INTERNATIONAL LABOUR OFFICE

OFFICIAL BULLETIN

Vol. LXXIV, 1991 *Series B, No. 1*

Report of the Committee on Freedom of Association (277th Report)

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[1] The letter S, followed as appropriate by a roman numeral, indicates a supplement.

[2] For communications relating to the 23rd and 27th Reports see Official Bulletin, Vol. XLIII, 1960, No. 3.

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Vol. LXXIV *1991* *Series B, No. 1*

Report of the Committee on Freedom of Association (277th Report)[1]

I. INTRODUCTION

1. The Committee on Freedom of Association, set up by the Governing Body at its 117th Session (November 1951), met at the International Labour Office, Geneva, on 18, 19, and 22 February 1991 under the chairmanship of Mr. Roberto Ago, former Chairman of the Governing Body.

2. The members of the Committee of Australian, American and British nationality were not present during the examination of the cases relating to Australia (Case No. 1511), the United States (Case No. 1523) and the United Kingdom (Cases Nos. 1540 and 1553), respectively.

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3. The Committee is currently seized of 77 cases in which complaints have been submitted to the Governments concerned for observations. At its present meeting it examined 18 cases in substance, reaching definitive conclusions in 11 cases and interim conclusions in 7 cases; the remaining cases were adjourned for the reasons set out in the following paragraphs.

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[1] The 277th Report was examined and approved by the Governing Body at its 249th Session (February-March 1991).

New cases

4. The Committee adjourned until its next meeting the cases relating to the United States (Case No. 1557), Ecuador (Case No. 1558), Argentina (Cases Nos. 1560/1567), Spain (Case No. 1561), Iceland (Case No. 1563), Sierra Leone (Case No. 1564), Greece (Case No. 1565), Peru (Case No. 1566), Honduras (Case No. 1568), Panama (Case No. (1569), the Philippines (Cases Nos. 1570 and 1572) and Romania (Case No. 1571), concerning which it is awaiting information or observations from the Governments concerned. Concerning Case No. 1559 (Australia), the Government, in a communication dated 14 February 1991, announced that it will send its observations shortly. These cases relate to complaints submitted since the last meeting of the Committee.

Subsequent adjournments

5. The Committee is still awaiting observations or information from the Governments concerned in the cases relating to El Salvador (Cases Nos. 1441/1494), Morocco (Case No. 1499), China (Case No. 1500), Guatemala (Case No. 1512), Haiti (Case No. 1520), Pakistan (Case No. 1525), Honduras (Cases Nos. 1538 and 1554), the United States (Case No. 1543), Poland (Case No. 1545) India (Case No. 1550), Argentina (Case No. 1551) and Colombia (Case No. 1555). As regards Cases Nos. 1426 (Philippines), 1532 (Argentina) and 1536 (Spain), the Governments have stated that they will be sending their observations shortly. Concerning Cases Nos. 1434, 1477 and 1562 (Colombia), the Government, in a communication dated 4 February 1991, forwarded certain information and announced that it would be sending additional information. The Committee again adjourns these cases and requests the Governments of these countries to transmit the information or observations requested.

6. As regards Cases Nos. 997, 999 and 1029 (Turkey), 1478, 1484, 1527 and 1541 (Peru), 1479, 1514 and 1517 (India), 1526 (Canada/Quebec), 1531 (Panama), 1544 (Ecuador) and 1554 (Honduras), the Committee intends to examine these cases in substance at its next meeting, since it has only just received the Governments' observations.

7. As regards Case No. 1483 (Costa Rica) the Committee requested the Government to accept a direct contacts mission in its 275th Report, paragraphs 240 to 322. In a communication dated 25 January 1991, the Government accepted the mission which will take place on 3 to 10 April 1991.

8. As regards Case No. 1504 (Dominican Republic), the Government transmitted certain documentation received in the ILO on 21 January 1991. In view of the contradictions existing between the complainants' and the Government's versions of the facts in this case, the Office has requested the complainants to send their comments on the Government's reply.

