exercise their right to strike provided that the minimum services are ensured. According to section 66(1) of Law No. 168/1999 on Settlement of Labour Disputes, the organizers of the strike shall ensure that essential services, which represent not less than one-third of the normal activity of the service and which satisfy the minimum life requirements of the local communities, continue to be provided. The Government further indicates that the body responsible for declaring a strike illegal is a tribunal which issues its ruling within three days. While acknowledging that in this particular case, the tribunal had declared the strike illegal, the Government disagrees with the complainants' allegation that the decision of the tribunal was tendentious and refers to numerous legislative provisions, which ensure the independence and impartiality of the judiciary in Romania.*

1240. *The Committee further notes that the Government had solicited information from the enterprise, which confirmed the events as presented by the complainants and further stated that according to minute No. M.01/475 of 17 January 2006, a collective agreement for 2006–07 was concluded by the parties, the parties agreed to cease the labour conflict and to renounce any existing action or pending cases in relation to the November 2005 and January 2006 strikes declared by the USLM.*

1241. *The Committee notes that the situation which gave rise to the initial conflict, i.e. negotiation of a new collective agreement, seems to be resolved as a collective agreement has been signed for 2006–07.*

1242. *With regard to the restrictions on the right to strike of transport workers, the Committee recalls its conclusions concerning Case No. 2057 against the Government of Romania presented by the National Trade Union Bloc and the USLM [see 320th Report, paras 747–783]. This case also concerned similar allegations of infringement of the right to strike and arose within the context of a strike at SC METROREX SA. In this case, the Committee had noted with interest Law No. 168/1999 on Settlement of Labour Disputes, which entered into force on 1 January 2000 drawn up on the basis of tripartite consultations and taking into account the recommendations of the Committee of Experts. Concerning the provision regarding the obligation to guarantee one-third of the unit's normal activity during a strike, contained in section 66(1) of Law No. 168/1999, which stipulates that this obligation must be guaranteed in units of public transport to meet the minimum requirements of local communities, the Committee acknowledged that the maintenance of minimum services in the case of strike action may be imposed in public services of fundamental importance [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fourth edition, 1996, para. 556]. It further specified that in relation to strike action taken by workers in the underground transport enterprise, the establishment of minimum services and the absence of agreement between the parties should be handled by an independent body [see* ***Digest****, op. cit., para. 565]. The Committee therefore concluded that respect of the obligation to maintain a minimum service of the underground railway's activities to meet the minimal needs of the local communities was not an infringement of principles of freedom of association. It further requested the Government, however, to amend the legislation so as to guarantee the establishment of minimum services by an independent body in the absence of agreement between the parties on the issue [see 320th Report, paras 779–781].*

1243. *The Committee recalls that 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 [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 612]. In view of the fact that no legislative amendments seem to have been adopted in this respect, the Committee requests the Government to amend its legislation so as to ensure that the minimum services to be maintained in the transport sector are negotiated by the social partners concerned rather than set by the legislation and that in the absence of agreement between the parties, minimum services are determined by an independent body.*

1244. *With regard to the complainants' allegation that the organizers of the strike remain vulnerable to sanctions as a result of being involved in a strike that has been declared illegal, even if it was ended immediately after being declared illegal, the Committee considers that the dismissal of workers in such cases entails a risk of abuse and can constitute a violation of freedom of association. Given that an agreement was reached between the union and SC METROREX SA shortly following the interruption of the strike, the Committee trusts that the trade unionists who had organized the strike have suffered no negative consequences in their employment.*

1245. *As concerns the complainants' allegation that strikes are illegal if a collective agreement is in existence, even if the dispute concerns an emerging problem not covered by the existing agreement and the employer refuses to negotiate the new issue with the union, the Committee recalls that if strikes are prohibited while a collective agreement is in force, this restriction must be compensated for by the right to have recourse to impartial and rapid mechanisms, within which individual or collective complaints about the interpretation or application of collective agreements can be examined; this type of mechanism not only allows the inevitable difficulties which may occur regarding the interpretation or application of collective agreements to be resolved while the agreements are in force, but also has the advantage of preparing the ground for future rounds of negotiations, given that it allows problems which have arisen during the period of validity of the collective agreement in question to be identified [see* ***Digest****, op. cit., para. 533]. Although strikes of a purely political nature do not fall within the scope of the principles of freedom of association, the Committee considers that the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests [see* ***Digest****, op. cit., paras 528 and 531].*

1246. *With regard to the complainants' allegation concerning the obligation to provide an employer with a 48-hour strike notice, the Committee recalls that the obligation to give prior notice to the employer before calling a strike may be considered acceptable [see* ***Digest****, op. cit., para. 552] and considers that 48 hours is a reasonable term.*

1247. *With regard to the complainants' allegation concerning the legislative restriction that strikes can only be held to defend the economic interests of the workers and must not be used for political reasons, the Committee recalls that while purely political strikes do not fall within the scope of the principles of freedom of association, trade unions should be able to have recourse to protest strikes, in particular where aimed at criticizing a government's economic and social policies [see* ***Digest****, op. cit., para. 529]. The*

Committee requests the Government to ensure the application of this principle and draws the attention of the Committee of Experts to the legislative aspects of this case.

The Committee's recommendations

1248. ***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 amend its legislation so as to ensure that the minimum services to be maintained in the transport sector are negotiated by the social partners concerned rather than set by the legislation and that in the absence of agreement between the parties, minimum services are determined by an independent body.

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

CASE NO. 2437

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

Complaint against the Government of the United Kingdom presented by
— the Association of United States Engaged Staff (AUSES)
— the International Federation of Professional and Technical Employees (IFPTE)
— the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and
— Public Services International (PSI)

Allegations: The complainants allege that the Embassy of the United Kingdom to the United States refused to recognize and negotiate with the trade union chosen by the locally engaged staff to represent them; on the contrary, it allegedly unilaterally implemented changes in the terms and conditions of employment of locally engaged staff and announced plans to set up a management-dominated "Staff Representative Council", inviting employees to go through the Council rather than their union

1249. The complaint is contained in a communication from the Association of United States Engaged Staff (AUSES), the International Federation of Professional and Technical Employees (IFPTE), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Public Services International (PSI) dated 23 June 2005. The

IFPTE and AUSES provided additional information in a communication dated 7 September 2006.

1250. The Government replied in communications dated 23 March and 25 September 2006.

1251. The United Kingdom 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 complainants' allegations

1252. In their communication of 23 June 2005, the complainants provide first of all information on the Association of United States Engaged Staff (AUSES) and the International Federation of Professional and Technical Employees (IFPTE), indicating that the IFPTE was founded in 1918, is an affiliate of the AFL-CIO and the Canadian Labour Congress and represents more than 86,000 workers in professional, technical administrative, research and associated occupations in the United States and Canada. The AUSES, Local 71 of the IFPTE, represents more than 600 United States-hired or "locally engaged" employees who perform a variety of staff functions at the Embassy of the United Kingdom, consulates, United Nations mission, British trade offices and other British government facilities in the United States.

1253. According to the complainants, the Embassy of the United Kingdom to the United States (hereinafter the Embassy), had recognized and bargained with the AUSES as the representative of locally engaged staff for almost 50 years on terms and conditions of employment and adjustment of grievances. Most recently, while the Embassy still recognized and bargained with the AUSES, bargaining had resulted in agreement on changes in pensions and health insurance.

1254. In a democratic process beginning in December 2004, a substantial majority of United States-engaged staff joined the IFPTE and chose it as their bargaining representative by freely signing cards to that effect. In terms of the relevant ILO Conventions, they joined an organization of their own choosing to further and defend their interests. The IFPTE granted the AUSES a charter making it Local 71 of the Federation.

1255. According to the complainants, the embassy management responded to the employees' choice of representative by cancelling dues check-off and refusing to recognize and bargain with the AUSES/IFPTE Local 71. Instead, management acted unilaterally to implement several changes in terms and conditions of employment injurious to employees, without bargaining with their chosen representative. Beyond that, embassy management had launched a campaign to undermine, marginalize, and de-legitimatize the employees' chosen representative. In a number of self-serving, contradictory, ambiguous and incorrect statements, the embassy management said that it welcomed staff "input" and "positive communication and dialogue" but behind this verbiage lay unilateral management power. The complainants attached a letter dated 31 January 2005 from the Embassy Counsellor on Change Management to the AUSES chairman, which indicated: "It is our duty to run the Embassy in as efficient and productive a manner as possible. This means we will on occasion have to change policies and practices, even where they have been in place for many years. It is in all our interests that the United States network responds and adapts to the changing environment, rather than resists change."

1256. The complainants added that the AUSES/IFPTE went to great lengths offering to indeed be responsive and responsible in adapting to change, as long as change was managed in the context of a collective bargaining relationship where workers' rights were respected and

protected. However, management moved to force significant changes on its own behind a pretence of employee "input". On 1 April 2005, the management unilaterally implemented new Terms and Conditions of Employment with changes affecting employees' salaries, pensions, health insurance, sick leave, overtime pay and other matters central to the employment relationship and universally recognized as a subject for collective bargaining where workers had chosen a representative to further and defend their interests. Citing paragraph 799 of the *Digest of decisions and principles of the Freedom of Association Committee*, fourth edition, 1996, the complainants considered that the above ran directly counter to one of the main objects of Convention No. 87 to enable employers and workers to form organizations capable of determining wages and other conditions of employment by freely concluded collective agreements.

1257. In a *Memorandum to Heads of U.S. Post* dated 11 March 2005 (attached to the complaint), the Embassy Counsellor on Change Management raised the question of "whether the International Labour Organization Conventions on core labour standards … oblige the Embassy to collectively bargain with staff over changes to terms and conditions of employment". The *Memorandum* indicated that the answer was that "they do not". Purporting to rely on "the advice of FCO [Foreign and Commonwealth Office] lawyers", the Counsellor declared that the reason for refusing to bargain with the AUSES/IFPTE was that Convention No. 98 "does not deal with the position of public servants engaged in the administration of the State". According to the complainants, the definition of "public servants engaged in the administration of the State" does not reach locally engaged staff of an embassy. This staff does not make diplomatic or equivalent policy. The complainants noted that most of the diplomatic staff posted to the Embassy were in fact represented by a public servants' union of the United Kingdom. The collective agreement between the FCO and the union that represented the United Kingdom-hired employees in the United States (namely, the FDA) contained a clause stating that "Staff are encouraged to join and be active in trade unions recognized by the FCO." Among other things, the agreement provided for bargaining over terms and conditions of employment including pay, leave time, use of facilities and other accommodations for union business, and arbitration of unresolved disputes. Thus, according to the complainants, a fortiori, locally engaged staff have the right to form and join a trade union for the defence of their interests under Conventions Nos. 87 and 98.

1258. The complainants also attached a letter dated 13 May 2005, in which the Embassy Counsellor on Change Management and the Consul General reiterated, according to the complainants, the Embassy's total refusal to recognize and bargain with the AUSES/IFPTE. The letter was addressed to the AUSES/IFPTE national committee, saying that it was "not realistic to expect the Embassy to engage in formal collective bargaining over terms and conditions of employment with the AUSES or any other group". The complainants added that, this time, in the Counsellor's constantly shifting and consistently mistaken arguments for denying bargaining rights to United States-engaged employees, he said that the Embassy's "relatively limited autonomy over its budgets and the way it operates them" excused a refusal to recognize and bargain with the AUSES/IFPTE. The complainants cited paragraphs 895 and 899 of the *Digest*, op. cit., according to which, the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants; a fair and reasonable compromise should be therefore sought between the need to preserve as far as possible the autonomy of the parties to bargaining, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other. The complainants emphasized that instead of "preference as far as possible to collective bargaining" the embassy management ruled out *ab initio* any bargaining with the AUSES/IFPTE.

1259. The complainants added that another reason proffered for refusing to bargain with the AUSES/IFPTE was that the union included some supervisors and managers. The complainants cited paragraph 231 of the *Digest* [op. cit.] in support of the view that "it is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade union as other workers …".

1260. The complainants added that the Embassy's negative response to the staff's choice of representative was at odds with the official position of the FCO as expressed in a telegram by the Foreign Secretary dated 5 February 2005 addressed to all diplomatic posts. The telegram (attached to the complaint) championed the ILO Declaration on Fundamental Principles and Rights at Work, recognized the importance of core labour standards and strongly supported them. According to the Foreign Secretary, "this means that we must respect the core labour standards in our own working practices". The Embassy's refusal to recognize the AUSES/IFPTE also ran counter to a letter from the Foreign Secretary dated 17 March 2005 addressed to the General Secretary of the Trades Union Congress (attached to the complaint), in which it was indicated that:

> [T]he FCO, and its missions overseas, is always ready to recognize trade unions … [T]here is no reason in principle to prevent the Embassy in Washington from recognizing voluntarily the AUSES staff association and the IFPTE union. The Embassy has recognised the staff association since 1957.
>
> We would like to see a more formal framework for relations with staff in the US, setting out the rights and responsibilities on each side. This should include recognition of the role of the staff association and union …What I would like to suggest … is that … both sides sit down together to discuss the question of a voluntary agreement.
>
> [I]f, as I hope, discussions get under way soon on a voluntary recognition agreement, the implementation of the package could be discussed at the same time.

Instead, however, according to the complainant, the Embassy did not recognize the AUSES/IFPTE and unilaterally implemented changes in terms and conditions of employment. Worse still, the Embassy announced plans to set up a management-dominated "Staff Representative Council" and invited employees to go through the Council rather than their union. In its bulletin entitled *In the know: News about your pay and benefits from the HR Review Team*, edition 9, dated 31 March 2005, the embassy management characterized the Council as the organization "with whom management can discuss all issues relevant to your employment with the Embassy". In its next bulletin dated 21 April 2005 it openly solicited support for its "Council", in place of the AUSES, saying:

> We have … asked Heads of Post to provide us with consolidated views of the staff in their posts.
>
> Some of the questions you will wish to consider when feeding in your views are:
>
> Is the idea of a Staff Representative Committee/Council a good one?
>
> If so, who should sit on the Committee?
>
> What issues should the Committee discuss?
>
> How often and where should the Committee meet?
>
> Should each post be represented?
>
> How should committee members be selected?
>
> Should membership be rotational (i.e. each post representative would spend, say, a year on the committee, with the membership then moving to another member of the post)?
>
> Finally, what should the Committee/Council be called?

We encourage you all to take time to discuss these questions – and any others you can think of – and feed in your views to your Head of Post/Group.

Any new Staff Committee/Council is for you. We hope it will become a key forum for discussing issues that matter most to staff with staff. If we are to get it right, we need you to tell us what you want.

Many thanks,

HR Review Team

1261. According to the complainants, underneath the language about "feeding in your views", these communications demonstrated blatant disregard for the trade union rights of United States-engaged staff and the role of their chosen representative. Instead of negotiating with the locally engaged employees' chosen representative, embassy management created and solicited employee "input" for what is known as a "company union", a management-dominated group. Citing paragraphs 771 and 779 of the ***Digest***, op. cit., the complainants recalled the importance of independence of the parties in collective bargaining and that negotiations should not be conducted on behalf of workers or their organizations by bargaining representatives appointed by or under the domination of employers or their organizations. They added that, besides setting up a management-dominated organization, the management of the Embassy, especially its personnel director, launched a campaign to undermine the union chosen by the locally engaged staff. In a series of meetings with locally engaged staff at embassy facilities around the country, he inveighed against the employees' choice of the AUSES/IFPTE as their bargaining representative and inveigled them to look to the management-dominated "Staff Representation Council" for their dealings with management.

1262. The complainants specified that in a letter of 13 May 2005 the Embassy Counsellor on Change Management had stated that they were "willing to consider dropping for now the proposal for a staff representative committee" but only in the context of the management's outright refusal in the same letter to recognize and bargain with the AUSES/IFPTE and its insistence on unilateral management (letter attached to the complaint).

1263. The complainants further added that the embassy management unilaterally implemented changes taking advantage of retrograde features of United States labour law, refusing to bargain with the locally engaged staff's chosen representative over the changes. For example:

– United States law tied employee and family health insurance to their employer, not to a national health service. Employers who did not recognize and bargain with trade unions could impose huge new costs on employees in the form of deductibles, co-payments and premium contributions. The Embassy took this dramatic step in its 1 April implementation of new terms and conditions of employment without bargaining with the AUSES/IFPTE. Management was unilaterally forcing employees to choose between increasing their out-of-pocket costs or reducing their benefits for family medical insurance, with potential liability of $3,000 in personal costs for health services. The union recognized that health care "cost-sharing" was a complex problem in collective bargaining throughout the United States, because of the lack of a national health plan. However, the way to address the problem where workers had chosen a representative was through collective bargaining, not through unilateral management action.

– United States law permitted employers, where there was no union, to require unlimited mandatory overtime work by employees (at no extra compensation for "exempt" employees) under pain of discipline, including discharge, if an employee did not work all overtime hours demanded by management, however unreasonable.

However, where employees had union representation, management should bargain with the union on overtime policy. Embassy management had negotiated with the AUSES on overtime policy before the association's affiliation with the IFPTE, but then acted unilaterally to deprive many employees of a right to pay for hours worked over the normal work week, without bargaining with the AUSES/IFPTE.

– United States law had no provision for paid sick leave but only protected an employee's right to return to her job after unpaid leave of up to 12 weeks under the Family and Medical Leave Act. Embassy management acted unilaterally to eliminate accumulated sick leave for many AUSES/IFPTE-represented staffers without bargaining with the AUSES/IFPTE.

1264. The complainants also referred to similarities between the present case and Case No. 2197 concerning the South African Embassy in Ireland (334th Report of the Committee on Freedom of Association approved by the Governing Body at its 290th Session (May–June 2004), paras 95–131). They highlighted in particular that, in response to a challenge by the Government of South Africa on grounds of non-receivability of the complaint, the Committee on Freedom of Association affirmed that:

> [T]he application of the fundamental international principles of freedom of association embodied in the ILO Constitution and the Declaration of Philadelphia are applicable to all member States … [i]f there has been a violation of international labour standards or principles relevant to freedom of association and collective bargaining in this case, it is the South African Government that is most assuredly in a position to take the necessary measures to address such a violation. The Committee thus concludes that the complaint is receivable and will now proceed with its analysis and examination of the substantive issues concerned [paras 106, 108].

Moreover, in response to the South African Government's argument that it was Irish national law, not ILO principles on freedom of association, that governed the Embassy's relationship with locally engaged staff (thus precluding collective bargaining with the union chosen by the locally engaged staff), the Committee framed the issue in that case as "whether non-recognition of the complainant [union] was a violation of international labour standards and principles concerning freedom of association". The Committee further noted that "the issue at hand is not which national law is applicable to the locally recruited personnel … but rather whether the actions at issue are contrary to international standards and principles of freedom of association". It also found that "Conventions Nos. 87 and 98 are applicable to locally recruited personnel" according to "the right of all workers, without distinction whatsoever … to form and join organizations of their own choosing" under Article 2 of Convention No. 87, and that "locally recruited staff … are not deemed to be public servants in the administration of the State".

1265. The complainants concluded by asking the Committee to invite the Governing Body to recommend that the Embassy of the United Kingdom in the United States recognize and bargain with the AUSES/IFPTE as the representative of its locally engaged staff. They also asked the Committee to request establishment of a direct contacts mission to the Embassy of the United Kingdom in the United States to promote the full implementation of freedom of association for United States-engaged staff.

1266. In a communication dated 7 September 2006, the IFPTE and AUSES added that the Embassy management's claim to offer terms and conditions of employment "which meet or exceed those offered by a good local employer" meant a change in the comparative "marker" from United States government employment standards to standards in the private sector, based on information supplied by the Mercer consulting group. As a result of this change, the Embassy management unilaterally reduced the terms and conditions of employment of locally engaged staff without bargaining with AUSES/IFPTE, the staff's

chosen trade union representative. Management sought to take advantage of downward pressure on private sector workers' wages and benefits, not least because fewer than 8 per cent of private sector workers in the United States were union represented (despite surveys indicating that millions of private sector workers would prefer to have union representation but were fearful of reprisals if they joined a union). The management used private sector comparisons to reduce employees' benefits, but insisted that the same employees were public servants without recourse to ILO protection. This kind of "cherry picking" characterized the Government's approach to the locally engaged staff's exercise of rights to freedom of association. Moreover, after using private sector comparisons to reduce benefits, the Government insisted that staff were public employees and thus excluded from coverage under United States law protecting the right to organize and bargain collectively.

1267. Thus, according to the complainants, the Government rejected those elements of United States law which required employers to bargain in good faith with the employees' chosen representative with a view to reaching a written contract. However, this was the employee representation system in the United States public employment sector as well. Where collective bargaining for public employees was permitted, public sector employers were obligated to recognize exclusive representation by a majority-selected representative of a defined bargaining unit, and to bargain in good faith toward a collective agreement. Exclusive representation by majority choice and a duty to bargain in good faith were fundamental elements of the United States labour relations system, inside or outside the National Labor Relations Act, in the private sector and in the public sector. The complainants recalled that the Committee had already considered arguments that these elements of the United States system run afoul of Conventions Nos. 87 and 98 and had decided that exclusive representation and a duty to bargain were compatible with the Conventions. Moreover, in paragraph 821 of the *Digest*, op. cit., the Committee had noted that "Employers, including governmental authorities in the capacity of employers, should recognize for collective bargaining purposes the organizations representative of the workers employed by them." Exclusive representation met ILO standards as long as employees had a reasonable opportunity to select a different representative if a majority so chose and a minority union was permitted to function freely, though it may not have bargaining rights. As paragraph 834 of the *Digest*, op. cit., put it, "It is not necessarily incompatible with the Convention to provide for the certification of the most representative union in a given unit as the exclusive bargaining agent for that unit."

1268. Moreover, the Government's reliance on the Committee's view that "nothing in Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining by compulsory means with a given organization" because it would "clearly alter the nature of bargaining" was misplaced according to the complainants. This constraint went to government enforcement of collective bargaining *results*, not to the employer's duty to bargain in good faith where required by law. As paragraph 849 of the *Digest*, op. cit., explained, "The opportunity which employers might have, according to the legislation, of presenting proposals for the purposes of collective bargaining – provided these proposals are merely to serve as a basis for the voluntary negotiation to which Convention No. 98 refers – cannot be considered as a violation of the principles applicable in this matter." The duty to bargain in the United States system did not alter the voluntary nature of collective bargaining because management was not compelled to *agree* to any union proposal. It was only compelled to bargain with a sincere desire to reach an agreement and to put agreements into a written contract when an overall accord was achieved. This preserved the voluntary nature of negotiations in the United States labour relations system. Since AUSES/IFPTE was the chosen representative of locally engaged staff in the United States and the Embassy purported to employ its local staff on the basis of local employment law, the complainants repeated their request that the Committee invite the Government to meet its ILO obligations and United States employment law standards by recognizing

AUSES/IFPTE as the locally engaged staff's bargaining representative and bargaining in good faith with the union toward a collective agreement.

B. The Government's reply

1269. In a communication dated 23 March 2006, the Government invited the Committee to reject the complainants' arguments on the grounds that the Government had not breached its obligations under the relevant ILO Conventions or in any way violated fundamental international principles of freedom of association.

1270. With regard to the legal framework for the employment of staff at the government offices of the United Kingdom in the United States, the Government indicated that it had an overseas network of 233 diplomatic posts. In the United States, the Government was represented by the British Embassy in Washington, the subordinate consulates-general and consulates and a number of other offices throughout the country. The Government used the term "the Embassy" in order to refer to all government offices of the United Kingdom in the United States. In addition to the 250 United Kingdom-based staff (drawn from a variety of government ministries in the United Kingdom), the Government employed some 600 locally engaged staff in the United States. Their employment was the single largest cost to the Embassy's budget, amounting to well over $20 million per year. United Kingdom-based staff served in the United States on a temporary basis while remaining in the employment of their parent ministry at home. Their employment was governed by the law of the United Kingdom. The terms and conditions of most staff were the result of collective agreements arrived at by voluntary negotiation between the employer (the Government) and the relevant British trade unions.

1271. The 10,000 locally engaged staff in British diplomatic posts were all employed by the Secretary of State for Foreign and Commonwealth Affairs. It was the established policy and practice of the Foreign and Commonwealth Office (FCO) to act as a good and responsible employer with respect to its local staff. Their contracts of employment were governed by local law. The FCO had recently made submissions to the House of Lords in a case concerning staff who worked abroad, which included a submission to the effect that locally engaged staff were governed by local employment law. This was accepted by the Appellate Committee, who concluded that such staff did not benefit from the application of United Kingdom employment law (*Serco* v. *Lawson* [2006] UKHL 3, paragraph 39). Terms and conditions of employment for local staff had been developed through a long-standing process of voluntary negotiation and consultation, using the local staff association where one existed.

1272. In the United States, the Embassy employed its local staff on the basis of local employment law. The Embassy's stated policy was to offer terms and conditions of employment which met or exceeded those offered by a good local employer. The Association of United States Engaged Staff (AUSES) and the International Federation of Professional and Technical Employees (IFPTE) sought to represent the locally engaged staff of the Embassy, not United Kingdom-based staff.

1273. The system in the FCO for determining the pay and conditions of locally engaged staff was as follows. Since 2003, responsibility for determining the best pay and conditions for local staff had been delegated to Heads of Post within the following constraints: arrangements must be consistent with local law, fall within the budget allocated by the parent department, be affordable and sustainable in the long term and comply with Treasury rules on local staff pay. Finally, "[they] should have regard to market forces and should not exceed what is required to attract, retain and motivate suitable staff taking account, where appropriate, of the practice of the generality of local employers".

1274. The Government added that whereas in the past there was in British Embassies worldwide a significant distinction between the functions fulfilled by United Kingdom-based and locally engaged staff, with United Kingdom-based staff holding the majority of senior management positions and playing traditional diplomatic roles (such as political, press and economic work), this position had changed considerably in the last 15 years. Within the United States network, locally engaged staff had risen to senior managerial positions (including the heads of finance and human resource management at the Washington Embassy) and taken on traditional diplomatic roles previously filled by United Kingdom-based staff. There were, for example, locally engaged second secretaries working in the political section of the Embassy, reporting on sensitive political issues with full security clearance and supervising United Kingdom-based administrative staff. The Embassy's press team which handled relations with the British and United States press was, with one exception, staffed by locally engaged employees.

1275. With regard to the relationship between the Embassy and the staff association, the Government indicated that the Embassy had always sought to involve its local staff in decision-making and to consult them on issues affecting their employment. The Association representing local staff (AUSES) was set up nearly 50 years ago (in 1957) and embassy management had maintained throughout the years a close working relationship with the AUSES leadership. While there was never any formal process of negotiation with the association, they were consulted on any changes affecting employment. There were regular meetings between embassy management and the AUSES committee to discuss issues of mutual interest. While the two sides did not always agree, the meetings took place in a constructive atmosphere. Although the Embassy did not grant the formal recognition to the AUSES that the current complaint was demanding, it gave staff the necessary time to devote to AUSES business, access to embassy facilities to organize AUSES meetings, and facilitated the organization of a membership drive by allowing the display of recruitment posters and the use of official means of communication for the association to communicate with staff. When the AUSES affiliated with the IFPTE, the Embassy wanted to continue this relationship, and said so publicly (letter of 31 March 2005, attached to the response). The Embassy adopted an open and constructive approach to both the AUSES and IFPTE and acted consistently in line with good employment practice and the requirements of the relevant ILO Conventions.

1276. With regard to the factual background to the dispute, the Government indicated that, in early 2004, the Embassy embarked on a major overhaul of its employment policy. The aim of the review (set out in a communication from the Ambassador of 1 April 2004, attached to the response) was to modernize employment practices in order to be more consistent with employment conditions in United States organizations. The employment package, which had developed over the years up to 2004, had given locally engaged staff terms and conditions which were out of kilter with standard United States labour law practice. The differences were increasingly anomalous. The situation had reached a point where the effective functioning of the British diplomatic network in the United States was under pressure because of the unsustainable cost of the wages and benefits package. It was also necessary to amend the terms and conditions as a matter of urgency to remove the provision imposing a mandatory retirement age.

1277. Following the Ambassador's note to staff of 1 April 2004, embassy management continued the process of consultation and communication with staff throughout the year-long review. The need for the review was discussed with the AUSES, and a timetable published for its work. The AUSES, its members and other locally engaged staff were given every opportunity to contribute to the review (anonymously if they wished) and emerging findings were published for all staff to see and comment upon. Staff meetings were held throughout the United States network and comments received were reviewed by the human

resources (HR) team. Meetings took place with the AUSES virtually every month from March 2004 to July 2005, and several meetings were held with locally engaged staff themselves to discuss the review. Some important elements of the change proposals (e.g. the continuation of the existing pension scheme for staff already participating) were modified as the result of representations from staff. The proposal to set up a Staff Representative Council was made to address staff concerns in order to improve communication between staff and management and was abandoned in the face of opposition from staff, particularly the staff association. Far from forcing the Council upon staff, as alleged, the Embassy dropped the proposal in view of widespread opposition. The Embassy's management also committed itself to a thorough review once the new terms and conditions had been in place for one year. The AUSES would be fully involved in this process.

1278. The new package introduced in April 2005 brought the Embassy more into line with United States employment law and practice and offered a competitive package of pay and benefits to recruit, retain and motivate the most professional possible cadre of locally engaged staff. In February 2005, the IFPTE wrote to embassy management welcoming some of the proposed changes. The union's position, as outlined in the complaint, failed to recognize that many of the changes implemented provided the majority of local staff with an improved benefits package, such as paid maternity and paternity leave (not a requirement under United States law). The union specifically criticized changes to the health benefits offered to staff in its complaint. In doing so, it failed to recognize that the new system was fairer to all staff, unlike the old one which offered anomalous advantages to staff who had been with the Embassy for many years. Employees with many years' service were able to "accumulate" their unused sick leave, giving them the opportunity to use it, for example, as unofficial maternity leave. Recently recruited staff who had been unable to accumulate sick leave enjoyed no such benefit. The new system offered proper short- and long-term disability benefit to all staff.

1279. Following the AUSES's affiliation with the IFPTE, the union called for the abandoning of the new policies and demanded that the Embassy formally negotiate the modifications through a collective bargaining process. The union made a number of demands and refused to consider any arrangement which fell short of these. An attempt to establish a voluntary framework for consultations which had been made by the Embassy (letter of 31 March 2005 attached to the response) had to be set aside with the submission of the complaint. The union was insisting on formal recognition which implied collective bargaining rights over any changes affecting the terms and conditions of locally engaged staff and exclusive rights to communicate with management over employment issues, including mandatory union involvement in disciplinary cases. The Embassy was not prepared to accept these demands. The Embassy would continue to communicate directly with staff, and there was no question of it granting exclusive rights to a union to communicate with staff on employment issues or indeed anything else. The Embassy was however prepared to discuss with the union, on a voluntary basis, pay and other employment matters, as had been indicated repeatedly, including in the letter of 17 March 2005 attached to the response. It was also of course prepared to involve the AUSES in disciplinary cases where the individual concerned wished this to happen, as was made clear in the letter of 13 May 2005 attached to the response. The offer to engage in discussions about a voluntary agreement remained open (letter of 2 August 2005, attached to the response).

1280. As for the letter by the Foreign Secretary referred to by the complainants as agreeing to "formal recognition" of the IFPTE, the Government considered that what this letter actually said was that there was no reason of principle to prevent the Embassy from recognizing voluntarily the AUSES staff association and the IFPTE union. The union, as a representative (not *the* representative) could sit down with the Embassy to discuss a voluntary agreement. There had been some such discussions and the Embassy was willing

to continue them. The Embassy never agreed, however, to compulsory collective bargaining with the union nor was it obliged to do so.

1281. The Government added that, despite the breakdown in relations, the AUSES had since June been actively involved in many of the policy issues stemming from the review. The Embassy remained determined to maintain a working relationship with representatives of its staff. The AUSES representatives had therefore observed the work of two committees: the first dealt with appeals stemming from an exercise to grade jobs across the network, and the second examined applications for bonus payments under the new performance pay scheme. Senior staff, including the management counsellor and head of human resources, held regular meetings with the AUSES chairman. This had been a positive experience, and one the Embassy saw as setting the tone for relations with staff representatives in the future.

1282. The Government further explained that the Embassy was not prepared to agree to collective bargaining for a number of legal and practical reasons. First, the US Labor Relations Act specifically exempted federal, state and local governments from its provisions so there is no legal framework governing the standards by which the Embassy should approach its dealings with local staff. Furthermore, United States labour law did not allow for managers and people they managed to be part of the same union (clearly the case in the Embassy where AUSES membership is open to all staff). Some 26 per cent of the Embassy's locally engaged staff held management positions. Including such supervisors in the same union as non-managers would risk pitting the individuals responsible for developing and implementing policies against the Embassy. The Embassy would have no objection to such staff forming their own association, or affiliating with a union, but would not accept either compulsory membership or agree to formal collective bargaining with it.

1283. The Government added that the union chose not to pursue its case through the National Labor Relations Board (NLRB) because it was seeking protection in excess of that provided in United States labour law for other employers. Collective bargaining as demanded by the union was not a right under the legislation. If the union had chosen to go to the NLRB, it would have been obliged to comply with a number of United States labour law requirements regarding, for example, the separation of managerial and non-managerial employees and the organization of the staff association, such as the organization of elections to positions of responsibility. In adopting a progressive and constructive approach to these issues, the Embassy had gone far beyond what was required of it under United States law.

1284. According to the Government, where the United Kingdom acted as employer of locally engaged embassy staff outside its own territory, the contracts of employment were governed by the law of the receiving State and so the United Kingdom was bound to comply with the employment law of the receiving State. So, in this case, the Embassy was bound to comply with the terms of United States employment law. The complaint did not indeed allege that rights available to the union under United States law had been denied by the Embassy and the United Kingdom maintained that it had complied with all applicable rights under United States law for the reasons given above.

1285. With regard to the allegations of breach by the Government of its obligations under Conventions Nos. 87 and 98, the Government indicated that the obligation of a State party to an ILO Convention was to give effect to its provisions in its own territory. The complaint concerned acts or omissions by the British Embassy in the territory of the United States The premises of a diplomatic or consular mission did not form part of the territory of the sending State: see articles 21 and 22 of the Vienna Convention on Diplomatic Relations and articles 30 and 31 of the Vienna Convention on Consular

Relations. In contrast to other human rights instruments, the ILO Constitution and Conventions did not contain a jurisdictional clause extending protection to those "within the jurisdiction of" a contracting party. Such provisions had been considered to extend Convention rights to acts occurring outside the territory of the State concerned, including to the acts of diplomatic and consular agents outside the territory of the State, but none such existed in the case of ILO instruments. The Government believed that it was not therefore under any legal obligation to give effect to ILO Conventions in a diplomatic or consular mission overseas.

1286. With regard to Case No. 2197 (which concerned the Embassy of South Africa in Ireland), the Government indicated that, although the Committee had decided that Conventions Nos. 87 and 98 were applicable to locally recruited personnel, the basis on which this decision was reached was not clear. It was also not clear whether the Committee had the benefit of any argument as to whether the Conventions were applicable outside the territory of the contracting party concerned – in that case, South Africa. Paragraph 109 of the Committee's report described the claim as being that "South Africa has failed to secure the effective observance within its jurisdiction, and specifically within its Embassy to Ireland, of ILO Conventions Nos. 87 and 98". According to the Government, if the Committee was applying a "jurisdictional" approach rather than a territorial approach, it should be respectfully submitted that this was not the correct approach.

1287. In the alternative, if the Committee decided that the United Kingdom's obligations under ILO Conventions did apply to its actions as employer in the United States then the United Kingdom would maintain that it was not in breach of those obligations for the following reasons.

1288. First, with regard to Convention No. 87, the Government did not interfere in any sense with the freedom of association or the right to organize as provided in the Convention. The Embassy complied with the requirements of the Convention by allowing the union to recruit members, organize meetings, communicate with its members, etc. The Embassy maintained a close working relationship with the AUSES leadership from the days when the AUSES, as a staff association, first came into being. It granted facilities to organize meetings and a membership drive by allowing the display of recruitment posters and the use of official means of communication to communicate with staff. None of this changed when the AUSES affiliated with the IFPTE. The Embassy wanted to continue the constructive relationship and said so publicly. It dealt with the union as a legitimate representative of embassy staff, and has had many meetings with the union about the review and other matters. It dropped the proposal for a Staff Representative Council at the request of the staff association/union. The union's complaint to the Committee was focused on the Embassy's refusal to recognize it for collective bargaining purposes, and therefore fell to be considered primarily under Convention No. 98.

1289. Second, with regard to Convention No. 98, the Government recalled that the complainants' reliance on Case No. 2197 in support of the argument that embassy staff were not public servants engaged in the administration of the State, and thus were not subject to the exception of Article 6 of the Convention, was misplaced for several reasons. In the first place, the complainants misrepresented the Case's holding, citing it for the proposition that "locally recruited staff … are not deemed to be public servants in the administration of the State". However, the complainants used only a partial quotation of the case and took the language out of context. A closer review of the South African Embassy case would demonstrate that it was inapposite. With regard to embassy employees as public servants, the Committee had stated that: "As for Convention No. 98, at no time does the Government contend that the employees in question, stated to be in the administrative support section, are excluded under Article 6, and even the Government's own assertion that these locally engaged staff are covered by Irish rather than South African legislation,

would confirm that they are not deemed to be public servants engaged in the administration of the State" [Case No. 2197, op. cit., para. 130]. Accordingly, then, the Committee did not decide in the South African Embassy case that all locally engaged embassy staff are not public servants within the meaning of Article 6 of Convention No. 98. Rather, the Committee merely noted in its response that the South African Government had not maintained that its locally engaged staff were public servants. The Committee clearly recognized that locally engaged staff could in principle fall within the exclusion of Article 6 of Convention No. 98.

1290. The position of the Government was that locally engaged staff represented by the union were public servants engaged in the administration of the State, for the purposes of Article 6 of Convention No. 98. The criteria for the applicability of Article 6 were related to the functions that an employee performed and were not determined by an employee's nationality or whether they were United Kingdom-based or locally engaged staff. Many of the Embassy's locally engaged staff were clearly engaged in identical activities to their United Kingdom-based colleagues. The governing law of the employment contract of the locally engaged staff was not a determining factor. In the British Embassy in the United States, some 26 per cent of locally engaged staff were performing senior managerial and other functions on behalf of the United Kingdom and were obviously engaged in the administration of the United Kingdom, which included its foreign relations. However, it was not just those performing senior managerial functions who were engaged in the administration of the United Kingdom: all locally engaged staff employed by the Foreign Secretary in the United States were Crown servants, and had the status to act as agents of the Government of the United Kingdom. They all worked in an environment where they either dealt with or might become aware of highly sensitive government information. They were all clearly working as public servants, working for the Government of the United Kingdom, a public entity. It followed that, in the submission of the Government, all of the locally engaged staff in the United States were engaged in the administration of the State for the purposes of Article 6 of Convention No. 98.

1291. Finally, always with regard to Convention No. 98, the Government maintained that it complied with its obligations under Article 4 of that Convention, to the extent that it might be held to apply and in respect of any members of staff to whom it applied. The Government considered that Article 4 of Convention No. 98 did not mandate collective bargaining between the Embassy and the union which was demanding formal collective bargaining. While the Embassy was eager to return to the constructive dialogue it enjoyed with the staff association (and the union) prior to the complaint, it was not prepared to consent to a formal collective bargaining arrangement and was not required to engage in such bargaining under the terms of any ILO Convention. In facilitating the union and staff association's activities and involving them in an open and consultative process on the new terms and conditions, the Embassy took every possible step to "encourage and promote" measures for voluntary negotiation. It was well established that the obligations under Convention No. 98 did not include a uniform system of compulsory collective bargaining. What it required was merely that measures be taken to encourage and promote machinery for collective bargaining. Further, the wording of Article 4 itself made clear both that the measures needed to be no more than was appropriate to national conditions and that this was a voluntary system – the Article referred explicitly to the machinery in question being for voluntary negotiation and the measures needed only be taken where necessary, implying a margin of discretion for the State party. It was the long-standing view of the Committee on Freedom of Association and the Committee of Experts that "nothing in Article 4 of Convention No. 98 place a duty on the Government to enforce collective bargaining, by compulsory means, with a given organization, an intervention which, as the Committee has already stated [in a previous case], 'would clearly alter the nature of such bargaining'" [Case No. 96 (1954), 13th Report, para. 137]. When faced with observations

against the United Kingdom by the British Trades Union Congress and the National Union of Journalists, the Committee of Experts concluded, as had the Committee on Freedom of Association, that conformity with Article 4 did not impose a duty to have in place machinery whereby employers can be obliged to negotiate with trade unions representing the staff imposed in any particular industry. To impose such an obligation would alter the voluntary nature of collective bargaining [78th Session, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), pp. 290–291]. Thus, nothing in Convention No. 98 required a government to impose, either on other employers or on itself as employer, a duty to recognize for collective bargaining purposes a trade union.

1292. Moreover, according to the Government, nothing in Conventions Nos. 87 or 98 conferred on the union the particular status which it was seeking as the sole representative of embassy staff. The Embassy had been willing to have discussions with the union and to consult with it in the ways described earlier.