9. The Committee also decided to adjourn its examination of Case No. 1523 (United States) and it requests the complainant and the

Government to send any additional information that they wish to present in this case.

10. As regards Case No. 1556 (Iraq), in a communication dated 11 January 1991 the Government sent very general information on the situation which gave rise to the complaints in question. Given the seriousness of the allegations made, the Committee requests the Government to send urgently its precise and detailed observations on the issues raised in this case.

URGENT APPEALS

11. As regards Cases Nos. 1273 (El Salvador), 1337 (Nepal), 1510 and 1546 (Paraguay), 1534 (Pakistan), 1530 (Nigeria) and 1539 (Guatemala), the Committee observes that, despite the time which has elapsed since the presentation of these complaints and the seriousness of the allegations contained therein, these Governments have not transmitted the observations or information which had been requested. The Committee draws the attention of these Governments to the fact that, in accordance with the procedural rules set out in paragraph 17 of the Committee's 127th Report, approved by the Governing Body, it will present a report on the substance of these cases at its next meeting even if the observations or information requested from the Governments have not been received in due time. The Committee accordingly requests these Governments to transmit their observations as a matter of urgency.

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12. The Committee draws the legislative aspects of the following cases to the attention of the Committee of Experts on the Application of Conventions and Recommendations: Cases Nos. 1511 (Australia), 1540 (United Kingdom), 1547 (Canada/British Columbia) and 1549 (Dominican Republic).

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

13. As regards Case No. 792 (Japan) on which the Committee reached definitive conclusions at its November 1978 meeting (187th Report, paragraphs 69 to 141), and on which information on developments in the trials of teacher trade unionists has been supplied at regular intervals, the World Confederation of Organisations of the Teaching Profession (WCOTP) alleges in a letter of 7 October 1990 that the Supreme Court of Japan has finally sentenced Mr. Makieda, ex-President of the Japan Teachers' Union, to six months' imprisonment with a one

year suspended final judgement for having called a peaceful strike over occupational demands in 1974. In a communication of 25 January 1991, the Government reiterates its previous statements on the views expressed by the Committee in this case. It points out that the December 1989 sentence has not and will not be implemented because the period of suspension (one year) expired on 28 December 1990, on which date the sentence became invalid. Therefore, Mr. Makieda has not and will not be restricted in his activities. The Committee takes note of this information, particularly the fact that Mr. Makieda has profited from the suspension of the Supreme Court's sentence. It considers that no new elements have been presented to warrant a change in its previous conclusions on this aspect of the case, and accordingly refers the Goverment to them, particularly those adopted at its March 1987 meeting (248th Report, paragraph 14) when it last examined the effect given to its recommendations.

14. As regards Case No. 1449 (Mali), the Committee had requested the Government to keep it informed of the situation of the teachers who had been dismissed because of strike action based on the late payment of their salaries which were held up several months between 1986 and 1988. In a communication of 15 January 1991, the Government sends a copy of the Decision of 4 December 1990 by which the Ministry of Employment and the Public Service rectroactively reinstated the teachers Modibo Diarra and Youssouf Ganaba with full promotion and salary rights. The Committee takes note of the information on the reinstatement of these teachers with interest.

15. As regards Case No. 1467 (United States), the Committee had requested the Government to keep it informed on developments in the judicial proceedings concerning the subcontracting grievance, which were before the District Court for the Eastern District of Kentucky for adjudication on the merits. In a communication dated 11 February 1991, the Government states that the litigation concerning Agipcoal (formerly Enoxy Coal) USA Inc. has been stayed, by agreement of the parties involved, pending the outcome of collective bargaining which has been undertaken in good faith by the United Mine Workers of America and the company. The Government undertakes to keep the Committee apprised of further developments in the matter. The Committee takes note of this information with interest, particularly in view of the recommendations it made on the importance of good faith collective bargaining when it examined the substance of this case in November 1989. It requests the Government to inform it of the final resolution of this labour dispute, through the current negotiations by the parties involved, in due course.