1293. As the Embassy had little control over the budget allocated to it, and many other aspects of its ownership, it was impossible for the Embassy to agree to recognize an exclusive employees' union or to agree to binding collective bargaining. The Embassy had, however, taken measures within its control to promote the full development and utilization of machinery for consultations with its locally engaged staff; it had worked with the AUSES for over 50 years and had recently indicated its willingness to enter into a voluntary arrangement with the IFPTE. Moreover, the Embassy was eager to continue such dialogue with its employees and their representatives.

1294. The Government further noted that, to the extent that Convention No. 98 applies to the Embassy and that some or all members of the Embassy were excluded under Article 6 of that Convention, it might be that Convention No. 151 was relevant. The complainants had not raised Convention No. 151 in the complaint and the Government mentioned it solely for completeness and the avoidance of doubt. However, even Convention No. 151 contained an exemption for certain employees. Article 1(2) provided that the extent to which the guarantees in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations. The Government was prepared to accept for the sake of argument that Convention No. 151 could apply to embassy staff to whom Article 6 of Convention No. 98 applied. Even if that were so, Convention No. 151 did not provide a right to collective bargaining. Like Convention No. 98, Convention No. 151 only required 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 …". In addition, it gave the State party the option of employing alternatives to meet the obligation by referring to "of such other methods as will allow representatives of public employees to participate in the determination of these matters" (Article 7). Provisions which allowed the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall budgetary package were compatible with the Convention, provided they left a significant role to collective bargaining [General Survey on freedom of association and collective bargaining by the Committee of Experts on the Application of Conventions and Recommendations, 1994, paras 262 and 263]. Workers and their organizations should of course be able to participate fully and meaningfully in designing the overall bargaining framework. The Government believed this to have been the case with locally engaged staff and the union, and assured the Committee that this would continue to be so.

1295. Finally, the Government indicated with regard to the request for a direct contacts mission, that this would be unnecessary and wholly inappropriate.

1296. In a communication dated 25 September 2006, the Government provided additional information with regard to its position that locally engaged staff are public servants engaged in the administration of the State. The Government submitted a statistical table (see annex) and examples of the duties performed by locally engaged staff across the United States network, ranging from support staff at pay reference point one through to the most senior level positions at pay reference point ten. The Government also attached detailed job descriptions of a representative sample of locally engaged staff. The Government added that all these jobs (including those at lower reference points) involved access to Embassy buildings and facilities and might provide opportunities for hostile persons to infiltrate; accordingly, they were all subject to security clearance. Most job holders worked with or might become aware of highly sensitive government information, even those at low reference points (e.g. passport clerk at point two, passport examiner at point three, visits and administration officer, personal assistant to press secretary at point four) and this was obviously the case for all jobs at points five to ten inclusive. The duties of nearly all the job holders showed quite clearly that they were "engaged in the administration of the State" to the same extent as if they were working for the Government of the United Kingdom.

1297. Finally, with regard to the complainants' allegation that the Embassy management "responded to the employees' choice of representative by cancelling dues check-off", the Government denied that this was the case and indicated that prior to AUSES affiliating with the IFPTE, the Embassy deducted membership fees twice yearly from the salaries of staff who were members of AUSES. The last fees were deducted in December 2004. By the time the next fees would have been due to be deducted, AUSES had affiliated with IFPTE and was insisting as part of the recognition issue that the Embassy deduct union dues from all staff, regardless of whether they were members of the union. The Embassy declined to do so. Nothing in Convention No. 98 required a government to impose, either on other employers or on itself as an employer, a duty to recognize for collective bargaining purposes a trade union. Nor did it oblige an employer to agree to a check-off arrangement. However, setting aside the issue of recognition, the Government confirmed that it had no problem in principle with the Embassy making deductions from its payroll for AUSES/IFPTE members.

C. The Committee's conclusions

1298. *The Committee notes that the present case concerns allegations that the Embassy of the United Kingdom to the United States – hereinafter the Embassy – refused to recognize and negotiate with the trade union chosen by the locally engaged staff to represent them and unilaterally implemented changes in the terms and conditions of employment of locally engaged staff while it announced plans to set up a management-dominated "Staff Representative Council", inviting employees to go through the Council rather than their union.*

1299. *The Committee notes that, according to the complainants, the Embassy had recognized and bargained with the Association of United States Engaged Staff (AUSES) as the representative of locally engaged staff on terms and conditions of employment for almost 50 years. In a democratic process beginning in December 2004, a substantial majority of locally (United States) engaged staff joined the International Federation of Professional and Technical Employees (IFPTE) and chose it as their bargaining representative. Thus, the AUSES became Local 71 of the IFPTE. The embassy management responded to the employees' choice of representative by cancelling dues check-off and refusing to recognize*

and bargain with the AUSES/IFPTE Local 71. Instead, management acted unilaterally to implement several changes in terms and conditions of employment injurious to employees and launched a campaign to undermine, marginalize and de-legitimatize the employees' chosen representative.

1300. *In particular, according to the complainants, on 1 April 2005, the management unilaterally implemented new Terms and Conditions of Employment with changes in the terms and conditions of employment of locally engaged staff in relation to salaries, pensions, health insurance, sick leave, overtime pay and other matters central to the employment relationship, taking advantage of retrograde features of United States labour law (e.g. in the areas of health insurance, overtime and sick leave), while refusing to bargain with the locally engaged staff's chosen representative over the changes. The complainants attach various communications in which the Embassy expresses the view that it has no obligation under Convention No. 98 to collectively bargain with staff over changes to terms and conditions of employment (*Memorandum to Heads of United States Post *dated 11 March 2005) and categorically refuses to recognize and bargain with the union (letter dated 13 May 2005 by the Embassy Counsellor on Change Management and the Consul General). The arguments put forward for this refusal are, in particular, that Convention No. 98 does not deal with the position of public servants engaged in the administration of the State.*

1301. *In response to these objections, the complainants contend that the definition of public servants engaged in the administration of the State does not include locally engaged staff of an embassy as this staff do not make diplomatic or equivalent policy. Moreover, that most of the diplomatic staff posted to the Embassy are in fact represented by a United Kingdom public servants' union and are covered by a collective agreement which provides for bargaining over terms and conditions of employment (the Government confirms this point in its reply)*; a fortiori, *therefore, locally engaged staff should have the same rights.*

1302. *The complainants further note that the Embassy's negative response is at odds with the official position of the Foreign and Commonwealth Office (FCO) as expressed in a telegram and a letter by the Foreign Secretary dated 5 February and 17 March 2005 respectively, in which the Foreign Secretary indicates that "there is no reason in principle to prevent the Embassy in Washington from recognizing voluntarily the AUSES staff association and the IFPTE union" and suggests that "both sides sit down together to discuss the question of a voluntary agreement". The complainants assert that, instead of conforming with this position, the Embassy not only refused to recognize the union for collective bargaining purposes but also announced plans to set up a management-dominated "Staff Representative Council" and invited employees to go through the Council rather than their union (in this respect, the complainants quote the bulletin entitled* In the know: News about your pay and benefits from the HR Review Team *dated 31 March and 21 April 2005). This proposal was subsequently dropped, according to the complainants, but only in the context of the management's outright refusal to recognize and bargain with the AUSES/IFPTE (the complainants attach in this respect a letter from the embassy management dated 13 May 2005).*

1303. *The Committee notes that, in its reply, the Government indicates that the 10,000 locally engaged staff in British diplomatic posts are all employed by the Secretary of State for Foreign and Commonwealth Affairs. Their contracts of employment are governed by local law. Since 2003, responsibility for determining the best pay and conditions for local staff has been delegated to Heads of Post within the following constraints: arrangements must be consistent with local law, fall within the budget allocated by the parent department, be affordable and sustainable in the long term and comply with Treasury rules on local staff pay. Finally, they should have regard to market forces. The Government adds that, whereas in the past there was in British Embassies worldwide a significant distinction*

between the functions fulfilled by United Kingdom-based and locally engaged staff, this position changed considerably in the last 15 years. Within the United States network, locally engaged staff has risen to senior managerial positions (including the heads of finance and human resource management at the Washington Embassy) and taken on traditional diplomatic roles previously filled by United Kingdom-based staff. There are, for example, locally engaged second secretaries working in the political section of the Embassy.

1304. *With regard to the issue of relations between the Embassy and the staff association, the Committee notes that, according to the Government, the Embassy has always sought to involve its local staff in decision-making and to consult them on issues affecting their employment. Embassy management had maintained for almost 50 years a close working relationship with the AUSES leadership. While there was never any formal process of negotiation with the association, they were consulted on any changes affecting employment. When the AUSES affiliated with the IFPTE, the Embassy wanted to continue this relationship and said so publicly. The Government attaches in this respect a letter of 31 March 2005 (see below).*

1305. *With regard to the factual background to the dispute, the Committee notes that, according to the Government, in early 2004 the Embassy embarked on a major overhaul of its employment policy in order to modernize employment practices so as to be more consistent with employment conditions in United States organizations. The Ambassador's note to staff of 1 April 2004, attached to the Government's reply, provides that:*

> *Heads of United States Posts and the Washington Board of Management have decided to review the terms and conditions of employment of locally engaged staff in the United States. We believe that the present arrangements do not represent the best professional employment practices for our staff, and that we need a new approach. This note describes the principles that will guide this new approach, how the new arrangements will be put in place, and how you can be involved. … Consultation will be an important part of how the [HR] team operates. The team will have a rolling programme for consulting AUSES and other staff on the emerging options. They will draft and consult on a revised staff handbook setting out terms and conditions of employment. … You are welcome individually and collectively to offer advice at every stage. We are setting up an electronic suggestion box to which people can send comments and suggestions on this or any other subject.*

According to the Government, pursuant to this note, the embassy management continued the process of consultation and communication with staff throughout the year-long review. The AUSES, its members and other locally engaged staff were given every opportunity to contribute to the review (anonymously if they wished) and emerging findings were published for all staff to see and comment upon. Meetings took place with the AUSES virtually every month from March 2004 to July 2005.

1306. *The Government also indicates that a proposal to set up a Staff Representative Council was made to address staff concerns in order to improve communication between staff and management and was abandoned in the face of opposition from staff, particularly the staff association. The new package introduced in April 2005 brought the Embassy more into line with United States employment law and practice and offered a competitive package of pay and benefits to recruit, retain and motivate the most professional possible cadre of locally engaged staff. The Government expresses the view that the union's position, as outlined in the complaint, fails to recognize that many of the changes implemented provide the majority of local staff with an improved benefits package in relation to United States law; the union specifically criticizes changes to the health benefits offered to staff, failing to recognize that the new system is fairer to all staff, unlike the old one which offered anomalous advantages to staff who had been with the Embassy for many years.*

1307. *The Committee also notes that, according to the Government, following the AUSES's affiliation with the IFPTE (after December 2004), the union called for the abandoning of the new policies and demanded that the Embassy formally negotiate the modifications through a collective bargaining process. The union was insisting on formal recognition which implied collective bargaining rights over any changes affecting the terms and conditions of locally engaged staff and exclusive rights to communicate with management over employment issues, including mandatory union involvement in disciplinary cases. The Embassy was not prepared to accept these demands. It was however prepared to discuss with the union, on a voluntary basis, pay and other employment matters (the Government attached letters dated 13 May and 2 August 2005 in this respect). The Government indicates that this is in conformity with the letter by the Foreign Secretary referred to by the complainants which actually said that there was no reason of principle to prevent the Embassy from recognizing voluntarily the AUSES staff association and the IFPTE union. The union, as a representative (not the representative) could sit down with the Embassy to discuss a voluntary agreement. There had been some such discussions and the Embassy was willing to continue them. However, the attempt by the Embassy to establish a voluntary framework for consultations had been set aside with the submission of the present complaint by the AUSES/IFPTE.*

1308. *According to the Government, the Embassy never agreed to compulsory collective bargaining with the union, nor was it obliged to do so, for a number of legal and practical reasons. In the first place, the Government states that, where it acts as employer of locally engaged embassy staff outside its own territory, the contracts of employment are governed by the law of the receiving State and so the Government is bound to comply with the employment law of the receiving State (according to the Government, this was confirmed in a recent decision by the Appellate Committee of the House of Lords:* Serco *v.* Lawson *[2006] UKHL 3, paragraph 39). However, the US Labor Relations Act specifically exempts federal, state and local governments from its provisions so there is no legal framework governing the standards by which the Embassy should approach its dealings with local staff. In general, the AUSES/IFPTE is seeking protection in excess of that provided in United States labour law, the reason for which it chose not to pursue its case through the National Labor Relations Board (NLRB) in the United States.*

1309. *In this respect, the Committee recalls the conclusions reached in a similar case concerning the locally recruited staff of the Embassy of South Africa in Ireland [Case No. 2197, 334th Report, approved by the Governing Body at its 290th Session (May–June 2004), paras 95-131]. The Committee recalls that the Government of the sending State (South Africa) had argued that the relationship between an embassy as employer and its locally recruited personnel is governed by the law of the country in which the embassy is situated. The Government of the receiving State (Ireland) had informed the CFA that the question of whether local staff was subject to the law of the receiving State or, on the contrary, was vested with immunity, had not been settled (in Ireland) and depended on the specific functions performed by such staff. In that context, the Committee had considered that, "while the question of whether the law of the receiving State applies to the locally recruited personnel in a given embassy is dependent on a variety of circumstances that can only be determined on a case-by-case basis, the application of the fundamental international principles of freedom of association embodied in the ILO Constitution and the Declaration of Philadelphia are applicable to all member States." "In view of this principle which binds ILO member States, it would be anomalous to abandon the locally recruited personnel, in this case, at the international level, merely because of an ambiguous situation relevant to the application of national law. Thus, while the national laws applicable to the locally recruited personnel have yet to be determined, the Committee, in the interests of justice, may look to the authority relevant to the employer, the Embassy, which in this case is clearly the Government, in light of the uncontested sovereignty it maintains over its government officials and employees representing it*

around the world" [op. cit., paras 106–107]. The Committee therefore concluded that "if there has been a violation of international labour standards or principles relative to freedom of association and collective bargaining in this case, it is the South African Government [the sending State] that is most assuredly in a position to take the necessary measures to address such a violation" [op. cit., para. 108].

1310. *The Committee notes that the Government questions the Committee's previous decision in Case No. 2197 on the ground that, although the Committee had decided that Conventions Nos. 87 and 98 were applicable to locally recruited personnel, the basis on which this decision was reached was not clear. According to the Government, if the Committee was applying a "jurisdictional" approach rather than a "territorial" approach, it should be respectfully submitted that this was not the correct approach. The obligation of a State party to an ILO Convention is to give effect to its provisions in its own territory. The Government refers to articles 21 and 22 of the Vienna Convention on Diplomatic Relations and articles 30 and 31 of the Vienna Convention on Consular Relations in support of the argument that the premises of a diplomatic or consular mission do not form part of the territory of the sending State. It adds that, in contrast to other human rights instruments, the ILO Constitution and Conventions do not contain a jurisdictional clause extending protection to those "within the jurisdiction of" a contracting party which would extend Convention rights to acts occurring outside the territory of the State concerned, including to the acts of diplomatic and consular agents outside the territory of the State. Thus, the Government is not under any obligation to give effect to ILO Conventions in diplomatic or consular missions with regard to locally engaged staff as the appropriate criterion in this respect is territorial and not jurisdictional. According to the Government, ILO Conventions apply throughout the territory of a State but do not extend to acts occurring outside the territory of the State concerned, including to the acts of diplomatic and consular agents outside the territory of the State.*

1311. *The Committee notes that by referring to the articles of the Vienna Conventions on Diplomatic and Consular Relations, the Government raises an important issue which is that of the sovereign immunity of the officers of the embassy, consulate and other offices of a State, in carrying out their functions. The Committee is of the view that the fact that the officers of the embassy, consulate, etc., are covered by immunity in the exercise of their functions, including the exercise of functions as employer of locally engaged staff, indicates two things: first, that it is the government of the sending State that exercises sovereign authority over the embassy, consulate, etc., including its staff; in particular, even if local law is applicable to locally engaged staff, it cannot be enforced against the embassy or consulate authorities, as employers, due to their immunity (thus, it is questionable whether the locally engaged personnel might indeed have recourse to the NLRB against the embassy); and second, that the government of the sending State is in the best position, as employer of the locally engaged staff, to take the necessary measures to ensure that fundamental principles relative to freedom of association and collective bargaining are observed with regard to such staff. As a result of the above, the Committee has difficulty accepting the Government's argument that it has no obligation to give effect to fundamental principles on freedom of association and collective bargaining in embassies, consulates and other offices, given that it is the Government that exercises sovereign authority over the offices in question and it is the Government, in its quality as employer, that is in a position to ensure the effective implementation of the principles in the offices in question.*

1312. *The Committee wishes to emphasize 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 [**Digest of decisions and principles of the Freedom of Association***

***Committee**, fifth edition, 2006, para. 15]; all ILO member States are therefore expected to give effect to these principles as expressed and developed in the fundamental Conventions on freedom of association and collective bargaining and this duty extends, in the Committee's view, to the embassies, consulates and other offices, as an integral part of the public administration. The Committee observes that this is reflected in the Foreign Secretary's communication dated 5 February 2005 which indicates that all diplomatic posts of the United Kingdom "must respect the core labour standards [based on the eight ILO core Conventions] in our own working practices". Thus, even if the Committee were to accept the Government's argument that ILO Conventions were not applicable to embassies because they do not form part of its territory, the Committee considers that this argument does not apply to the fundamental principles of freedom of association, respect for which it has been mandated to promote. The Committee will therefore proceed with its examination of the Government's further arguments relating to the substantive application of the freedom of association Conventions in so far as they are relevant to the fundamental principles of freedom of association.*

1313. *The Committee further notes that the Government maintains that, even if ILO Conventions on freedom of association and collective bargaining are found to be applicable, it is still not in breach of any obligations under the ILO Conventions as it is under no obligation to engage in collective bargaining with the AUSES/IFPTE or to recognize this union for collective bargaining purposes, for the following reasons: (1) locally engaged staff of the Embassy are public servants engaged in the administration of the State falling under the exclusion of Article 6 of Convention No. 98; (2) in respect of any member of staff who might not fall within this exclusion, Article 4 of Convention No. 98 does not mandate collective bargaining or place any duty on the Government to enforce collective bargaining by compulsory means, as it refers explicitly to machinery for voluntary negotiation; and (3) by facilitating the union and staff association's activities and being ready to engage in constructive dialogue (instead of formal collective bargaining), the Embassy took every possible step to "encourage and promote measures for voluntary negotiation" in accordance with the provisions of the Convention; it will therefore continue to communicate directly with staff and there is no question of granting exclusive rights to a union in this respect; it has offered to engage in discussions about a voluntary agreement and is prepared to discuss with the union, on a voluntary basis, pay and other employment matters as indicated in the letters of 17 March and 13 May 2005. The Government also considers that it has not violated Convention No. 87 as it has never interfered in any sense with freedom of association or the right to organize and has allowed the AUSES/IFPTE to recruit members, organize meetings, communicate with its members, etc.*

1314. *With regard to whether Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining (point (2) raised by the Government above), the Committee recalls that Article 4 of Convention No. 98 requires measures to encourage and promote the full development and utilization of machinery for voluntary negotiation with a view to the regulation of terms and conditions of employment by means of collective agreements; the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners is a fundamental aspect of the principles of freedom of association. Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining. Thus, nothing in Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining by compulsory means with a given organization; such an intervention would clearly alter the nature of bargaining [**Digest**, op. cit., paras 925-927]. At the same time, the Committee considers that, whereas governments are not under a duty to enforce collective bargaining by compulsory means, they are under a duty to encourage and promote voluntary collective bargaining in good faith between the parties, including the government itself in the quality of employer. The*

*Committee emphasizes the importance which it attaches to the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations. 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; genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties [**Digest**, op. cit., paras 934-936].*

1315. *The Committee notes in this respect that, according to the Government, the AUSES/IFPTE adopted an uncompromising attitude by insisting on formal recognition which implied collective bargaining rights over any changes affecting the terms and conditions of locally engaged staff and exclusive rights to communication with management over employment issues – something that the Government would not accept. The Committee notes that, according to the complainants, the Embassy should recognize the union as the exclusive representative for the bargaining unit, as long as AUSES/IFPTE is the majority-selected union and the Embassy purports to employ its locally engaged staff on the basis of United States law which in fact establishes an exclusive representation system both in the private and public sectors. The Committee recalls that, while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach an agreement [**Digest**, op. cit., para. 938]. With regard to the issue of exclusive representation in particular, the Committee recalls that systems of collective bargaining with exclusive rights for the most representative trade union and those where it is possible for a number of collective agreements to be concluded by a number of trade unions within a company are both compatible with the principles of freedom of association [**Digest**, op. cit., para. 950].*

1316. *Moving on to the question of whether collective bargaining was in fact encouraged and promoted (point (3) above), the Committee takes due note of the Government's statement that measures were taken by the Embassy in order to allow the union to recruit members, organize meetings, use official means of communication to communicate with staff and use facilities to organize meetings. Moreover, the Committee takes due note of the Government's reply to the allegation that the proposal for setting up a staff council, which was initially promoted, was dropped in the light of opposition from the union. It also notes, however, that the Embassy cancelled the dues check-off once the AUSES affiliated with the IFPTE on the ground that the union insisted, as part of the recognition issue, that the Embassy deduct union dues from all staff. The Committee recalls in this respect 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 [**Digest**, op. cit., para. 475]. The Committee does, however, consider it inconsistent with the principles of freedom of association to unilaterally extend the check-off facility to all staff without a collective agreement between the parties to that effect.*

1317. *Furthermore, the Committee observes that the Embassy repeatedly and categorically refused to engage in negotiations with the union, proposing to establish a framework for consultations instead. For instance, the Committee notes that in the letter dated 13 March 2005, the embassy management indicated that:*

> *… it was not realistic to expect the Embassy to engage in formal collective bargaining over terms and conditions of employment with AUSES or any other group … We would be willing to commit to discussing any proposed changes with you in advance, before any action is taken. However, we would reserve the right, where there are compelling business reasons, to make the changes we deem necessary even if we have not been able to reach agreement with you. …*

As I said previously, the result of our [proposed] discussions is not going to be a "bargaining agreement" or "final package".

The Committee also notes from the letter dated 31 March 2005 that the Embassy's offer for voluntary discussions did not constitute in any way an invitation to collective bargaining as it focused mainly on union involvement in individual grievances and was based on language which avoided any allusion to negotiating a collective agreement, or renegotiating the unilateral decision to change the terms and conditions of employment of locally engaged staff. In particular, the letter indicated, among other things, that "there are compelling business reasons why the Embassy must introduce the new handbook of employment policies on 1 April 2006" but that the Embassy did "want to continue the dialogue with the staff and their representatives on our employment policies". Recognizing that the Embassy does not "currently have a forum for the exchange of ideas and concerns on employment issues between staff, their representatives and management", they "would like the staff association and union to play an active part in these discussions" and were pleased to discuss "the possible terms of a voluntary agreement between us to recognize your role. In particular, we believe that there is a good deal of common ground between us on the role of the union in grievance and disciplinary procedures".

1318. *The Committee observes that the question of whether voluntary consultations can be envisaged as an alternative to negotiations is linked to the question of whether locally engaged staff are public servants engaged in the administration of the State falling under the exclusion of Article 6 of Convention No. 98 (point (1) raised by the Government above). The Committee notes that, according to the complainants, the definition of public servants engaged in the administration of the State does not reach locally engaged staff of an embassy as this staff do not make diplomatic or equivalent policy. The Committee also notes however that, according to the Government, many of the Embassy's locally engaged staff are clearly engaged in identical activities to their United Kingdom-based colleagues. There are locally engaged second secretaries working in the political section of the Embassy, reporting on sensitive political issues with full security clearance and supervising United Kingdom-based administrative staff. The Committee also notes that, according to the Government, some locally engaged staff hold senior management positions (head of finance and human resource management) and that 26 per cent of locally engaged staff perform senior managerial and other functions. The Government considers that these are therefore obviously engaged in the administration of the State, which includes its foreign relations. However, it is not just those performing senior managerial functions who are engaged in the administration of the State: all locally engaged staff employed by the Foreign Secretary in the United States are Crown servants, and have the status to act as agents of the Government of the United Kingdom. They all work in an environment where they either deal with or might become aware of highly sensitive government information and are subject to security clearance. They are all clearly working as public servants for the Government of the United Kingdom. It follows that, in the submission of the Government, all of the locally engaged staff in the United States are engaged in the administration of the State for the purposes of Article 6 of Convention No. 98. The Committee further notes that, in a subsequent communication, the Government provided a statistical table (see annex) and detailed job descriptions of a representative sample of locally engaged staff.*

1319. *The Committee observes that the tasks of locally engaged staff as communicated by the Government include building-related maintenance, property management and procurement, administrative assistance to various departments as well as lobbying, consultancies and advisory services (at various pay levels) in the following areas: human resources (including comparative analyses of the United States-United Kingdom systems in the areas of pensions, welfare and labour market policy); trade and investment; United Kingdom-United States business relations; United States regulations affecting United*

Kingdom economic interests; environmental policy; and science and innovation. With the possible exception of the vice-consul and passport examiner, the Committee has difficulty considering that the above employees constitute, as a whole, public servants engaged in the administration of the State given that the tasks performed by them do not seem to involve the exercise of state authority. Furthermore, the Committee has difficulty in understanding the justification for granting locally engaged staff lesser collective bargaining rights in relation to those enjoyed by their United Kingdom-engaged colleagues who are, according to the Government, occupied in identical activities and represented by British trade unions and covered by collective agreements, regardless of whether they are engaged in the administration of the State or not.

1320. *The Committee would like to emphasize that all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of the terms and conditions of employment in the public service [**Digest**, op. cit., para. 886]. The mere fact that public servants are white-collar employees is not in itself conclusive of their qualification as employees engaged in the administration of the State. If this were not the case, Convention No. 98 would be deprived of much of its scope [**Digest**, op. cit., para. 892]. Similarly, the Committee does not consider that the mere fact that public servants are subject to security clearance vests them with the quality of employees engaged in the administration of the State. The Committee thus considers that the Embassy should negotiate with the AUSES/IFPTE in respect of the terms and conditions of employment of the locally engaged staff. The Committee therefore requests the Government to take all necessary measures with a view to encouraging and promoting negotiations between the Embassy, consular missions and other offices of the United Kingdom in the United States, on the one hand, and the AUSES/IFPTE on the other, with a view to reaching an agreement on the nature of their relationship and on the terms and conditions of employment of locally engaged staff, and to keep it informed of developments.*

The Committee's recommendation

1321. ***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 all necessary measures with a view to encouraging and promoting negotiations between the Embassy, consular missions and other offices of the United Kingdom in the United States, on the one hand, and the AUSES/IFPTE on the other, with a view to reaching an agreement on the nature of their relationship and on the terms and conditions of employment of locally engaged staff, and to keep it informed of developments.***

Annex

Statistical table and job examples concerning United States locally engaged staff

Pay reference point	Number of locally engaged staff	Percentage of locally engaged staff	Job examples
1	26	5	Kitchen porter Temporary accommodations assistant
2	34	6	Passport clerk Receivables/administrative support clerk General maintenance worker
3	121	21	Estates assistant Passport examiner Benefits/human resources assistant
4	86	15	Visits and administration officer Personal assistant to the press secretary Property manager
5	126	22	Recruitment/human resources generalist Business development associate – (Homeland Security) Assistant public affairs officer
6	46	8	Assistant director of the Estates Services Group Procurement officer Vice consul of the Passport Office
7	42	7	Policy adviser, business relations and regulatory affairs Senior human resources generalist
8	61	11	United Kingdom trade and investment officer Global issues science and innovations officer External relations manager, Northern Ireland Bureau
9	19	3	Senior work, pensions and education adviser
10	14	2	Head of Human Resources
Total	575	100	

CASE NO. 2466

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

Complaint against the Government of Thailand presented by the Thai Industrial Gases Labor Union (TIGLU)

Allegations: The complainant alleges that the employer has made several attempts to destroy it and to prevent collective bargaining through various acts of anti-union discrimination, including: the dismissal of four key trade union leaders one month after the issuance of the union's registration, prohibiting members of the negotiation team from entering company premises, the refusal to pay a bonus to trade union members and representatives, and the filing of lawsuits by the employer against trade union leaders to counter decisions of unfair dismissal and reinstatement orders previously made by labour and human rights courts

1322. The complaint is contained in a communication from the Thai Industrial Gases Labor Union (TIGLU) dated 10 September 2005. The complainant submitted additional information in a communication of 19 June 2006.

1323. The Government submitted its observations in communications dated 17 July and 27 October 2006.

1324. Thailand has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) or the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

A. The complainant's allegations

1325. In its communication of 10 September 2005, the complainant states that the employer, Thai Industrial Gases (Public) Co. Ltd, committed several acts to destroy the union and frustrate collective bargaining, including the following:

– On 13 and 25 November 2004, the employer prohibited the union leaders from carrying out union-related activities and prevented nine union representatives engaged in the negotiation of a collective agreement from entering the company. As a result, negotiations came to a halt.

– On 25 November 2004, the employer chose not to pay bonuses to union members and those involved in negotiating a collective agreement. Consequently, some

representatives resigned from the negotiation team in order to receive the bonus, and negotiations were suspended.

– On 14 December 2004, the employer terminated the union's President, Vice-President, Treasurer, and one union organizer; the employer later accused the President, Treasurer and organizer of theft for having photocopied union documents to be used in the collective agreement negotiations. Members of the negotiating team lost confidence following the firing of the union President, and negotiations collapsed. The complainant states that membership declined and recruitment had become almost impossible due to fears of dismissal. It also indicates that, due to the termination of their Treasurer, the union was forced to suspend recruitment as memberships could not be completed until workers paid their union dues.

– On 7 December 2004, a request was made to the National Human Rights Committee for justice and urgent help. On 28 January 2005, the union President and Treasurer filed a complaint with the Labour Relations Committee; the union's Vice-President filed a similar complaint with the Labour Relations Committee on 1 February 2005. The National Human Rights Committee issued its report on 25 April 2005, concluding that the dismissal of the President and Treasurer was wrong and unfair. The Labour Relations Committee dismissed the Vice-President's complaint by an order of 3 June 2005, but ordered reinstatement with compensation pay for the President and Treasurer by an order of 13 June 2005.

– On 1 July 2005, the employer filed a lawsuit against the union President and Treasurer on charges of theft. The employer had commenced this action, the complainant states, in order to derail the decisions of the Labour Relations Committee and the National Human Rights Commission, which had handed down decisions finding that employees whose contracts were terminated by the employer were unfairly dismissed and ordering reinstatement. On the same date the employer also appealed the 13 June 2005 decision of the Labour Relations Committee to the Central Labour Court.

– On 11 July 2005, the union President and Treasurer received a notice from the employer indicating that they could not be reinstated, as per the Labour Relations Committee's order, until a decision on the employer's appeal to the Central Labour Court was handed down.

1326. TIGLU provides additional information in support of its complaint in a communication of 19 June 2006, which includes the following:

– On 19 December 2005, the provincial Criminal Court of Sara Buri dismissed the case brought by the employer against the union President and Treasurer for theft; the employer appealed the Court's decision.

– On 14 March 2006, the Central Labour Court dismissed the charge filed by the employer to revoke the order of the Labour Relations Committee. The judgement called for the employer to comply with the Labour Relation Committee's order, but the employer instead lodged an appeal with the Supreme Court on 20 March 2006. On 8 May 2006, the union filed a request to oppose the appeal lodged by the employer.

– From 14-17 March 2006, employees in three of the employer's branch operations were told to quit the union upon pain of dismissal. A total of four employees subsequently gave up membership in the union.

– On 22 May 2006, the complainant submitted a list of 19 demands to the employer. Negotiations over these demands took place on 25 May 2006, but no agreement was concluded; the next round of negotiations was to be held on 23 June 2006.

B. The Government's reply

1327. In its communication of 17 July 2006, the Government indicates that, with respect to the complaint filed by the union President and Treasurer – Mr Chatchai Paiyasen and Mr Chatri Jarusuvanwong, respectively – on 28 April 2005 the Labour Relations Committee of the Department of Labour Protection and Welfare issued Order No. 54-55/2005; the said Order found that the two union officers had been unfairly dismissed in violation of section 121 of the Labour Relations Act (and, in particular, for having been collective bargaining representatives and founders of the union) and called for their reinstatement, with back pay, as well as the granting of their annual salary raises and bonuses in keeping with the normal conditions of employment.

1328. In its 27 October 2006 communication, the Government states that, on 18 March 2006, the employer appealed to the Supreme Court to overturn the 14 March 2006 decision of the Central Labour Court upholding Order No. 54-55/2005 of the Labour Relations Committee. The Government adds that the appeal was still before the Court and that it was unable to specify when a decision would be handed down.

1329. As regards the charges of theft brought against Mr Paiyasen and Mr Jarusuvanwong, the Government states that the provincial Criminal Court of Sara Buri dismissed the case and that the employer had appealed the Court's decision; the case was still under appeal.

C. The Committee's conclusions

1330. *The Committee recalls that the present case involves allegations of acts of anti-union discrimination, including dismissal, threats of contract termination to pressure employees to resign from the union, and other acts intended to frustrate collective bargaining. According to the complaint, four union officials were dismissed due to their membership in the union, whereas four other employees were pressured by the employer into withdrawing their union membership upon pain of termination. The complainant is of the view that these acts demonstrate the employer's intent to destroy the union and adds that they have had the further effect of making recruitment in the union virtually impossible. The Committee notes that the Government does not refute these allegations and, with respect to the dismissal of the union's President and Treasurer, confirms that the Labour Relations Committee found, on 28 April 2005, that the two union officials had been unfairly dismissed; the Labour Relations Committee's order of reinstatement with back pay was subsequently upheld by the Central Labour Court on 14 March 2006.*

1331. *In the light of the above information, the Committee cannot but conclude that the dismissal of the union's President and Treasurer, as well as the seeking of union resignations on pain of termination, constitute acts of anti-union discrimination. The Committee recalls in this regard that no person should be dismissed or prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities, and it is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment [see* ***Digest of decisions and principles of the Freedom of Association Committee****, fifth edition, 2006, para. 770]. Noting that the dismissals referred to above concern four union officials (the President, Vice-President, Treasurer and a union organizer), the Committee stresses that one of the principles of freedom of association is that workers should enjoy adequate protection against all acts of anti-union discrimination*

in their employment, such as dismissal, demotion, transfer or other prejudicial measures. This protection is particularly needed 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 considers that the guarantee of such protection in the case of trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom [see ***Digest****, op. cit., para. 799]. Recalling that the Government is responsible for preventing all acts of anti-union discrimination, the Committee accordingly requests the Government to take steps to ensure the reinstatement of these union officials, with the payment of back wages, as well as to ensure that those employees who had resigned from the union may resume their membership in the union free of the threat of dismissal or any other form of reprisal. While observing that the employer has appealed the 14 March 2006 decision of the Central Labour Court which upheld Order No. 54-55/2006 of the Labour Relations Committee finding that the union President and Treasurer had been unfairly dismissed, the Committee expects that the Government will ensure the reinstatement of these two union officials. It requests the Government to keep it informed of developments in this regard and to transmit a copy of the Supreme Court judgement as soon as it is handed down.*

The Committee's recommendation

1332. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendation:***

Recalling that the Government is responsible for preventing all acts of anti-union discrimination, the Committee requests the Government to take steps to ensure the reinstatement of the four dismissed union officials of Thai Industrial Gases Labor Union, with the payment of back wages, as well as to ensure that those employees who had resigned from the union may resume their membership in the union free of the threat of dismissals or any other form of reprisal. While observing that the employer has appealed the 14 March 2006 decision of the Central Labour Court which upheld Order No. 54-55/2006 of the Labour Relations Committee finding that the union President and Treasurer had been unfairly dismissed, the Committee expects that the Government will ensure the reinstatement of these two union officials. It requests the Government to keep it informed of developments in this regard and to transmit a copy of the Supreme Court judgement as soon as it is handed down.

CASE NO. 2365

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

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

Allegations: The complainant organization alleges the deportation of and refusal of entry to foreign trade unionists collaborating with the ZCTU; the sponsoring of a rival faction within the ZCTU in its efforts to undermine the ZCTU leadership; breaking up ZCTU meetings; raiding ZCTU headquarters and unlawfully seizing union property; launching inquiries into allegations of financial malpractice to harass the union; and several instances involving the arrest, detention, and beating of ZCTU members and officers – many of which were committed in the course of suppressing a demonstration organized by the ZCTU on 13 September 2006

1333. The Committee has already examined the substance of this case on three occasions, most recently at its June 2006 meeting, where it presented an interim report to the Governing Body [see 342nd Report, paras 1040–1053, approved by the Governing Body at its 296th Session].

1334. The complainant submitted additional information in support of its complaint in a communication dated 28 September 2006. The Government provided its additional observations in communications dated 6 September, 14 September, 1 October and 17 October 2006.

1335. Zimbabwe has ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135).

Background

A. Previous examination of the case

1336. In its previous examination of the case, the Committee made the following recommendations [see 342nd Report, para. 1053]:

(a) The Committee strongly urges the Government to be more cooperative in the future.

(b) The Committee strongly urges the Government to keep it informed on developments concerning the dismissal of 56 workers at the Netone company, and to provide it with any judgement handed down in this respect.

(c) The Committee firmly urges the Government once again to keep it informed of developments on the situation at Zimpost and at TelOne company, and to provide detailed information on the reasons for the arrest of the following trade union leaders and members: Mr Sikosana, arrested in Bulawayo on 11 October 2004, and six other union members arrested in Gweru; Messrs. Mparutsa, Mereki and Kaditera, arrested in Mutare; Messrs. Marowa, Mhike, Nhanhanga and Chiponda, arrested on 6 October 2004; Messrs. Khumalo, Ngulube and Munumo, arrested on 11 October 2004.

(d) The Committee firmly urges the Government to provide it with a copy of the judgement handed down against Mr Choko and eight other trade unionists, for their participation in a demonstration on 18 November 2003 in Bulawayo.

(e) The Committee urges the Government to ensure that Mr Takaona is rapidly reinstated in his functions at Zimpapers, or in an equivalent position, without loss of pay or benefits and to keep it informed of developments in this respect.

(f) The Committee firmly urges the Government to encourage the employer to reconsider the transfer decision affecting trade union leader Mr Mangezi, with a view to permitting his return to his initial workplace in due course, if he so desires. It requests the Government to keep it informed of developments in this respect.

(g) The Committee reiterates its deep concern with the extreme seriousness of the general trade union climate in Zimbabwe, and once again calls the Governing Body's special attention to the situation.

(h) The Committee requests the Government to accept a direct contacts mission.

B. New allegations

1337. In its communication of 28 September 2006, the ICFTU submitted additional information referring primarily to acts of intimidation, harassment, and violence against trade union officials and trade unionists that occurred from February 2005 to September 2006.

Update on the 5 August 2005 arrests of four trade union leaders

1338. With respect to the arrest of four leaders from the Zimbabwe Congress of Trade Unions (ZCTU) in Gweru on 5 August 2004 (Lucia Matibenga, ZCTU Vice-President; Wellington Chibebe, ZCTU Secretary-General; Sam Machinda, Vice-Chairperson, ZCTU central region; and Timothy Kondo, ZCTU Advocacy Officer), which the complainant had referred to in a previous communication, the complainant now states that Ms Matibenga, Mr Machinda, and Mr Kondo's cases were heard on 3 November 2004 and the charges against them subsequently withdrawn. As regards the case against Mr Chibebe, it was dismissed for lack of evidence.

Interference by the authorities in the union's international cooperation activities

1339. The complainant cites several instances aimed at obstructing international trade union cooperation, including the harassment and deportation of foreign trade unionists. On 9 February 2005, two South African trade union educators, Bobby Marie and Vichemina Prout, were deported by Zimbabwean immigration officers. Both were in Zimbabwe at the request of the Southern African Trade Union Co-ordinating Council (SATUCC) to discuss with the ZCTU the issue of establishing a trade union school for workers in southern Africa. Upon arriving in Harare, they were told by immigration officers that all trade

unionists needed "security clearance letters" from the Ministry of Labour. As they had none, they were sent back on the same flight.

1340. On 29 October 2005, two representatives from the United Federation of Danish Workers (3F) received information that a team had been sent to beat them up during their visit to the Federation of United Clothing, Textiles and Leather Workers of Zimbabwe (FUCTLWZ). The complainant states that the two officials, Arne Skov Andersen and Silva Mulambo from 3F's regional office in Maputo, Mozambique, had arrived on 26 October 2005 to plan a new phase of cooperation with the FUCTLWZ; they quickly left the country, however, upon being informed that a team from the Zimbabwean Central Intelligence Organization (CIO) was being dispatched to "deal with them".