16. As regards Case No. 1468 (India), when the Committee last examined it at its meeting in February 1990, it requested the Government to keep it informed of the outcome of outstanding legal proceedings in relation to the serious incidents that took place in 1988 in the State of Tripura. In a communication of 21 January 1991, the Government sends a copy of the judgement of the South Tripura Magistrates' Court concerning the clash between supporters of two rival unions at the Kalshimukh Rubber Plantation Centre on 6 May 1988

which had resulted in the hospitalisation of Mr. Rakhal Roy Burman, Secretary of the Rubber Shramik Union. It appears from the judgement that the parties jointly filed a compromise petition which was examined and accepted by the magistrate; the accusations were accordingly discharged. The Committee notes this information and requests the Government to continue supplying information on the other incidents listed in this case in the Committee's 265th Report at paragraph 517(b), (c), (e), (g), (h), (i) and (k).

17. As regards Case No. 1481 (Brazil), the Committee had requested the Government to keep it informed of the outcome of the police investigations aimed at clarifying the facts and determining responsibilities in relation to the alleged repression and ill-treatment of workers in the National Iron and Steel Works of Volta Redonda in November 1988. In a communication dated 17 December 1990, the Government states that the judge of the First Criminal Court of Volta Redonda has decided to close the police inquiries. The Committee takes note of this information and regrets that it has not been possible to identify the guilty parties responsible for such serious allegations.

18. Finally, as regards Cases Nos. 1054 and 1388 (Morocco), 1168 (El Salvador), 1189 (Kenya), 1396 (Haiti), 1417, 1461 and 1509 (Brazil), 1428 and 1471 (India), 1341 and 1482 (Paraguay), 1493 (Cyprus), 1495 (Philippines), 1502 (Peru), 1505 (Barbados) and 1513 (Malta), the Committee again requests these Governments to keep it informed of developments in the various matters. The Committee hopes that these Governments will communicate the information requested at an early date.

II. CASES IN WHICH THE COMMITTEE HAS REACHED DEFINITIVE CONCLUSIONS

Case No. 1522

COMPLAINTS AGAINST THE GOVERNMENT OF COLOMBIA PRESENTED BY - THE GENERAL CONFEDERATION OF LABOUR (CGT) AND - THE WORLD CONFEDERATION OF LABOUR (WCL)

19. The complaints are contained in communications of the General Confederation of Labour (CGT) and the World Confederation of Labour (WCL) dated 21 February and 21 March 1990, respectively. The Latin American Central of Workers (CLAT) sent a communication dated 5 April 1990 in support of these complaints. The Government sent its reply in a communication dated April 1990 which, in accordance with the Committee's procedure, was transmitted by the Office to the complainant organisations because the allegations and the Government's reply contradicted one another [see Digest of decisions and principles

of the Freedom of Association Committee, 3rd edition, 1985, paras. 49 and 50]. The Government subsequently sent a further communication dated 14 May 1990, reiterating the observations contained in its previous communication. The WCL sent its comments on the Government's observations in communications dated 16 August and 20 September 1990. The Government sent a further reply in a communication dated 31 October 1990.

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

A. The complainants' allegations

21. The complainants allege that at a general meeting held on 4 November 1989 the Workers' Union of the Manufacturas Piltex enterprise (SINTRAPILTEX) approved a list of claims with a view to signing a new collective agreement and appointed the bargaining committee for this purpose. The trade unionist, María del Carmen Ramírez, who took part in drawing up the list of claims, was dismissed.

22. The complainants add that in this context, the Manufacturas Piltex enterprise, with the collusion of officers of the Cundinamarca Workers' Union (UTRACUN) and with the aim of ignoring the decisions of the above-mentioned general meeting, allowed Mr. Alvaro Herrera (an officer of UTRACUN) to enter the enterprise during working hours in December 1989 in order to demand using a megaphone that another so-called meeting be held, which was finally done on the enterprise's premises on 9 December 1989. At this so-called meeting, with the sole support of one Vice-Chairperson of the trade union (Mrs. Rosa Elvira Herrera), the members of the bargaining committee were replaced; they then proceeded to negotiate and sign (on 22 December 1990) a collective agreement of boundless corruption and immorality. For example, payment of certain non-statutory benefits (such as Christmas and vacation bonus) was made conditional upon the trade union's affiliation to UTRACUN; in particular, the bonus clause states that "these bonuses will be paid if the trade union is affiliated to UTRACUN". In addition, the above-mentioned so-called general meeting disaffiliated the trade union from the General Confederation of Labour and ratified its affiliation to UTRACUN (an organisation which had been expelled from the General Confederation of Labour for manoeuvring in favour of employers). In view of the unlawful nature of the so-called assembly of 9 December 1989 (the date on which the lawful executive committee had planned its general meeting elsewhere), the lawful committee contested it on 12 December 1989 before the Ministry of Labour, which has not issued a ruling to date.