1341. On 13 December 2005, police at Harare International Airport confiscated the passport of Raymond Majongwe, General Secretary of the Progressive Teacher's Union (PTUZ) and a member of the ZCTU, who had returned from an ILO HIV/AIDS workshop in Nigeria. Majongwe was said to be on the Government's list of "sell-outs", whose passports the police were under orders to confiscate to prevent them from travelling abroad. Although Majongwe's passport was returned to him following an intervention by the organization "Zimbabwe Lawyers for Human Rights" the complainant maintains that the confiscation is yet another example of the Government's harassment of trade unionists and obstruction of international solidarity between Zimbabweans and foreign trade unionists.

1342. On 1 March 2006, South African labour activist Pat Horn of the organization "Street Net" was deported from Zimbabwe. She was to facilitate an educational event at the ZCTU Silver Jubilee School. On 20 March 2006, the Dutch consultants Bagani Ngeleza and Jeff Handmaker were deported. They were working for the Netherlands Trade Union Confederation, Federatie Nederlandse Vakbeweging (FNV), and were to evaluate a ZCTU programme funded by the FNV.

1343. The complainant states that Ms Alice G. Siame, a Norwegian Confederation of Trade Unions (LO Norway) consultant for Africa and a Zambian national, entered Zimbabwe on 16 May 2006 but was then escorted by force to Harare airport, where she stayed overnight, and was put on a plane to Johannesburg, South Africa, the following morning. The LO Norway's programme officer for Africa, Nina Mjonberg, was also denied entry under article 31(1)(b) of the Immigration Act and forced to return on the same plane she arrived in. The trade unionists Jan Mahlangu from South Africa and Wiep Basie from Holland were also denied entry, as was Zwelinzima Vavi, the General Secretary of the Congress of South African Trade Unions (COSATU) (a South African affiliate of the ICFTU), who was invited as a guest of honour to the ZCTU Congress. The complainant adds that Mr Vavi was not only denied entry but also labelled a security threat and declared persona non grata, permanently preventing him from entering Zimbabwe.

1344. On 22 September 2006, on the International Day of Action against the torture that took place on 12 and 13 September, the Zimbabwe Government refused to allow a delegation of United States trade union leaders into Zimbabwe to meet with injured leaders of the ZCTU. A four-person labour delegation of the AFL-CIO constituency group, the Coalition of Black Trade Unionists led by AFL-CIO Vice-President, William Lucy, was denied entry into Zimbabwe by government officials and forced to return to South Africa.

Government interference in ZCTU affairs to oust the union's leadership

1345. The complainant states that throughout 2005 the ZCTU and its leadership were continually harassed by the Government, both openly and through the use of "agents provocateurs"

who attempted to oust the existing ZCTU leadership. The ICFTU alleges that there were press reports stating that sources from inside the CIO had confirmed that it was planning to destabilize the ZCTU by creating internal strife and replacing its internal existing leadership through paying leaders from ZCTU affiliates to demand that the leadership be replaced. Those sources had reportedly also stated that it would not allow the current ZCTU leadership to stay.

1346. According to the complainant, at the beginning of March 2005, a series of articles started to appear in the press, quoting disgruntled leaders whose unions were affiliated to the ZCTU. The said leaders accused the ZCTU leadership of corruption, fraud, and of taking decisions without consulting the ZCTU membership. On 19 March, three dissenting trade union leaders of ZCTU affiliates disrupted a ZCTU Executive Council meeting in Harare; they organized a group of 40 demonstrators, who charged the ZCTU leadership with mismanaging union affairs and called for their resignation. The group was led by Nicholas Mazarura and Kumbirayi Kudenga of the Zimbabwe Construction and Allied Workers' Union (ZCAAAWU) and a group that called itself the Aggrieved Affiliates Workers' Union (AAAWU). The complainant states that the ZCTU leadership informed it that it was certain that the Government was behind these attacks, and that some of the disgruntled leaders had suddenly been able to pay off financial debts. Furthermore, as part of its campaign against the ZCTU, the Government stated on 15 March 2005 that it would not let the ZCTU monitor the parliamentary elections, contrary to previous practice.

1347. On 6 April 2005, a ZCTU General Council meeting to discuss preparations for May Day was disrupted by Langton Mugeji, Nicholas Mazurura and Farai Makanda, all members of unions affiliated to the ZCTU. They tried to force the meeting to discuss a motion calling for the ZCTU leadership to resign amid allegations of corruption and fraud, and upon failing to secure such a motion began to man-handle General Council members, causing the meeting to be abandoned.

1348. On 23 April 2005, the complainant states that Mr Matombo, Ms Matibenga, Mr Chibebe and Tabitha Khumalo were physically attacked by agents provocateurs from two ZCTU affiliates – the Construction Workers' Union and the Leather Workers' Union – whom the ZCTU believes were acting under the influence of the Government. On that day, hooligans hired by the two affiliate unions attacked ZCTU members at a meeting and demanded that the General Secretary resign. Due to these violent personal attacks Mr Matombo, Ms Matibenga, Mr Chibebe and Ms Khumalo all managed to obtain court-issued peace orders to safeguard the security of their persons. The complainant alleges that the AAAWU maintains that leaders who did not hold jobs in the industry they were representing did not have a constituency, and consequently could not represent workers; the ZCTU leadership should therefore step down. The AAAWU maintains this view despite the fact that ZCTU leaders such as Mr Matombo lost their jobs as a direct result of their trade union activities. The complainant adds that there are no internal ZCTU rules requiring union officials to be employed in the sector they represent.

1349. In a letter dated 26 May 2005, Mr Mazarura, the AAAWU spokesperson, indicated that the General Council had decided to appoint an investigative committee to examine accusations made by his group that:

– the payment of a salary to Mr Matombo and the use of the ZCTU's vehicles were unauthorized;

– Ms Matibenga was no longer employed in the commercial sector, which she represented when she was elected in 2001, and should therefore be removed from the ZCTU leadership;

– Ms Khumalo had no constituency but was still elected to the General Council due to the personal interest of the leadership;

– the management of the Informal Sector Account is unconstitutional because Mr Chibebe and the officer of the Informal Sector Project are the only signatories to the account. Furthermore, the account had been abused and the concerned unions had filed a complaint with the police, who had opened an investigation;

– there had been a general mismanagement of funds, and management, financial, and audit reports were not submitted to the General Council;

– property was purchased without proper authorization from the General Council; and

– COSATU had been invited to take part in a fact-finding mission without the General Council's express permission.

1350. In May 2005, the Government used its power to select trade union representatives to Zimbabwe's delegation to the International Labour Conference (ILC) to intensify the government-fomented internal strife. By not sponsoring the official candidates of the ZCTU, namely its democratically elected President, Lovemore Matombo, and its General Secretary Wellington Chibebe, it hoped to help bring about a change in the leadership. It decided to sponsor members of the AAAWU and invited Elias Mlotshwa, the second Vice-President of the ZCTU at the time, as the official delegate, and Mr Edmund Ruzive, the third Vice-President, to be the adviser and substitute delegate. Despite the government backing, the lack of a proper mandate from Zimbabwean workers themselves eventually made Elias Mlotshwa decline the government sponsorship. However, the Government and the AAAWU continued to try to sidestep the real representatives of the ZCTU and, on 26 May, Nicholas Mazarura, spokesperson for the AAAWU, wrote to the Director-General of the ILO to denounce the ZCTU leadership and support the candidature of Edmund Ruzive, instead of Elias Mlotshwa as he had "chickened out", as it was phrased in the AAAWU letter. The Government contended that it played no role in the selection of the candidates from the ZCTU. They were informed by the ZCTU that President Lovemore Matombo, his deputy Lucia Matibenga, General Secretary Wellington Chibebe and Tabitha Khumalo, were all under investigation and suspended from the leadership. This was the only reason why the government subsequently invited the second and the third Vice-Presidents. The Government had demanded that the four legitimate representatives of the ZCTU prove that they had not been suspended by reproducing the minutes of the meeting on 23 April 2005. According to the Government, it had not received such proof and therefore it could not select the elected leadership of the ZCTU. The complainant points out that the Government did not ask the AAAWU to provide proof of the alleged suspension in the form of written minutes or any other proof concerning the allegations of fraud, nor did the AAAWU provide any such evidence. The complainant is of the opinion that this clearly demonstrates that the Government unduly attempted to interfere in the ZCTU's internal affairs by creating strife over who would attend the ILC on behalf of the ZCTU and attempting to impose government-friendly fractions. In the end the ICFTU sponsored the ZCTU President Lovemore Matombo's trip to Geneva and ensured his participation in the Conference.

1351. There were further attempts to discredit the ZCTU General Secretary. On 5 July, a group of more than 20 people thronged the ZCTU offices in search of Wellington Chibebe, threatening to beat him up. When they failed to locate him they went outside and began singing derogatory songs about him. This was all recorded by ZBC, the public television station. All the action seemed to be scripted. Then on 6 July, a demonstration was staged at the ZCTU headquarters accusing Chibebe of going outside his mandate, alleging that he had been part of a group calling for a global ban on asbestos at the ILO. The demonstrators

also accused the leadership of participating in the activities of the opposition Movement for Democratic Change (MDC). This was all perceived by the ZCTU as part of the Government's campaign to discredit its leadership.

1352. Tabitha Khumalo and Phoebe Vhareta from the ZCTU Women's Advisory Council (WAC) were assaulted at a WAC meeting on 9 July by people from the AAAWU. They declared that they would continue to disrupt all ZCTU activities until the leadership resigned. A group of AAAWU members and youths suspected of being hired to carry out the assault, reportedly got into a conference room at the Quality International Hotel where the women were having a meeting of the WAC. They are reported to have started disrupting the meeting. The intruders reportedly proceeded to assault Phoebe Vhareta and Tabitha Khumalo. Ms Khumalo was subsequently admitted to the Avenues Clinic for an X-ray as she was badly injured. The ZCTU believed the group was supported by the Government as part of its attempt to replace the ZCTU leadership.

1353. The complainant states that, according to the government-sponsored AAAWU, up to 17 affiliates were dissatisfied with the leadership. However, this was proved wrong with a statement of support made by 30 out of 35 affiliates on 10 August 2005 (the list is attached to the complainant's new allegations as Appendix 1). Following the many accusations by the AAAWU and their contention that 17 affiliates were discontent with the leadership, the ZCTU leadership decided to call on its affiliates to express whether they supported the leadership or not on 14 July. The five unsatisfied members were the Zimbabwe Construction and Allied Trades Workers' Union, the Associated Mine Workers' Union of Zimbabwe, the Transport and General Workers' Union, Zimbabwe Leather Shoe and Allied Workers' Union and the Zimbabwe Union of Journalists. The latter expressed its support for the ZCTU, but did not want to take position either in favour of or against the leadership. The leaders of the other four affiliates, who were responsible for creating the strife by attacking the ZCTU in the media, assaulting and disturbing general council meetings, hiring thugs to disrupt ZCTU activities, and trying to represent the ZCTU without a proper mandate at international forums, and with international partners such as the 1LO and the ICFTU, were suspended according to article 15, paragraphs 4 and 5 of the ZCTU's constitution, according to which members can be expelled if they act in a manner that is detrimental to the interests of the ZCTU.

Raid on ZCTU headquarters

1354. On 13 May 2005, police raided the ZCTU's headquarters on the ninth and tenth floor of Chester House, Harare, in search of any evidence of foreign currency transactions, as part of the state's tightened grip on the operations of civic and labour organizations. The police also hinted that they suspected the ZCTU of committing fraud against some of its affiliates. Police led by detective inspector Mambambo let four officials from the National Economic Conduct Inspectorate (NECI), Bernard Savanhu, Mapanzure, Musiiwa and Sango conduct the search. They rampaged through checkbooks and bank statements as well as files in the organization's accounts, informal sector, and health and safety departments, despite protests from the legal adviser of the ZCTU, Ms Tsitsi Mariwo. They seized files, computer diskettes and Mr Savanhu also took foreign currency in the following amounts: US$27, UK£40, 2,500 Zambian kwacha (ZMK) and €110, although he was informed by the ZCTU's legal adviser that the money belonged to a ZCTU officer and not the ZCTU. The ZCTU was of the opinion that the seizure of the abovementioned material and money was illegal and filed a lawsuit (Case No. 2401/05 dated 24 May 2005) against the Minister of Home Affairs, Kembo Mohadi, a senior detective, and Police Commissioner Augustine Chihuri to the High Court. The ZCTU filed the lawsuit on the grounds that its property was seized illegally, the search warrant was couched in vague and general terms and did not cover the seized material, and the search warrant did not specify which offence the ZCTU was suspected of that could justify the search of their premises. The urgent chamber

application was also filed with a view to having the unlawfully seized material returned. The material seized included disks used for the work of the union and most importantly the current checkbooks of the union. Without full access to its funds, the operations of the union were severely paralysed.

Government investigation into union finances

1355. In October 2005, the Ministry of Labour organized a consultative meeting with the General Council of the ZCTU after the removal from office of the AAAWU members. The Government then started a preliminary investigation in November 2005 concerning reports of alleged financial malpractices and breaches of the ZCTU's constitution, allegedly based on complaints from the suspended AAAWU members. This preliminary investigation led to the appointment of an official investigator at the end of 2005. On 28 December the Minister of Labour, Nicholas Goche, announced that he had appointed an investigator: Tendai Chatsauka, a professional auditor to probe into the affairs of the ZCTU following accusations of gross embezzlement of funds, corruption and breaches of the organization's constitution. According to the Labour Relations Act, section 120, the Minister may order an investigation into a union (or employers' organization) if there is reasonable grounds to suspect that property or funds of the union are being misused or embezzled, or that affairs are conducted in a manner that is detrimental to the interests of its members. According to the Government, the investigation was ordered after numerous complaints from ZCTU affiliates. The complaints allegedly contained several reported cases of financial misconduct and embezzlement, amongst others the payment of a salary to ZCTU President Lovemore Motombo amounting to 15 million Zimbabwean dollars (ZW$). The complainant states that the Minister of Labour claimed he had stressed the vital importance of sticking to the facts and not to targeting individuals to the investigator, Mr Tendai Chatsauka, a professional auditor, at a meeting they held on 28 December 2005. The tasks of the investigator included investigation into the operations of the ZCTU under its informal sector project account (allegedly the project was not managed in conformity with the ZCTU's constitution), the financial administration handbook and other rules of the ZCTU. The investigation would also look into the purchase of property in Harare, Chinhoyi, Gwere, Masvingo, Bulawayo and elsewhere.

1356. Mr Nicolas Mazarura of the Zimbabwe Construction and Allied Trades Workers' Union had also reportedly complained on behalf of Edmund Ruzive and Joseph Midzi both from Associated Mine Workers' Union of Zimbabwe, Mr Langton Mugeji from the Zimbabwe Leather, Shoe and Allied Workers' Union, Farai Makanda from the Transport and General Workers' Union and himself against their suspension from the ZCTU General Council. According to the five, they had been suspended due to unfounded accusations by the leadership of the ZCTU, namely that they allegedly had questioned whether to maintain the name ZCTU. Furthermore, Mr Charles Gumbo, Mr Benson Ndemera and Mr Leyson Mlambo had complained to the Minister about their removal from office in the ZCTU.

1357. According to the complainant, the probe was yet another attempt by the Government to replace the leadership of the ZCTU by government-friendly fractions. The ZCTU has itself submitted documentation relating to this matter to the ILO. Despite their suspension and their complaints to the Government against the ZCTU leadership, representatives of the AAAWU were invited to the sixth ZCTU Congress in May 2006 and were given full rights and representation at the Congress.

1358. The investigation was initially due to end in March 2006 but when the investigator failed to find incriminating evidence, the Government decided to prolong the mandate of the investigator until further notice. The ZCTU feared that the Government would use the investigation to make trumped up charges against them in order to prevent them from

standing for re-election at the ZCTU Congress, which was planned for the first semester of 2006. Fortunately, the government-appointed investigator did not manage to conclude the investigation before the ZCTU Congress, during which the present leadership was re-elected in the presence of several international observers.

1359. On 19 July 2006, the executive summary of the investigation report was read out to the ZCTU by the Minister of Labour but not until later were the conclusions of the report made available, making a number of allegations concerning the exchange of currency and the misuse of union funds. The investigator handed his report over to the police for further action.

1360. On 8 August, Wellington Chibebe, General Secretary of the ZCTU, was interrogated by the Serious Fraud Section of the Criminal Investigation Department. The interrogation concentrated on the allegations of his responsibility for illegal foreign currency exchange as signatory to ZCTU bank accounts. This case had already been investigated before and had been dropped by the police. However, after the report of the investigator the case was revived.

Arrest, detention, intimidation and harassment of trade unionists, 2005–06

1361. The ZCTU President, Lovemore Matombo, General Secretary, Wellington Chibebe and WAC Secretary, Tabitha Khumalo, all received death threats after the Zanu Patriotic Front (PF) party won the country's general elections at the end of March 2005. The authorities were again said to be planning to "eliminate" the labour leadership, and weight was given to these threats by the news that the former head of the CIO had been appointed as Minister of Labour.

1362. On 27 April 2005, police stormed and called off a ZCTU meeting at the Helenic Club in Mutare, which was held in preparation of May Day 2005. Five ZCTU Regional Council members and one General Council member were arrested. According to the complainant, the police alleged that the meeting contravened the provisions of the Public Order and Security Act (POSA), according to which the police have to give prior approval for public meetings. However, trade unions are exempted from seeking approval according to the law and May Day preparations are a legitimate trade union activity. The complainant states that, on several other occasions, the police have cited POSA provisions to quell trade union activity – even though the Government had repeatedly provided guarantees to the ILO to the effect that POSA did not apply to or restrict trade union activities. Before the Committee on the Application of Standards of the 95th International Labour Conference (Geneva, June 2006), for instance, the Minister of Public Service, Labour and Social Welfare, indicated that POSA was never meant to interfere with trade union activities but rather had been enacted for counter-terrorism and national security purposes. The abovementioned incident in Mutare, the complainant alleges, is just one example of the systematic use of POSA by the authorities to obstruct legitimate trade union activities.

1363. On 28 April 2005, six ZCTU activists, including Nathan Banda, the ZCTU Health and Safety Coordinator, were arrested for taking part in a Health and Safety Day march organized by the National Social Security Authority (NSSA) to celebrate International Commemoration Day for Dead and Injured Workers. The march was also ended by the police due to the ZCTU's participation, even though they had been authorized to participate in the march. Apart from Banda, the other unionists arrested were: Elijah Mutemeri, Vmbai Mushongera, Nyikadzino Madzonga and two activists from the Bindura Nickel Mine. The unionists were under arrest for over an hour whilst NSSA officials negotiated their release with the police.

1364. The Projects Committee of the Commercial Workers' Union of Zimbabwe (CWUZ) was prevented from holding a meeting on 12 May after security guards from the Chinotimba Security Company surrounded the building, preventing staff from leaving or entering. The Chinotimba Security Company is run by Joseph Chinotimba, a war veteran and one of the founders of the government-affiliated Zimbabwe Federation of Trade Unions (ZFTU). The security guards alleged that the meeting was illegal and when the police eventually arrived, they forced people to leave and the meeting had to be abandoned. The following day the security guards returned, this time stating that the CWUZ's National Executive Committee meeting scheduled later that day should also be cancelled. The meeting was subsequently cancelled.

1365. In Zimbabwe, the harassment against ZCTU activists continued. Mr Percy Mcijo, Mr David Shambare and Mr Ambrose Manenji were picked up from their homes in Bulawayo at 5 a.m. on 9 June 2005 and taken to the police station. They were accused of organizing a two-day job stay-away that took place on 9 and 10 June. The stay-away was part of a national general strike organized by the opposition parties. The police detained 30,000 people during the strike and demolished thousands of homes and businesses. The police had said they were dealing "ruthlessly" with any street protests.

1366. On 15 July, a ZCTU leadership workshop to validate the draft pension scheme was disrupted at the Bronte Hotel, Harare, when an unknown person stormed the meeting and started splashing human waste on the participants. The meeting was adjourned for an hour and the person was taken away by the police and later released.

1367. The complainant also indicates that, on 4 August 2005, Mr Bright Chibvuri, a journalist at *The Worker*, a newspaper published by the ZCTU and Mr Lovemore Madhuku, human rights defender and Chairman of the National Constitutional Assembly (NCA), a grouping of independent NGOs dedicated to the promotion of democracy and the rule of law in Zimbabwe, were arrested during a demonstration in favour of constitutional reforms on 4 August 2005. The police called in a riot squad in order to foil the public protest, and Mr Bright Chibvuri and Mr Lovemore Madhuku were charged under section 19 of the POSA for being involved in gatherings conducive to riot, disorder or intolerance. If they were found guilty they could be liable for a fine of up to ZW$50,000 and/or up to ten years imprisonment. Both men were released the following day on a bail of ZW$250,000, but have since been summoned to court on several occasions; however a final trial date has yet to be set.

1368. On 7 August 2005, junior- and middle-ranking medical doctors, who went on strike during the first week of August, were ordered back to work by the Government failing which they would face detention. During the strike's second week the doctors were visited by people whom they suspected were state security agents, who told them that for their own good they should go back to work or face arrest for breaching the Essential Services Act. The doctors, who earn a basic salary of ZW$5.7 million a month (about US$57) were demanding a salary increase to ZW$47 million (about US$474) and better working conditions. In addition to visits by the security agents, the Deputy Minister of Health, Edwin Muguti, told the doctors they would be arrested if they did not go back to work. The strikers called off the strike as the patients were suffering and hundreds of new patients were being turned away from the hospitals.

1369. Harry Taruva, an English teacher at Mambo High School in Gweru and a member of the Progressive Teachers' Association (PTUZ) was forcibly taken away for questioning on 20 September 2005 and tortured by two people claiming to be from the CIO. Mr Taruva was forced into a white Mazda B1600 truck around 10.30 a.m. in front of fellow teachers and students, despite protests from the Headmaster of the school. He was brought to a

place called Agritex offices, also known as "Chinyavada" where he was interrogated and subsequently tortured for belonging to the PTUZ, teaching opposition policies to the students and associating with the General Secretary of the PTUZ, Raymond Majongwe.

1370. Lucia Matibenga, the General Secretary of the CWUZ and leader of the MDC Women's Assembly, was ordered to report to the police station in Gweru, where she lives. Instead she was handcuffed and taken by a public bus to Harare with two police escorts on 19 October 2005. The police said they had to use the bus as they did not have fuel or a vehicle to take her to the Harare Central Police Station. Lucia Matibenga told the media that she believed her arrest was connected with her position in the CWUZ, as their offices had been invaded in May 2005 by people trying to remove the union executive in connection with the government-fomented move to remove the leadership of the ZCTU, but the CWUZ had successfully challenged this in the courts and the union was operating normally again.

1371. Over 1,254 workers represented by the Communications and Allied Services Workers Union (CAAAWUZ), a trade union duly registered in accordance with the laws of Zimbabwe to represent the interests of workers in communications and related industries, were fired without benefits by the management of the government-operated telecommunications company (TelOne) after engaging in a strike over a salary dispute on 6 October 2004. The "employers had refused and/or failed to implement the recommendations of an independent arbitrator to increase the salaries of the workers at the recommendation of the Labour Court. After having pursued all relevant avenues to settle the matter amicably, the workers then resorted to collective job action. The workers, through their representation, complied with the requirements under the Labour Act to give proper notice of intention to embark on action. All attempts to stop the action as unlawful and illegal by management were successfully challenged by the workers' union in court. The management of TelOne, having tried in vain to successfully challenge the job action, resorted to dismissing all the workers on the basis that they had violated the code of conduct. The workers then appealed to the High Court, which decided in their favour on 26 October, stating that the employers could not dismiss them on the basis of a code of conduct, when it is not in conformity with the law. According to the judgement "a code of conduct does not override the authority of Acts of Parliament, but merely regulates the employer and employee relationship". This effectively meant that the dismissals were considered null and void. On Monday, 30 October 2005, following the decision of the High Court, 300 workers proceeded to the offices of their employers with a view to resuming work as the court had ruled that they had been illegally dismissed and had to be reinstated effectively. They were met with resistance at their usual work premises. In protest at the failure by their employer to meet, discuss and respect the court order, the workers resorted to a peaceful and non-violent night vigil at the premises of their employers. Around 10 p.m., Inspector Moyo of the Zimbabwe Republic Police in the company of Mr Chikwaya, a senior security manager with TelOne, came to address the workers, whose numbers by now had reduced to about 72 as others had sought shelter in the nearby buildings and passageways. Inspector Moyo and Mr Chikwaya misled the workers into believing that the management was prepared to discuss issues with them at Harare Central Police Station. They protested against the idea of going to the police at such an hour but were then force-marched to Harare Central Police Station. Upon arrival at around 2.30 a.m., the workers established that the management of TelOne were nowhere near the police station; neither were they prepared to enter into meaningful discussions. Meanwhile, Inspector Moyo and his team summoned the riot police to come to the gathering at the police station. When the riot police arrived around 3 a.m., they immediately switched off the lights in the area of the police station housing the workers and indiscriminately started beating the workers. The riot police used batons sticks and booted feet to beat the defenceless workers. About 16 of them were treated for various injuries and one was treated for a head injury.

1372. Two ZCTU officials in Bulawayo were arrested during the night of 7 November 2005 and a third arrested early in the morning of 8 November for their involvement in planning a march on the National Action Day against Poverty on 8 November. They were arrested even though they had respected the requirements set forth in the law and notified the police ahead of the planned march on 8 November.

1373. Police arrested 118 ZCTU members in Harare, 41 in Mutare, six in Gweru and five in Bulawayo. Among the arrested were General Secretary Wellington Chibebe and President Lovemore Matombo. They were arrested in the city centre on their way to the corner of Nelson Mandela and Leopold Takawira streets, the starting point of the ZCTU's anti-poverty march. The march was organized to protest against poverty, hunger, unemployment, high inflation and high transportation costs. The protesters were calling for proper wages, a reduction of income tax from 40 per cent to 30 per cent, availability of anti-retroviral drugs and a halt to the import of cheap goods from Asian countries. According to the ZCTU, the life of workers had never been poorer, with mass unemployment and a 360 per cent inflation rate. The protestors also planned to deliver a petition to the Labour Minister on all the above issues. The march lasted only ten minutes before riot police armed with batons, shields and dogs intervened and arrested 118 participants, who were singing songs about poverty and carrying placards against the import of poor-quality Chinese goods. The protestors were taken by lorry to Harare Central Police Station. They were later transported to Chitungwiza, 25 kilometres outside of Harare. The ZCTU officials had access to Chibebe and Matombo, against whom no charges were brought. Armed police maintained a heavy presence in the streets of Harare on 8 November 2005, and before the march they stopped all vehicles with more than one passenger at roadblocks, which had been mounted on all routes into the city. Paramilitaries with dogs, shields and batons were to be seen throughout the city of Harare. Furthermore, 20 people infected with HIV/AIDS were reportedly among the arrested and they were kept without access to medication. Women with babies and disabled persons were also detained. On 8 November, Mlamlei Sibanda, Last Tarabuku, Tabitha Khumalo and Leonard Ngwenzi, were dragged from a ZCTU minibus by soldiers at a roadblock in central Harare shortly before 1 p.m., for allegedly photographing an army truck. They were taken to barracks, where they were detained for more than four hours and questioned about their intentions, their family, residence, etc. Later in the evening the army handed them over to the police who released them as they were only media officers and drivers. However, their photos were deleted and they had to leave their professional registration numbers behind.

1374. Leading ZCTU activists in the regions were arrested before the march despite local unions having notified police of all marches, as required by law. For example, two ZCTU officials in Bulawayo were arrested on 7 November at night and a third official was arrested in the morning on 8 November. They were Regional Union Official Reason Ngwenya, Regional Vice-Chairman Dzavamwe Shambari, and Regional Officer Percy Mcijo. A further 41 people were arrested in Mutare. The Regional Officer for Mutare of the ZCTU, Tambaoga Nyazika, was threatened by an armed person claiming to be a policeman. The man told Nyazika "that he will live to regret working for the ZCTU". A vendor, who sold drinks to ZCTU officials destined for arrested ZCTU members, was reportedly severely assaulted by police officers claiming to belong to the Criminal Investigation Department. Four of the people arrested in Mutare were released on bail on 10 November after paying a fine of ZW$25,000, the remaining 37 were released on ZW$500,000 bail each, except for Tambaoga Nyazika, who had to pay ZW$1.5 million bail. They were expected to appear in court on 24 November 2005. They were all charged under the POSA. Furthermore, the ICFTU has received a copy of the police decision to ban the anti-poverty march which was sent to the ZCTU on 4 November 2005, along with similar bans on marches in 2004. One of the decisions refers directly to the POSA. Two members of the ITF-affiliated Zimbabwe

Amalgamated Railwaymen's Union (ZARU) were also arrested, namely Area Organizing Secretary (eastern Zimbabwe) Ms S. Moyo and activist Ms Francisca Gurure, who were held in Chitungwiza and Mutare police cells, respectively. In Chinoyi and Masvingo, the police blocked the premises of the unions and thus denied them the possibility to attend rallies. The 118 ZCTU members arrested in Harare were released on 12 November 2005 after intense negotiations with the Attorney-General's office. According to the Attorney General, the police had no strong case and they would proceed by way of summons.

1375. Two ZCTU staff members, Michael Kandukutu and Wilson Kambanje from the northern region were questioned by the police on 8 August 2006, following police confiscation of ZCTU flyers in their office the week before. The flyers contained information about the high rate of taxation, and according to the police this information was wrong and prejudicial to the State and could incite public violence. The police informed them that they were going to be charged under the Criminal Law (Codification and Reform) Act No. 23 of 2004 as soon as the police obtained an approval from the Attorney-General's Office. The complainant is not aware if charges have formally been made. Additionally, the Northern Regional Office in Chinhoyi, about 100 kilometres from Harare, was raided and over 2,000 flyers on ZCTU's campaign against high taxation were confiscated.

1376. On 15 August 2006 at around 7.20 p.m., Mr Wellington Chibebe was arrested at a roadblock and detained at Waterfalls police station, as he was travelling by car from Masvingo with his family. According to our information, he was stopped at a roadblock along the Simon Mazorodze Road, near Waterfalls, by police sergeant Mukonyonga. The police demanded to search his car, supposedly in order to look for cash. Such police action could be part of the Government of Zimbabwe's campaign to prevent financial speculation whilst it was conducting a major monetary reform purportedly aiming at fighting hyperinflation, which stood at 1200 per cent at the time. Such searches – and confiscation of money from Zimbabwean citizens at police roadblocks – are illegal and are in the process of being challenged in the courts. Whatever the case may be, police officers at the Waterfalls roadblock reacted with excessive violence when M. Chibebe informed them that what they were doing was illegal. A policeman tried to forcibly remove him from his car while his seat belt was still buckled on. Reportedly, the policeman then vigorously slapped Mr Chibebe twice, accusing him of resisting being searched. All this was done in front of Mr Chibebe's family. The police then arrested Mr Chibebe and took him to Waterfalls police station where he was charged with common assault for allegedly assaulting a policeman, whereas in fact he is the one who had been assaulted. According to ZCTU legal sources, the police deliberately changed the charges to common assault so as to make the issue more serious, given the identity and high national standing of the prisoner. On 17 August he was finally brought before the Mbare Magistrates Court, where he was charged under section 176 of the Criminal Law (Codification and Reform) Act (Chapter 9:23), which states "Any person who assaults or by violent means resists a peace officer acting in the course of his or her duty, knowing that he or she is a peace officer or realising that there is a risk or possibility that he or she is a peace officer, shall be guilty of assaulting or resisting a peace officer and liable to a fine not exceeding level 12 or imprisonment for a period not exceeding ten years or both." He was then released on ZW$2 million (ZW$2,000 revalued) (US$8) bail and was ordered to appear in court on 4 September. The case was later postponed to 7 September because a lawsuit had been filed before the Supreme Court as to whether the Criminal Law (Codification and Reform) Act was in conformity with the Constitution. The same day that Mr Chibebe was released, another trade unionist, ZCTU National Organizer, Leonard Gwenzi was arrested carrying ZW$200,000 (US$200) upon his return from a series of trade union workshops throughout the country. He was on his way back to the ZCTU offices to deposit the money. He was later released, however, after the Zimbabwean Reserve Bank acknowledged, on the basis of receipts and vouchers held by Gwenzi, that he was in fact carrying ZCTU funds. He was released without charges and the money was returned to him.

Arrests, detentions and beatings relating to a 13 September 2006 demonstration

1377. The ZCTU had planned a protest on 13 September 2006 against the country's inflation rate now at 1,200 per cent – by all available accounts the highest in the world – and to demand higher incomes (linking the minimum wage to the Poverty Datum Line), lower taxes, better access to antiretroviral drugs needed to fight HIV/AIDS and a stop to the harassment of workers in the informal economy. The protest had been announced widely beforehand and the police were informed by the ZCTU of the planned routes the protest would take two days ahead of the protest. The Government had warned the ZCTU that the protest was deemed illegal as such issues were to be dealt with under the Tripartite National Forum. The Minister of Labour was cited in the news on 12 September as saying that the protest was not linked to the interest of workers, but was instead a political manifestation. Meanwhile, routes planned for use by union marchers and assembly points had been blocked in many cities, including in Harare, where Zanu PF militia wearing party regalia moved from point to point, intimidating people. The latter strongly suggests that the authorities themselves were intent on politicizing what was a purely trade union event. In Harare, they managed to march approximately ten minutes before the police asked them to stop. They obeyed the order. Then they were ordered to sit down which they also did. Then they were ordered onto trucks and taken to detention facilities. In addition, scores of trade union leaders throughout the country were detained, interrogated and, in some cases, assaulted by police; others were threatened or intimated. The arrests and intimidation began on 12 September ahead of the planned protest on 13 September. Police arrested a number of ZCTU leaders at their homes and offices. On 13 September, the arrest campaign intensified. The ZCTU offices were blockaded and/or sealed by army and/or police forces, as happened for instance in Masvingo and Mutare. Repression against unionists and other civilians took place throughout the whole country, including Harare, Chitungwiza, Plumtree, Gwanda, Hwange, Bulawayo, Beitbridge, Masvingo, Mutare, Chinhoyi, Kariba, Gweru, Shurugwi, Gokwe, Kwekwe and Chegutu. All in all, some 265 union protesters were arrested on 12 and 13 September in cities and towns throughout the whole country, several people were interrogated and an unknown number were either intimidated or assaulted. On 13 September at 3.30 p.m., the situation was as follows:

– Harare: 15 people arrested, including the ZCTU General Secretary, Wellington Chibebe, President Lovemore Matombo, Vice-President Lucia Matibenga and Raymond Majongwe, the head of the Progressive Teachers' Unions of Zimbabwe. They were assaulted during the arrest. There was heavy police presence in the city since the morning. The march route was sealed. Zanu PF militia wearing party regalia were present;

– Chitungwiza: heavy deployment of army troops with tankers. 50 people arrested, including members of the Chitungwiza Residents Association and the former Mayor's wife;

– Plumtree: heavy police presence;

– Gwanda: heavy police presence;

– Hwange: Daniel Ncube detained for four hours for interrogation;

– Bulawayo: about 20 people arrested, including the Regional Chairperson, the Secretary and an organizer; two people arrested on 12 September were still detained by the police the following day;

– Beitbridge: three people arrested;

– Masvingo: Mr Gapare was questioned by Masvingo police; 15 police officers with button sticks, canisters and guns sealed ZCTU offices;

– Mutare: 20 people arrested, eight police officers surrounded the Mutare ZCTU office with truncheons and canisters; ordinary citizens were beaten up;

– Chinhoyi: 15 workers were arrested; the Regional Chairperson was taken for four hours of interrogation; a regional officer and three others were arrested on 12 September and were still detained, including one whose only offence had been to bring food to those already detained;

– Kariba: committee members were intimidated by the police; according to unconfirmed reports arrests took place on 12 September;

– Gweru: 16 protesters arrested;

– Shurugwi: executive members taken for interrogation;

– Gokwe: executive members taken for interrogation;

– Kwekwe: executive members taken for interrogation;

– Chegutu: 15 protesters were arrested, two interrogated;

– Kadoma: 11 protesters arrested;

– Victoria Falls: three protesters arrested; and

– Rusape: unconfirmed reports that union leaders were arrested at their homes and offices.

1378. On 13 September 2006, the ZCTU President Lovemore Matombo, First Vice-President Lucia Matibenga and General Secretary Wellington Chibebe were arrested along with 12 others in Harare. The 15 were thrown into a bus, following another bus with approximately 30 other trade unionists. They followed the first bus which went to Harare Central Police Station, but their bus continued to the infamous Matapi police station in Mbare, where it is common for prisoners to be tortured. They were pushed and kicked into the police station and thrown into prison cells two by two. Five men awaited them in the cells where they were beaten severely. Initial reports indicated that, further to their ordeal at the hands of the police, Messrs Matombo and Chibebe could not manage to stand after the assaults and that their clothes were soaked in blood. Ms Lucia Matibenga had swollen feet and could no longer walk suggesting that they had had the soles of their feet beaten. At the beginning of their detention they were refused medical attention and they were also denied access to a lawyer. Police denied a medical doctor from "Doctors for Human Rights" access to the detained trade unionists, despite the fact that their physical condition was so bad that senior police authorities refused to take them into custody at Harare Central Police Station, where the three ZCTU leaders had been transferred in the early morning of 14 September. According to consistent reports from different sources, police officials at the central police station were insisting on receiving a report on who assaulted them. Police from Matapi denied that the arrested were assaulted. The lawyer representing the arrested urgently made an application to the High Court for an order to give the arrested access to a medical doctor. The three were transferred back to Matapi. More accurate information about the severity of the injuries caused to the top leaders of the ZCTU was obtained later. According to their lawyer Aleck Muchadehama, ZCTU President Lovemore Matombo had a broken arm and had bruising and swelling all over his body. First Vice-President Lucia Matibenga had whip marks all over her back and

buttocks. Her neck was swollen and her eardrums were damaged so much her hearing was impaired. She had to have her arm in a sling. General Secretary Wellington Chibebe had serious cuts to the head, three broken bones, and severe bruising and swelling all over his body. Doctors' reports for other ZCTU council members show that others have also sustained bone fractures, severe bruising and swelling, and cuts. Some of those were Moses Ngondo and R. Chigwagwa. Full reports for all who had been injured in police custody were not available at the time of writing. The trade union leaders were reportedly also forced to walk barefoot through sewage in cells that have been deemed inhumane by the Zimbabwean Supreme Court.

1379. Wellington Chibebe informed reporters that the union leaders were taken in pairs to cells where police beat them with bars and batons. He was frightened because of the repeated beatings and the language used by the police, who told them "people died during the struggle for independence and that is exactly what is also going to happen now" and "we were trained to kill and not to write dockets". At around 4 p.m. he was himself beaten until he was unconscious and he only regained consciousness the following day on 14 September. He was finally transferred to Parirenyatawa Hospital, which has no medication, on Friday 15 September. Police refused to move him to a better hospital, though the other 14 were admitted to Dandaro Hospital in Borrowdale. (The complainant attaches as Appendix 4 several photographs of Mr Chibebe lying in a hospital bed, with his left arm bandaged and in a cast.)

1380. Lucia Matibenga also confirmed that they had been taken into cells two by two and that in the cells five men with batons waited for them. They were beaten and assaulted for approximately 20 minutes. Lucia Matibenga had her head rammed into the wall three times; she was smacked with open hands several times, and beaten on the legs, arms and back continually. When she collapsed she was ordered back onto her feet. After the assault she was not kept in a cell, but she was allowed to sit in the counter area. ZCTU colleagues and lawyers had just been told to leave the counter area as the 15 trade union leaders were not in Matabi Prison, when Lucia Matibenga, despite threats from police officers, managed to make the union leaders' presence known to her colleagues. On 15 September in the evening, 29 of the activists and leaders arrested in Harare were brought to court. Six had their arm in a sling due to injuries sustained under police custody. They were all charged under section 37 of the Criminal Law (Codification and Reform) Act, according to which it is an offence to act in a manner likely to cause public disorder. They were all released on bail of ZW$20,000 each. They are due to go to trial on 3 October at 9.30 a.m. and report to the Harare Central Police Station every Friday until that date. Due to the serious injuries inflicted upon Wellington Chibebe by the police he was unable to attend the same court hearing as the other 29 activists and leaders. Instead a separate court hearing was held for him on 16 September at his hospital bed. He was released on free bail and his court hearing is also set for 3 October. As a result of the assault, he had to be operated on Monday, 18 September. The State Prosecutor, Tawanda Zvakare, reportedly dismissed the torture and the injuries that trade union leaders had suffered as bruises obtained during skirmishes with the police during which police officers had been injured themselves. However, the magistrate ordered an investigation into the assault and Alec Muchadehama, the trade union leaders' lawyer, also filed a complaint for torture against the police on behalf of Chibebe and others.