23. According to the complainants, the lawful executive committee planned a general meeting for 22 February 1990, but as was to be expected, the enterprise, the confederation UTRACUN and the

Vice-Chairperson Rosa Elvira Herrera sabotaged the meeting by planning another one on 24 February at the UTRACUN headquarters, at which the lawful executive committee was taken by surprise, two inspectors from the Ministry of Labour were refused entry, and the chairperson, general secretary and treasurer of the organisation expelled without being given the opportunity to explain themselves (Mrs. Ana Tulia Gutiérrez, Rosa Irene López and María del Carmen Castro de Reyes, respectively). In addition, 46 new members were admitted contrary to the union's rules, and a new executive committee was appointed without the previous one having completed its term of office, which was one year. In these circumstances, the lawful executive committee, legally registered and recognised by the Ministry of Labour, contested this meeting. The inspectorate which was to register the new executive committee decided in the first instance not to register it; that committee therefore appealed and the case is now in progress. None the less, as of March 1990, the enterprise granted trade union leave to all of the members of the unlawful executive committee and dismissed the following trade unionists as part of the trade union persecution referred to above: María del Carmen Ramírez Calderón (31 October 1989), Marlen Campos Cano (18 November 1989), Adela Castro Chauta (24 November 1989), Miryam Elsa Rativa and Blanca Sofía Mora Guerrero (18 November 1989). In addition, Ana Tulia Gutiérrez and Rosa Irene López Letrado (Chairperson and General Secretary, respectively) were dismissed in March 1990 after refusing to sign a letter of voluntary resignation demanded by the enterprise. Lastly, the trade union dues deducted under the check-off system are now being paid to the unlawful executive committee.

24. The complainant organisations allege further that for the last five years, the Nylon Van Raalte Textile Workers' Union has been subjected to the most ignominious persecution, in the form of dismissals of workers, violation and disregard of the collective labour agreement, the setting up of a parallel trade union to divide the workers and the imposition of a regime of constant terror on those persons who have kept their dignity, maintaining a consistent position in the trade union. One trade unionist has not been allowed to work for over four years. Her only "crime" has been her courageous defence of workers' rights and her constant struggle to maintain a genuine trade union.

B. The Government's reply

25. The Government states that in December 1989, the executive committee of the CGT presented a complaint to the Colombian authorities similar to that sent to the Committee on Freedom of Association. The labour inspectorate took the appropriate steps, of which the following should be highlighted: (1) in March 1990 the members of the executive committee of SINTRAPILTEX dissociated themselves in writing from the complaints presented by the executive committee of the CGT and the other executive committee allegedly affected; this communication was

backed by the signature of 148 members of SINTRAPILTEX; (2) not having ascertained any violation of the clauses of the current collective agreement, the labour inspectorate refrained from adopting punitive labour law measures against the Piltex enterprise and did not consider the CGT's complaints to refer to violations of freedom of association.

26. The Government adds that on 12 December 1989 Mrs. Ana Tulia Gutiérrez Gómez, in her capacity as chairperson of the trade union, contested the decisions adopted at the meeting held on 9 December 1989 for the same reasons as those cited by the CGT. She requested the Ministry to declare null and void everything which had taken place on 9 December, to recognise the decisions adopted at the meeting of 4 November 1989 as the workers' sole legitimate instrument, and to compel the Manufacturas Piltex SA enterprise to negotiate the list of demands presented by the trade union with the bargaining committee elected at the meeting of 4 November 1989. This investigation was carried out by the labour inspectorate in order to elucidate the facts referred to in the complaint. The investigation was opened by a resolution of September 1990; it should be pointed out that the labour inspectorate had already carried out an investigation regarding an alleged refusal to bargain (following a complaint lodged against the enterprise by SINTRAPILTEX) and that the case had been closed in March 1990, as the inspectorate had been presented with an authentic record of the opening of talks as part of the planned bargaining process, and it had subsequently been established that the signed collective agreement had been legally deposited with the Ministry. The investigation concluded that the general meeting of workers of Manufacturas Piltex SA held on 9 December 1989 was in conformity with the law and the trade union's by-laws.

27. The Government adds that on 2 March 1990 the Ministry of Labour was requested to register a new trade union executive committee elected at the general meeting held on 24 February 1990; the application was referred to the labour inspectorate; written contestations were also presented, and the facts referred to in them were investigated; the investigation was completed in July 1990. The Ministry refrained from registering the executive committee because one of the requirements laid down in section 11(c) of Decree No. 1469 of 1978 had not yet been met; upon a second application, the earlier decision was revoked in October 1990 and registration of the new executive committee of the trade union organisation "SINTRAPILTEX", elected at the meeting held on 24 February this year, was ordered.

28. The Government states that it is clear from all of the proceedings that have taken place that a struggle is being waged between the General Confederation of Labour (CGT) and the Cundinamarca Workers' Union (UTRACUN) over the eventual affiliation of SINTRAPILTEX. This has resulted in a division within the SINTRAPILTEX union itself, each faction being supported by one of these central organisations. Moreover, it is essential to point out that it is not for the Ministry of Labour to declare instruments reflecting decisions taken by trade union organisations lawful or unlawful, since it is only the trade union's highest executive body, namely the general meeting with the

quorum required by the law and the union's own rules, which can declare its decisions valid or invalid. In each of the investigations carried out by the inspectors, documents have been presented, signed by a total of 148 members of the trade union organisation and refuting the complaints made by the complainant, which had always been the CGT and some members of the former executive committee.

29. As regards the dismissals in the Manufacturas Piltex SA enterprise, the Government states that investigations have confirmed five cases of unilateral termination without just cause (from 31 October 1989 to 21 February 1990) and two cases of unilateral termination with just cause (from 5 to 10 March 1990). The legislation relating to protection in the event of collective dismissals provides that an employer intending to carry out such dismissals must obtain authorisation from the Ministry of Labour in the case of dismissal without just cause. As regards the five terminations without just cause in this enterprise, they occurred over a period of 110 days, out of a total of approximately 290 workers employed in the enterprise. A collective dismissal in violation of the labour law is considered to be one carried out by an employer without the authorisation of the Ministry, on one day or successively, but with brief intervals in order to evade authorisation; in the case under consideration the terminations occurred as follows: one on 31 October, two on 17 November, one on 23 November and one on 21 February 1990. By a resolution of 29 June 1990, the Ministry of Labour ruled that these facts did not constitute collective dismissal and afforded the opportunity for an administrative appeal, which was not used, and therefore it was ordered that the case be closed on 12 July 1990.

30. As regards the allegations of trade union persecution of the members of the Nylon Van Raalte Textile Workers' Union, the Government states that no complaint has been presented to date by that trade union to the Ministry of Labour and Social Security regarding the irregularities referred to in their complaint to the ILO. The Government states that in order to protect the right to organise, legislation and regulations have been enacted guaranteeing the right of trade union organisations at every level to function freely and independently and preventing the commission of any act in violation of this right, by adopting all of the necessary and appropriate measures to put it into effect, including the imposition of penal sanctions and fines.