1381. In the other 34 ZCTU districts, activists were released on bail or upon paying admission of guilt fines or fines for blocking the traffic, in some places amounting to ZW$250:

– Chegutu: 11 members of the General Agriculture and Plantation Workers' Union of Zimbabwe, six men and five women, were beaten and tortured by the police. They were called into a room one by one and assaulted. Three of them were beaten by CIO

officers. One of the leaders is reportedly so badly injured that he risks dying as a result of the assault against him. Their complaints about the assaults were ignored and they had to pay ZW$1,000 bail each and were summoned to court on 29 September equally charged under the Criminal Law (Codification and Reform) Act;

– Victoria Falls: three activists were released on bail of ZW$5,000 each;

– Hwange: two ZCTU members, who had been arrested for distributing flyers on 13 September were released on ZW$2,000 bail each;

– Chitungwiza: activists were released on 14 September after paying admission of guilt fines. Eight of them had been assaulted by the police and had to receive medical attention; and

– Kadoma: 11 members appeared in court on 15 September and were charged under the Criminal Law (Codification and Reform) Act.

1382. On 19 September 2006 at 12.30 p.m., the First Assistant General Secretary of the ZCTU, Japhet Moyo, was detained and interrogated for two hours at the Harare International Airport. At the immigration point he was approached by people claiming to be members of the CIO. They accused him of having organized ZCTU protests (presumably on 13 September) and then leaving the country to disseminate lies about Zimbabwe. During his interrogation his luggage was searched but nothing was confiscated. He was told not to report the incident to anybody as it had just been a routine security check. The ZCTU suspects that Silas Kuvheya the General Secretary of Zimbabwe Textiles Workers' Union was also interrogated, as he was nowhere to be found after his scheduled arrival at Harare International Airport at 2.30 p.m.

1383. On 25 September 2006, President Mugabe told newspapers that the police were right in dealing sternly with the trade union leaders on 12 and 13 September. "Some people are now crying foul that they were assaulted. Yes, you get a beating. When the police say move, move." he said. "If you don't move, you invite the police to use force." President Mugabe was quoted as saying. According to him, the 13 September protest was part of a campaign to remove him from office. In the complainant's view these quotes clearly show that the Zimbabwean Government condones and is fully responsible for the torture and assault that trade union leaders suffered on 12 and 13 September. The complainant states that it is very alarmed by these statements and requests that the Committee on Freedom of Association makes unequivocally clear to the Government of Zimbabwe that it is against the principles of Convention No. 87 to torture and assault peaceful trade union protestors.

1384. On 20 August 2004, a Bill on non-governmental organizations (NGOs) was publicized (*Gazette* No. 68, 20 August 2004; General Notice 432 of 2004 Government). The Bill required that all NGOs would have to register. According to the Bill, board members of an unregistered non-governmental organization would face up to five months imprisonment if operations were not ceased. The Bill aimed at preventing local NGOs from receiving funds for "issues of governance", which was defined as including "the promotion and protection of human rights and political governance issues", particularly from foreign donors. Trade unions feared that it would interfere with their cooperation with foreign donors. In October 2005, the then Minister of Labour, Public Service and Social Welfare, Nicholas Goche, declared that according to policy, it was mandatory for NGOs to apply for permission to operate by their provincial governor, as an interim measure ahead of the final approval of the Bill. The purpose of such measures was to ensure accountability among NGOs. However, this policy was not followed by NGOs. The Bill was passed by Parliament on 9 December 2005. President Robert Mugabe did not sign it within the required 21 days period however and referred it back to Parliament. According to the

current Minister of Labour, Public Service and Social Welfare, Paul Mangwana, the Bill is still under consideration by the President and would be subject to consultations with civic organizations. The ZCTU fears that if it becomes law the Bill would be used to prevent foreign funding of its activities.

1385. The Labour Amendment Bill H.B.1, 2005, was published in the law gazette on 11 March 2005. The ZCTU complained about the lack of consultation on a number of provisions in the Bill. One element of major concern was that government employees would not be covered by the general Labor Act, but would be subject to separate and more stringent legislation under the Public Service Act (PSA). The PSA deprives government employees the right to collective bargaining. According to the ZCTU, these amendments would be a reversal of the gains made under the harmonized Labour Act of 2003, which grants civil servants the right to form and belong to a union and to collective bargaining. According to the ZCTU, the amendment would also proscribe industrial action and access to alternative and efficient dispute resolution mechanisms for all government employees. There were already signs in 2005 that the new bill was having an effect. It was reported in October 2005 that Zimbabwe's teachers' unions were too frightened to take any industrial action in case they would be imprisoned for going on strike. The Bill was later approved and came into effect on 30 December 2005, as the Labour Amendment Act, 2005 (Act 7/2005). A comprehensive position paper by the ZCTU on the Bill analyses in detail the impact of this new law. Apart from the exclusion of civil servants from the scope of the Labour Act, the law contains several problematic features. Sections 25, 79, 80 and 81 give the Minister of Labour power to approve collective bargaining agreements, register and publish them. Contrary to promises made by the Government at the ILC in June 2004, these sections were not repealed. The Government has also included a subsection in the law prescribing that collective bargaining agreements should provide for measures to combat workplace violence. The ZCTU believes that this could be abused to criminalize industrial action. The law also centralizes the decision on registration of trade unions and employer organizations against the express wishes of trade unions.

1386. Furthermore, the law contains provisions for the Registrar to supervise the election of officers of employers' and workers' organizations, set aside elections, postpone or change the venue of an election. Under the new law, the decision of the Registrar will stand despite appeal, whereas previously an appeal would suspend the decision of the Registrar. This is contrary to ILO jurisprudence under which trade union suspension should not take effect before a final decision is made by an independent judicial body. The legislation does not include provisions that prohibit employers from hiring replacement workers in the event of a strike. However, an employer is barred from hiring replacement workers during a lockout. The law also includes a section that enables employers to sue workers for liability during unlawful strikes. Under section 109, subsection (2), legal and natural persons engaging in illegal strike can be sentenced to a fine not exceeding level 14 (the law does not mention what amounts to level 14) or to imprisonment for a period not exceeding five years of imprisonment or to both fine and imprisonment. In addition the right of a trade union to collect union dues by check-off can be cancelled for up to 12 months by order of the Minister of Labour.

1387. The complainant includes with its allegations a DVD containing:

(1) Brief interviews with five trade unionists, including Mr Chibebe, Ms Matibenga and James Gumbi, a ZCTU General Council member. All of the individuals attest to having participated in the 13 September 2006 protest and to having been severely beaten by the police. In the cases of Mr Chibebe and Ms Matibenga, bodily injuries and bruising consistent with the complainant's allegations are evident.

(2) Footage indicating that it is of the 13 September protest, in which several protestors are directed into the back of a van by policemen, who strike the protestors several times with their batons before entering the van and driving away.

C. The Government's new replies

1388. On the arrest of trade unionists alleged by the complainant, in a communication dated 6 September 2006, the Government reiterates its position that the arrests had nothing to do with trade union activities but were due rather to the trade unionists' political activities. The Government maintains that the concerned individuals had embarked on demonstrations and activities called by their political party, which had not been sanctioned by the relevant regulating authorities in accordance with laws governing demonstrations by political parties.

1389. As regards the Committee's previous recommendation, the Government indicates that it has no records available regarding the alleged arrest of Mr Choko and eight other trade unionists. With respect to the case of Mr Takaona, the Government states that the company Zimpapers has appealed an arbitration award made under section 98 of the Labour Act; the issue of Mr Takaona's reinstatement is thus being pursued through the dispute settlement procedures obtaining in Zimbabwe.

1390. As concerns trade union leader Mr Mangezi, the Government states that it can only encourage his employer to reconsider the transfer decision affecting him. Accordingly, the Government has requested the union to advise Mr Mangezi to lodge an unfair labour practice complaint with the Ministry, so that the matter may be handled through the dispute resolution system.

1391. The Government also states that a direct contacts mission to Zimbabwe is not only unacceptable but inappropriate. The Government maintains that the ILO systems cannot achieve their intended results if they are used to resolve issues that are predicated in the political domain, and reiterates its position that the allegations leveled against it are deeply rooted in the political ambitions of a few leaders of the ZCTU who pursue political interests through the abuse of privileges accorded to trade unions. These individuals, according to the Government, also hold positions in the opposition party (MDC) and a number of quasi-political organizations seeking to violently and unconstitutionally remove the present Government.

1392. Copies of a March 2006 Supreme Court decision and a November 2005 Labour Court decision relating to the NetOne company and Zimpost, respectively, are attached to the Government's 6 September 2006 communication. With respect to NetOne, the Supreme Court held that the dismissal of 56 employees was lawful, thus setting aside a previous arbitration award of reinstatement. In the case of Zimpost, the Labour Court upheld an arbitrator's reinstatement award, modifying it slightly by adding that, should the parties fail to agree on the sum of damages in lieu of reinstatement, either party may petition the Court for the assessment of said damages.

1393. In a communication dated 1 October 2006, the Government states that the ZCTU demonstration was undertaken in collaboration with the oppositional political party MDC. It therefore ceased to be a workers' activity and instead was subject to the laws governing political demonstrations. The Government refused to grant permission for the demonstration due to the fact that the MDC had recently experienced near-fatal violent skirmishes, and so arrested ZCTU leaders for having engaged in an illegal activity. The Government adds that the issues cited by the complainant as the basis for holding the demonstration are within the purview of the social dialogue process: it is therefore mind-boggling to note that one party to a process would elect to pursue a confrontational course

of action over matters that all parties are engaged with. The Government contends that as far as one issue over which the demonstration was held – the linking of wages to the Poverty Datum Level and HIV/AIDS – itself and the complainant were in fact already in complete agreement, as the minutes of the Tripartite Negotiating Forum (TNF) prove. In respect of such other issues as HIV/AIDS and the income tax, the Government maintains that the complainant could have pursued them through the TNF or sought to engage the authorities with possible suggestions first before resorting to demonstrations.

1394. In a communication dated 17 October 2006, the Government attaches a statement from the Commissioner of Police, summarizing the affidavits of police officers who were present at the 13 September 2006 demonstration. The statement's assertions are that: (1) as the demonstration was unlawful, the police possessed the authority to disperse the demonstrators and arrest those who defied the order to disperse; (2) the demonstrators who were injured resisted arrest and the order to disperse; (3) the police had to use minimum force to deal with the demonstrators and in the process some were injured: (4) there were also allegations from the police that some demonstrators injured themselves by jumping from vehicles taking them to various police stations; and (5) investigations are still being carried out to establish whether the ZCTU members were assaulted after being detained at Matapi police station.

1395. In its communication dated 19 January 2007, the Government first contests the "additional information" transmitted by the ICFTU since the Government has already on many occasions responded to the same allegations under different complaints and cases. It expresses the hope that the ICFTU will desist from the practice of repackaging old issues for the sake of putting the Government of Zimbabwe in the spotlight.

1396. As regards the alleged deportations of international trade unionists, the Government fully reserves its right to determine its immigration policies and laws in accordance with the aspirations of the Republic. Trade union membership cannot be used to circumvent national immigration laws and policies. The Government emphasizes that it does not wish at all to compromise its laws and policies for individuals bent on destabilizing the country under the banner and guise of trade unionism.

1397. The Government stresses that there is no blanket ban for international trade unionists to visit Zimbabwe and enumerates a number of international trade unionists from organizations such as SATUCC, LO Norway and the workers' spokesperson in the Governing Body, Mr L. Trottman, who have been hosted in the country. Only those individuals found undesirable for the social, political and economic survival and development of Zimbabwe were not allowed to enter Zimbabwe.

1398. The few isolated cases cited by the ICFTU should be viewed in the context of Zimbabwe exercising its sovereign right to determine its immigration laws and policies. Accordingly, the Government has no apology to make for exercising its constitutional obligation to protect the interests and security of the majority of Zimbabweans.

1399. As regards the alleged attempts to remove the leadership of ZCTU, to which the Government has responded on several occasions, the Government insists that the ZCTU leadership is abusing the ILO supervisory machinery over purely internal matters of the ZCTU. The so-called *agents provocateurs* are indeed members of the ZCTU leadership who have levelled allegations of corruption, maladministration and violation of the ZCTU constitution against the current ZCTU leadership. The Government considers that the ZCTU seeks to draw sympathy from its western allies who have a conspicuous phobia for the Zimbabwe Government with a view to scuttle the allegations levelled against them through labelling the leaders of the ZCTU affiliates as government agents. The

Government, therefore, has no business to comment on purely internal matters of the ZCTU. The ZCTU leadership should be advised to solve their internal matters without dragging the name of the Government into its internal matters.

1400. The Government further contests the ZCTU allegation that the CIO confirmed through press reports its intentions to remove the ZCTU leadership. In addition, the so-called death threats on the ZCTU leadership cannot be substantiated with any shred of evidence and are based on hearsay. This indeed is meant to create hype about the security of the ZCTU leadership simply to mask their anti-establishment activities and also to draw sympathy from their sponsors and handlers in the West.

1401. On the question of the alleged arrests during preparations of May Day celebrations, the Government states that it instituted enquiries into these allegations and no information was obtained regarding the matter. The Government considers that this is fictitious manipulation of events by the ZCTU in its true fashion of seeking to discredit the Government of Zimbabwe. The Government affirms, as indicated by the ZCTU, that trade union activities are not subject to POSA. The said allegations are indeed classical examples of office-engineered events by the ZCTU meant to buttress the efforts of their colleagues in the opposition who view POSA as a hindrance to their unconstitutional and violent anti-establishment aspirations.

1402. As for the arrests on 27–28 April 2005, the Government confirms that the named individuals were indeed apprehended distributing subversive material advocating for civil unrest and violent removal of the Government during the march organized by NSSA. Accordingly, law enforcement authorities acted in a proper manner to avoid breach of peace and order since other workers from other political persuasions could have acted in a similar manner leading to the breakdown of peace and order. The Government of Zimbabwe is on record encouraging the ZCTU leadership to desist from politicizing the workplace and this has all been in vain as the ZCTU leaders continue to take opportunity of any gathering to advance their political interests.

1403. The ZCTU Informal Project Coordinator was indeed under police investigations relating to illegal foreign exchange dealings, which subsequently led to a court case, which is currently under consideration by the courts.

1404. The issue relating to the alleged harassment by thugs and the issue of the two suspicious cars should be dismissed with the contempt it deserves. The Government notes that similar allegations by Mr R. Majongwe were dismissed by the committee owing to their fictitious nature.

1405. The allegations against the so-called Chinotimba Security Company are typical of competition since Chinotimba is from ZFTU, a rival centre to ZCTU. This is a clear case of competition between federations. It is mind-boggling to note that no report was made to the police yet it is common cause that security guards have no policing powers.

1406. The raid on the ZCTU offices on 13 May 2005 was indeed legal, given the fact that the police had a search warrant. It is the duty of the police to investigate where they suspect an offence has been committed. It is also worth noting that the ZCTU leadership resorted to the courts, a clear testimony of the credibility of the rule of law in Zimbabwe.

1407. As regards the workers' representative to the ILO Conference, the Government recalls that the Conference Credentials Committee dealt with this issue and reiterates its position that it had no role in selecting the ZCTU candidate, as the name of the third ZCTU Vice-President was submitted to it following the suspension of the ZCTU leadership in which the Government played no role.

1408. As for the alleged arrest of ZCTU activists for organizing a two-day stay-away, it is clear from the ICFTU submissions that the stay-away was organized by oppositional political parties and not the ZCTU. Oppositional political parties are subject to POSA. There are individuals in the ZCTU who are bent on abusing their trade union membership to advance their political interests and they have the propensity to raise the trade union flagship whenever they are caught on the wrong side of the law during political activities.

1409. As regards alleged efforts to discredit the ZCTU General Secretary, once again this concerns leadership struggles within the ZCTU following allegations levelled against Chibebe's leadership. The individuals made reference to in the allegations are indeed leaders of ZCTU affiliate unions, which is also the case for the allegations of assaults at the ZCTU, WAC and the Bronte Hotel incident. The Government has no business in trade union matters in line with Statutory Instrument 131 on protection against acts of interference.

1410. Inquiries into the alleged arrest of Lucia Matibenga on 19 October 2005 revealed that no such event occurred. The said individual is facing leadership challenges from the members of the union and in true fashion of the ZCTU leadership in similar circumstances allegations were conjured up against the Government to scuttle the internal strife within her union.

1411. With reference to its reply to the Office following an intervention requested in relation to the investigations into the ZCTU's activities, the Government adds that pursuant to the lodging of above cited complaints from ZCTU members it called for a meeting of all ZCTU General Council members to establish the true facts of the matter. Some ZCTU General Council members elected to constructively abstain from participating in the meeting. However, the submissions by those who attended the meeting were sufficient to satisfy the Minister of the need to invoke section 120 of the Labour Act thus leading to the appointment of an independent investigator.

1412. It is not the intention of the Government to comment on the merits of the case, as this would be sub judice given the fact that the matter is under the consideration of the courts. The courts in Zimbabwe are highly competent to handle this matter to the best of all considerations.

1413. As to claims by the ZCTU that they did not attend the meeting called by the Director of Labour Administration as they claim to have been in prison, the Ministry understands that it was only two members of the General Council who were in police cells and not in prison as alleged by the ZCTU after they had initiated and participated in a politically motivated demonstration.

1414. The issues raised by the ZCTU leadership relating to their internal struggles are not for the Government to comment for lack of locus standi. The leadership of the ZCTU should be informed to confine their turmoil to themselves without dragging the name of the Government into their dogfights.

1415. The Government further wishes to put the record straight that Mr Chibebe was picked up by police on 8 August 2006 for charges relating to illegal foreign currency activity to which Mr E. Mutemeri and Ms V. Mushongera are jointly charged. These charges were never dropped.

1416. In addition, the alleged arrest of Mr L. Madhuku relating to constitutional reform demonstrations has nothing to do with workers' activities. The chairman of the National Constitutional Assembly is a known political activist. The inclusion of the alleged arrest of

the NCA chairman on freedom of association issues for workers is indeed clear testimony of the relationship existing between the ZCTU leadership and oppositional political parties as well as the quasi-political organizations such as the NCA. They indeed work hand in glove for anti-establishment activities. Workers in Zimbabwe have, on many occasions, voiced their concern over the dabbling in politics by the ZCTU leaders who they have accused of concentrating on individual political interests at the detriment of the welfare of workers.

1417. Moreover, some of the information submitted by the ICFTU was not in the initial allegations by ZCTU/ICFTU only to be submitted a year later. The Government contends that these additional incidents are office-engineered to profile the Government of Zimbabwe as a grave violator of workers' rights much to the interest of the adversaries of the Government of Zimbabwe, particularly western governments.

1418. The allegations levelled against Deputy Minister Muguti are malicious and baseless. The Government challenges the ZCTU/ICFTU to provide credible evidence to substantiate these scandalous allegations.

1419. There has been no information regarding the allegations of the torture of Mr Tarwa as alleged. Again, a typical office-engineered allegation contrived to tarnish the image of the Government of Zimbabwe. Officials at the school confirmed that no such occasion occurred.

1420. The Government has always, at all material times, furnished the Committee with information regarding the case of the dismissed TelOne workers up to the time the Supreme Court conclusively dealt with the case. The Supreme Court judgement on the case was also deposited with the ILO. At no time at all were the allegations of beatings by the police raised. The ZCTU is only raising these issues at this point in time to tarnish the image of the law enforcement agents of Zimbabwe following the failing of the appeal at the Supreme Court. It is, indeed, a case of sour grapes following the dismissal of their appeal by the Supreme Court. It should thus be dismissed with the contempt it deserves. Police have also confirmed that no such incident occurred as alleged.

1421. Two ZCTU officials were indeed arrested on 8 November 2005 for participating in an illegal demonstration organized by the oppositional political party MDC that had not been sanctioned by the regulating authority. The event had nothing to do with trade union activities but rather pure political engagements of the political party MDC to which they belong. It should also be emphasized that mere notification of a political demonstration to the regulating authority does not constitute an approval to undertake the proposed demonstration. Accordingly, the regulating authority had not given consent to the political demonstration.

1422. As regards the alleged arrests of trade unionists on November 2005, the fliers allegedly confiscated from Mr Kamukutu and Mr Kambanje were indeed subversive in nature for they advocated the violent removal of the current Government. The Government notes that terrorist activities are not desirable at all and thus it is the duty of the police to maintain peace, order and tranquillity.

1423. The Government was not able to obtain information on the alleged raid at the ZCTU offices in Chinhoyi. Police also confirmed that no report was made regarding the alleged raid.

1424. As regards the mass protests of 13 September 2006, the Government considers that the situation is being recycled for the purpose of creating a hype about the alleged violations in Zimbabwe with a view to winning sympathy from the adversaries of the Republic of

Zimbabwe who are eager to engineer the listing of Zimbabwe to appear before the Conference Committee on the Application of Standards in 2007.

1425. It should also be noted that the call for the illegal demonstrations were a flop as the majority of the people in Zimbabwe ignored the call and proceeded with their daily business. The ZCTU leadership therefore undertook the demonstration and hired hooligans from the oppositional political party MDC. The numbers indicated by the ZCTU/ICFTU are therefore a figment of the imaginations of the ZCTU leaderships.