C. The Committee's conclusions

31. As regards the allegations concerning the Nylon Van Raalte Textile enterprise, the Committee would point out that these are extremely general allegations: although the complainant organisation referred to the dismissal of workers, the violation of the collective agreement and the setting up of a trade union parallel to the one already in existence, it has not provided precise information on the

date of the dismissals, the specific reasons on which they were based or the number of persons affected, on the provisions of the collective agreement allegedly violated or on the circumstances in which a parallel trade union was allegedly set up. The Committee also observes that, according to the Government, the trade union of the enterprise referred to has not presented complaints to this effect to the Ministry of Labour. In these circumstances, taking account of the fact that the complainant organisations have been afforded the opportunity to present additional information and that the Government's reply was even sent to them for their comments, and that no comments have been received to date, the Committee considers that it is not in a position to formulate conclusions on the allegations and that it should not proceed with its examination of the case.

32. As regards the allegations concerning the Manufacturas Piltex enterprise, the Committee observes that the complainant organisation acknowledges the existence of two factions within the Manufacturas Piltex Workers' Union (SINTRAPILTEX), represented by two executive committees with different positions regarding the contents of the new collective agreement and the higher-level organisation with which the trade union should be affiliated. The Committee considers that although the complainant organisation cited collusion on the part of the enterprise management in the setting up of the unlawful (according to the complainant organisation) executive committee and the signing of the new collective agreement, the issues raised in the complaint arise out of, and are essentially attributable to, the struggle between two factions of the same trade union. On previous occasions the Committee has considered that conflicts within a trade union lie outside its competence and should be resolved by the parties themselves or by recourse to the judicial authority or an independent arbitrator [see Digest of decisions and principles of the Freedom of Association Committee, 3rd edition, 1985, paras. 663, 665 and 671]. In the present case, the Committee must recall the principles it has expressed in the past without deciding in favour of either of trade union factions, the more so since, according to the Government's statements: (1) out of a total of approximately 290 workers employed in the Manufacturas Piltex enterprise, 148 trade union members refute the complaints presented by the complainant organisations in this case and by the executive committee which the complainants consider to be lawful; (2) the meetings called by the executive committee which the complainant organisations consider to be unlawful were in any case held with the quorum required by the law and the union's own rules.

33. However, the Committee observes that the Government admits that between 31 October 1989 and 21 February 1990 there were five dismissals in the Manufacturas Piltex enterprise without a reason being given. The complainant organisation specified that during this period the trade unionists María del Carmen Ramírez Calderón, Marlen Campos Cano, Adela Castro Chauta, Myriam Elsa Rativa and Blanca Sofía Mora Guerrero were dismissed, and that subsequently, in March 1990, Ana Tulia Gutiérrez and Rosa Irene López Letrado (chairperson and general secretary of the trade union, respectively, and members of the executive committee considered to be lawful by the complainant

organisation) were dismissed without a reason being given. The Committee observes that the investigations carried out by the Ministry of Labour into these dismissals did not examine whether they were based on trade union activities, but restricted themselves to noting that the periodicity of the dismissals proved that there had not been a collective dismissal.

34. In this respect, the Committee would like to draw the Government's attention to the principle it has recalled on several occasions, that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is not accorded by legislation which enables employers in practice - on condition that they pay the compensation prescribed by law for cases of unjustified dismissal - to dismiss a worker if the true reason is his or her trade union membership or activities [see, for example, 211th Report, Case No. 1053 (Dominican Republic), para. 163; 241st Report, Case No. 1293 (Dominican Republic), para. 273; 254th Report, Case No. 1393 (Dominican Republic), para. 186; as well as Digest, para. 547]. In these circumstances, taking account of the fact that the seven trade union leaders and trade unionists referred to by the complainant organisations were dismissed without a reason being given, since the opening of negotiations on the new collective agreement in the Manufacturas Piltex enterprise and in the context of inter-union conflict in the same enterprise, the Committee requests the Government to take steps with a view to reinstating the persons concerned in their jobs.

The Committee's recommendations

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

(a) The Committee requests the Government to take measures so that the legislation guarantees to both union leaders and workers sufficient protection against acts of anti-union discrimination.