1426. The Government humbly submits that, while police used minimal force to effect arrests, the hype about the alleged tortures is highly exaggerated and is intended to blow out of proportion the minimal use of force by the police as is aptly manifested in the case of Ms Matibenga. Had there been no further examinations in South Africa, such falsehoods would have been taken as true simply because they were reported against the Government of Zimbabwe. This clearly shows the extent to which political actors in the labour movement in Zimbabwe can go in their insatiable appetite to discredit the Government of Zimbabwe.

1427. The Government of Zimbabwe is deeply concerned about the malicious distortions of the press statements allegedly issued by President Mugabe. It also should be noted that there is no proper citation to authenticate the allegations made by the ZCTU/ICFTU. The said organizations are better advised to seek clarifications with relevant government departments before submitting distorted allegations against the Government and public officials of the Republic of Zimbabwe.

1428. As regards the NGO Bill, the Government states that this does not in any way relate to trade union business. The ZCTU is registered in terms of the Labour Act as a trade union federation and not an NGO. It is therefore inappropriate to discuss and bring before the ILO system a piece of legislation that does not apply even with the widest stretch of imagination to trade union activities and the world of work.

1429. The Government considers the comments made by ICFTU and the ZCTU as submissions for consideration in the context of the ongoing labour law reform and the suggestions were noted. Labour law amendment involves consideration of different views and positions of all stakeholders. Accordingly, it is misleading for the ZCTU to assume that their views and suggestions should outrightly be considered at the expense of the views of other stakeholders like employers and civil society.

1430. It is also interesting to note that the ICFTU makes vague allegations against the existing Labour Act without making reference to the specific sections to substantiate their claims. It is in this respect that the Government challenges the ZCTU/ICFTU to provide the supposed section of the Act which prescribes that collective bargaining agreements should provide measures to combat workplace violence.

D. The Committee's conclusions

1431. *The Committee notes that the new allegations in this case concern: the deportation of and refusal of entry to foreign trade unionists collaborating with the ZCTU; the sponsoring of a rival faction within the ZCTU in its efforts to undermine the ZCTU leadership, breaking up ZCTU meetings, raiding ZCTU headquarters and unlawfully seizing union property, launching inquiries into allegations of financial malpractice to harass the union, proposed amendments to the labour legislation in violation of freedom of association principles, and several instances involving the arrest, detention, and beating of ZCTU members and officers – many of which were committed in the course of suppressing a demonstration*

organized by the ZCTU on 13 September 2006. Before addressing the substance of this case, the Committee must, in the strongest of terms, deplore the Government's accusations of ILO involvement to engineer the new allegations in this case.

1432. *As regards the arrests and detentions that took place on 13 September 2006, the Committee notes the complainant's assertion that the purpose of the demonstration organized on that day was to protest against, inter alia, poverty, hunger, unemployment, high inflation and high transportation costs. The Committee deeply regrets that the Government limits itself to defining this allegation as "hype" aimed at winning sympathy from its adversaries without providing the detailed and serious reply that this allegation deserves. The Committee observes more generally that the Government responds by reiterating the position it had previously maintained regarding allegations of a similar nature – namely, that the concerned individuals were arrested for having engaged in unlawful political demonstrations, not for legitimate trade union activity. The Committee is compelled to recall once again, as it did at its June 2005 meeting [see 337th Report, para. 1661], that trade union activities cannot be restricted solely to occupational matters since government policies and choices are generally bound to have an impact on workers; workers' organizations should therefore be able to voice their opinions on political issues in the broad sense of the term. While trade union organizations should not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests, a general prohibition on trade union activities would not only be incompatible with the principles of freedom of association, but also unrealistic in practice. Trade union organizations may wish, for example, to express publicly their opinion regarding the Government's economic and social policy [**Digest of decisions and principles of the Freedom of Association Committee**, fifth edition, 2006, paras 502–503].*

1433. *According to the complainant, ZCTU members and leaders were also arrested and detained on: 28 April, 9 June, 4 and 7 August, 20 September, 19 October, 7 and 8 November 2005, and 8 and 15 August 2006. The Committee deplores the fact that numerous allegations of this nature continue to arise, in spite of its previous recommendation to the Government to abstain from resorting to measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities [see 337th Report, para. 1671]. The Committee must once again emphasize 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 [see **Digest**, op. cit., para. 64]. Noting as well that a number of ZCTU leaders and members have been charged under the Criminal Law (Codification and Reform) in connection with their participation in the demonstration on 13 September 2006, including 29 ZCTU members in Harare, 11 in Chegutu and 11 in Kadoma, the Committee urges the Government to drop the charges brought for reasons connected to their trade union activities against these trade unionists and to abstain from resorting to measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities. While noting the Government's affirmation that the Public Order and Security Act (POSA) is not used against trade unionists, the Committee considers that economic and social protest action does constitute legitimate trade union activity that should be protected. The Committee thus urges the Government to ensure that no other charges are pending against trade unionists under the POSA for their exercise of legitimate trade union activity.*

1434. *As regards the beatings and injuries suffered by trade unionists on 13 September 2006, the Committee notes that, according to the Government, the police used minimum force to disperse the demonstrators and that none of the police officers whose affidavits are attached to its reply witnessed any acts of violence committed against the arrested trade unionists. The Committee nevertheless also takes note of the detailed information provided by the complainant in support of these allegations. The said information includes video*

footage in which the ZCTU leadership attest to having been detained and beaten on the day in question, and in which their bruises and physical injuries can readily be discerned. The complainant, moreover, also alleges acts of violence against trade unionists on other occasions: torture of PTUZ member Harry Taruva on 20 September 2005 (an allegation that the Government simply denies), the beating and dispersal of 300 workers holding a vigil on 30 October 2005, and the assault on Mr Chibebe on 15 August 2006. The Committee recalls in this respect that the right of employers' and workers' 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. Moreover, in cases in which the dispersal of public meetings by the police has involved loss of life or serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately through an independent inquiry and to a regular legal procedure being followed to determine the justification for the action taken by the police and to determine responsibilities [see ***Digest****, op. cit., paras 45 and 49]. While noting the Government's indication that investigations were being carried out to establish whether ZCTU members were assaulted after being detained at Matapi police station, the Committee urges the Government, in light of the gravity of the allegations, to initiate an independent inquiry into all the allegations of beatings and maltreatment, to be led by a personality that has the confidence of all the parties concerned. It requests the Government to keep it informed of the results of the investigation.*

1435. *The complainant also indicates, with reference to the events of 12 and 13 September 2006, that on 25 September 2006 President Mugabe told newspapers that the police were right to have dealt sternly with the trade union leaders on those days. The Government, in reply, states that this allegation is a malicious distortion that should have been clarified with the relevant government department. In the light of the contradictory positions on this point and in the absence of any further elements, the Committee can only request the Government to ensure that no statements are made by government officials that could be perceived as a threat or intimidation to trade unionists or the trade union movement as a whole.*

1436. *The Committee notes that, according to the complainant, the Government has sought to destabilize and create internal strife within the ZCTU by supporting rival factions to oppose the ZCTU leadership and disrupt ZCTU meetings. In support of this allegation the complainant refers to the following occurrences: the publication, in March 2005, of a series of articles in which leaders of ZCTU affiliates accuse the ZCTU central leadership of fraud and corruption; the disruption of a ZCTU Executive Council meeting on 19 March 2005 by the AAAWU, a rival faction within the ZCTU, that according to the complainant, receives financial support from the Government; the disruption of a ZCTU General Council meeting on 6 April 2005 in which members of unions affiliated to the ZCTU attempted to force the discussion of a motion calling for the ZCTU leadership to resign due to accusations of corruption and fraud; physical attacks on ZCTU members by* agents provocateurs *from two ZCTU affiliates on 23 April 2005; and the disruption, by members of the AAAWU, of a 9 July 2005 meeting of the ZCTU WAC, in which several of the members of the WAC were physically assaulted. The Committee is compelled to express its concern with the seriousness of these allegations. Moreover, although it is not in a position to verify allegations regarding internal conflicts within the ZCTU, the Committee must nevertheless note with great concern that, according to the allegations, those responsible for these acts are factions of the ZCTU, operating at the behest of or in collaboration with the authorities. While noting the Government's indication that these allegations concern purely internal trade union affairs, the Committee notes with deep regret that the Government does not reply in any detail to the serious concerns raised, including as regards alleged physical attacks, nor does it indicate the measures taken to investigate*

their veracity and determine those responsible. In these circumstances, the Committee urges the Government to initiate a full and independent investigation into these allegations, with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts.

1437. *According to the complainant, proof of the Government's intention to foment internal strife in the ZCTU by interfering in its internal affairs is also evinced by its refusal to sponsor the union's democratically elected President, Lovemore Matombo, and its General Secretary, Wellington Chibebe, to the June 2005 ILC, but instead support the nominations of Elias Mlotshwa and Edmund Ruzive of the AAAWU faction. While noting the Government's statement that it had no role in selecting the ZCTU candidate, the Committee notes that the findings of the Credentials Committee respecting this issue corroborate the complainant's allegations. In particular, in its disposal of the matter, the Committee noted that the "actions taken by the Government are inconsistent with the principles of freedom of association and amount to interference in the internal activities of a workers' organization" and considered that the procedure for nominating the workers' delegation did not fulfil the conditions of impartiality, transparency and predictability required under article 3, paragraph 5, of the ILO Constitution [see Third Report of the Credentials Committee of the ILO,* Provisional Record *No. 4D, paras 51–62, 93rd Session, 2005]. The Committee considers such acts of interference in the internal activities of a trade union to constitute a fundamental violation of freedom of association principles and of Convention No. 87 which the Government has ratified. It strongly urges the Government to fully observe the right of trade unions to organize their internal administration, free from interference by the public authorities and ensure that the ZCTU shall have the right to determine the trade union officials to represent it at national and international forums.*

1438. *With regard to the entry by police into ZCTU premises and the seizure of files, diskettes and foreign currency, while noting the Government's statement that the search was legal and carried out with a search warrant, the Committee observes that, according to the complainant, there were a number of irregularities relating both to the search warrant itself and to the manner in which the search was carried out. Noting that the complainant has filed a lawsuit with the High Court contesting the legality of the search and the confiscation of its property, the Committee requests the Government to keep it informed of the progress relating to this case and submit a copy of the final decision once rendered.*

1439. *With respect to the allegations concerning the Government's investigation into the ZCTU's finances, the Committee observes, from the complainant's allegations, that: (1) although the investigation, undertaken by a professional auditor appointed by the Government, failed to find any incriminating evidence, the investigator's mandate was subsequently prolonged past its scheduled March 2006 termination date; and (2) on 19 July 2006, the executive summary of the investigation report was read out to the ZCTU by the Minister of Labour but only later were the report's conclusions – which made a number of allegations concerning the exchange of currency and the misuse of union funds – made available; and that (3) the report was handed by the investigator to the police for further action. The Government states that the matter is sub judice.*

1440. *The Committee further notes from the complainant and the Government that, on 8 August 2006, ZCTU General Secretary Wellington Chibebe was interrogated by the authorities in connection with allegations of illegally exchanging foreign currency. According to the complainant, this case had previously been investigated and dropped, but was revived after the report of the investigation into ZCTU finances was submitted. Noting that, from the information before it, there appear to be a number of procedural irregularities respecting both the investigation into ZCTU's finances and the case against Mr Chibebe and his colleagues, the Committee requests the Government to provide a full and detailed*

reply respecting these inquiries, and to transmit the full texts of any court judgements rendered in this regard.

1441. *The Committee further notes the Government's indication that a court case is currently pending against the ZCTU Informal Project Coordinator relating to allegedly illegal foreign exchange dealings and requests the Government to transmit a copy of the judgement as soon as it is handed down.*

1442. *As regards the deportation and refusal of entry to foreign trade unionists, while observing from the Government's reply that some foreign trade unionists were allowed to enter the country, the Committee is alarmed by the Government's declaration that those who were not allowed entry were not desirable for the social, political and economic survival and development of the country although their visits related to programmes of cooperation and assistance between their respective trade unions and ZCTU or one of its affiliates. In this connection, the Committee recalls, as it did in its previous examination of this case, that it is a fully legitimate trade union activity to seek advice and support from other well-established trade union movements in the region to assist in defending or developing the national trade union organizations, even when the trade union tendency does not correspond to the tendency or tendencies within the country, and visits made in this respect represent normal trade union activities, subject to provisions of national legislation with regard to the admission of foreigners; the corollary of that principle is that the formalities to which trade unionists and trade union leaders are subject in seeking entry to the territory of a State, or in attending to trade union business there, should be based on objective criteria and be free of anti-union discrimination [see 337th Report, para. 1667]. The Committee notes that the Government has not provided any information respecting this matter. It urges the Government once again to allow in the future mutual support missions into the country, subjecting any approval to objective criteria only without recourse to decisions of an anti-union nature.*

1443. *The Committee notes the Government's indications that: (1) it has no available record regarding Mr Choko and the eight other trade unionists who had participated in the demonstration on 18 November 2003 in Bulawayo; and (2) as concerns Mr Takaona's case, the company Zimpapers is currently appealing an arbitration award made under section 98 of the Labour Act. With regard to the case against Mr Choko and the eight other trade unionists, the Committee recalls that the arrest and detention of trade unionists for engaging in trade union activity are violations of the principles of freedom of association. Nevertheless it will not pursue this matter without further information from the complainant. With respect to Mr Takaona the Committee recalls that he was dismissed from his journalist position at Zimpapers on 4 March 2004 due to his trade union activities [see 336th Report, para. 897]. Noting that the employer Zimpaper has appealed an arbitration award ordering Mr Takaona's reinstatement, the Committee – in light of the time of period that has elapsed since Mr Takaona's dismissal – once again requests the Government to ensure that he is rapidly reinstated in his functions at Zimpapers, or in an equivalent position, without loss of pay or benefits and to keep it informed in this regard.*

1444. *The Committee notes the Bill on non-governmental organizations (the "NGO Bill") which, according to the complainant, is aimed at preventing local NGOs from receiving funds for "issues of governance" – including the promotion and protection of human rights and political governance issues. The complainant indicates that the ZCTU has expressed concern that the Bill would be deployed to prevent it from receiving foreign funding for its activities. In this regard, the Committee recalls that all national organizations of employers and workers should have the right to receive financial assistance from international organizations of employers and workers, respectively, whether or not they are affiliated with the latter [see* ***Digest****, op. cit., para. 744]. Noting the Government's*

statement that this Bill does not apply to trade unions, the Committee expects that the Government will ensure that, if adopted, the NGO Bill does not in any way restrict the right of trade unions to receive foreign financial assistance for legitimate trade union activities.

1445. *The Committee notes the complainant's allegations that the Labour Amendment Act 2005 impinges upon trade union rights by: excluding public servants from the scope of its provisions, thus denying them the rights to strike and bargain collectively; granting the Minister of Labour power to approve collective bargaining agreements; permitting decisions of the Registrar to stand despite appeal, whereas previously an appeal would suspend the decision of the Registrar; and allowing employers to hire replacement workers in the event of a strike.*

1446. *As regards civil servants, the Committee recalls that the right to strike may be restricted or prohibited only for public servants exercising authority in the name of the State; too broad a definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers [see* ***Digest****, op. cit., paras 574-575]. Moreover, all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service [see* ***Digest****, op. cit., para. 886].*

1447. *With respect to the Minister's power to approve collective bargaining agreements, the Committee recalls that making the validity of collective agreements signed by the parties subject to the approval of these agreements by the authorities is contrary to the principles of collective bargaining and of Convention No. 98 [see* ***Digest****, op. cit., para. 1012].*

1448. *As regard decisions of the Registrar, the Committee recalls that a decision to prohibit the registration of a trade union which has received legal recognition should not become effective until the statutory period of lodging an appeal against this decision has expired without an appeal having been lodged, or until it has been confirmed by the courts following an appeal [see* ***Digest****, op. cit., para. 301]. Finally, with respect to the hiring of replacement workers in the event of a strike, the Committee recalls that if a strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights [see* ***Digest****, op. cit., para. 633].*

1449. *The Committee requests the Government to take the necessary measures to review the Labour Amendment Act (2005), in full consultation with the social partners, and take the necessary measures to ensure that it is amended so as to give effect to the abovementioned principles.*

1450. *The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the complaint.*

1451. *Before concluding, the Committee is bound to note with deep concern that the trade union situation in Zimbabwe has not evolved, and may even have worsened, since its last examination of the case, where it made the following comments [see 342nd Report, para. 1052].*

> *… The Committee deeply regrets the deterioration of the situation relating to the trade union climate in Zimbabwe since its last examination of the case, which it considered to be extremely serious [see 337th Report, para. 1670]. The Committee reiterates its deep concern in this regard, and once again calls the Governing Body's special attention to the situation. Finally, the Committee requests the Government to accept a direct contacts mission.*

1452. *In the light of the above, the Committee notes with grave concern that the Government has refused its request to accept a direct contacts mission. It urges the Government to reconsider its request for such a mission and once again calls the Governing Body's special attention to the grave situation relating to the trade union climate in Zimbabwe.*

The Committee's recommendations

1453. ***In the light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:***

(a) The Committee urges the Government to drop the charges brought for reasons connected to their trade union activities against several of those who had participated in the 13 September 2006 demonstration, and to abstain from resorting to measures of arrest and detention of trade union leaders or members for reasons connected to their trade union activities. In addition, it urges the Government to ensure that no other charges are pending against trade unionists under the Public Order and Security Act for their exercise of legitimate trade union activity.

(b) The Committee urges the Government to initiate an independent inquiry, to be led by a personality that has the confidence of all the parties concerned, to determine whether ZCTU members were beaten after being detained in Matapi police station, as well as in respect of the other allegations of beatings and maltreatment. It requests the Government to keep it informed of the results of the investigation.

(c) The Committee urges the Government to initiate a full and independent investigation into the allegations concerning the disruption of ZCTU meetings and physical assault upon ZCTU members, by rival factions within the ZCTU, with a view to fully clarifying the facts, determining responsibility, punishing those responsible and preventing the repetition of such acts.

(d) The Committee strongly urges the Government to fully observe the right of trade unions to organize their internal administration free from interference by the public authorities and to ensure that the ZCTU shall have the right to determine the trade union officials to represent it at national and international forums.

(e) The Committee requests the Government to keep it informed of the progress of the ZCTU case before the High Court regarding the search of its headquarters and confiscation of its property, and to submit a copy of the final decision once rendered.

(f) The Committee requests the Government to provide a full and detailed reply respecting the investigation into the ZCTU's finances and the interrogation of Mr Wellington Chibebe for financial misconduct, and to transmit the full texts of any court judgements rendered in this regard.

(g) The Committee urges the Government to allow mutual support missions into the country, subjecting any approval to objective criteria only, without recourse to decisions of an anti-union nature.

(h) The Committee once again requests the Government to ensure that Mr Takaona is rapidly reinstated in his functions at Zimpapers, or in an equivalent position, without loss of pay or benefits and to keep it informed in this regard.

(i) The Committee expects that the Government will ensure that, if adopted, the NGO Bill does not in any way restrict the right of trade unions to receive foreign financial assistance for legitimate trade union activities.

(j) The Committee requests the Government to review the Labour Amendment Act (2005), in full consultation with the social partners, and take the necessary measures to ensure that it is amended so as to give effect to the principles set forth in its conclusions.

(k) The Committee draws the attention of the Committee of Experts on the Application of Conventions and Recommendations to the legislative aspects of the complaint.

(l) The Committee urges the Government to reconsider its request for a direct contacts mission.

(m) The Committee once again calls the Governing Body's special attention to the grave situation relating to the trade union climate in Zimbabwe.

Geneva, 15 March 2007. *(Signed)* Professor Paul van der Heijden, Chairperson.

Points for decision:	Paragraph 268;	Paragraph 667;	Paragraph 1023;
	Paragraph 280;	Paragraph 724;	Paragraph 1040;
	Paragraph 304;	Paragraph 801;	Paragraph 1052;
	Paragraph 314;	Paragraph 823;	Paragraph 1066;
	Paragraph 331;	Paragraph 844;	Paragraph 1096;
	Paragraph 352;	Paragraph 864;	Paragraph 1158;
	Paragraph 386;	Paragraph 879;	Paragraph 1215;
	Paragraph 415;	Paragraph 896;	Paragraph 1248;
	Paragraph 439;	Paragraph 913;	Paragraph 1321;
	Paragraph 460;	Paragraph 939;	Paragraph 1332;
	Paragraph 587;	Paragraph 999;	Paragraph 1453.