(b) In view of the fact that Colombian legislation allows the dismissal of trade unionists without grounds being given, the Committee requests the Government to take steps with a view to the reinstatement of the following persons: Ana Tulia Rodríguez (chairperson of SINTRAPILTEX), Rosa Irene López Letrado (general secretary of SINTRAPILTEX) and trade unionists María del Carmen Ramírez Calderón, Marlen Campos Cano, Adela Castro Chauta, Myriam Elsa Rativa and Blanca Sofía Mora Guerrero, all of whom were dismissed without a reason being given, following the opening of negotiations on the new collective agreement in the Manufacturas Piltex enterprise and in the context of an inter-union conflict in that enterprise.

Case No. 1533

COMPLAINT AGAINST THE GOVERNMENT OF VENEZUELA PRESENTED BY THE VENEZUELAN GENERAL CONFEDERATION OF LABOUR (CGT)

36. The complaint is contained in a communication from the Venezuelan General Confederation of Labour (CGT) dated 3 April 1990. The Latin American Central of Workers (CLAT) supported this complaint in a communication dated 5 April 1990. The Government replied in a communication dated 10 October 1990.

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

A. The complainant's allegations

38. In its communication dated 3 April 1990, the Venezuelan General Confederation of Labour (CGT) alleges that on 30 January 1990, an indefinite strike was called by more than 250 drivers of heavy vehicles, belonging to the Occupational Trade Union of Drivers of Heavy Vehicles and Related Trades of the State of Bolivar (SUCHOGAND-BOLIVAR). These drivers work for 20 private haulage companies, which are franchise holders of the Orinoco Iron and Steel Corporation (SIDOR). The CGT adds that the strike called for the restoration of working conditions that had been altered by an illegal alleged collective agreement. This agreement, signed without the consent or the authorisation of the workers by an unlawful executive committee (five of the seven members of that committee had been dubiously replaced in April 1989), in collusion with the employers, had been declared lawful by the Labour Inspectorate in spite of workers' protests. More specifically, the strike set out to restore the system whereby 20 per cent of the net transport load was reimbursed to the workers - a system that had been in force for more than 25 years in the branch of activity under consideration; the above-mentioned collective agreement (the deposit of which had been accepted by the Ministry of Labour) replaced this system by a wage scale.

39. The CGT points out that on 19 December 1989 SUCHOGAND-BOLIVAR appointed a new lawful executive committee and dismissed the previous officials; but the Ministry of Labour and the employers refused to recognise it.

40. The CGT adds that the Government's response to the strike launched on 30 January 1990 was to issue Decree No. 795 of 2 March

1990 which, in violation of Conventions Nos. 87 and 98, ordered a return to work and subjected the dispute to compulsory arbitration.

B. The Government's reply

41. The Government states that the drivers working for the haulage companies of the Venezuelan Corporation of Guayana (CVG) and the Orinoco Iron and Steel Corporation (SIDOR) have not been working since 30 January 1990 and that the Ministry of Labour intervened in this dispute, proposing a compromise, but the parties failed to reach an agreement. As the Venezuelan economy could not tolerate a labour dispute that caused considerable losses to a fundamental state enterprise, with all the obvious harmful repercussions this had on the economic life of the country and its population, the National Executive, under Decree No. 795 of 2 March 1990, ordered that work should be resumed under the same conditions existing before it came to a standstill and submitted the dispute to an arbitration board - with the proviso that, if either of the parties failed to appoint representatives within five days of the Decree having been issued, the Ministry of Labour would appoint them ex officio. The Government adds that on 12 March 1990, the Ministry of Labour, under Order No. 537, appointed the workers' representative on the arbitration board ex officio, as the workers had submitted two different candidates, thereby creating a conflict of representativity and legitimacy.

42. The Government states that on 20 March 1990, the Occupational Trade Union of Drivers of Heavy Vehicles and Related Trades of the State of Bolivar, the Autonomous National Federation of Drivers' Trade Unions, the Venezuelan Central of Workers and the Venezuelan General Confederation of Labour submitted an application to the Politico-administrative Chamber of the Supreme Court of Justice, seeking both a writ for amparo (enforcement of constitutional rights), and a judicial review of administrative decisions that had been handed down, namely the Presidential Decree No. 795 of 2 March 1990 and the Order No. 537 issued by the Ministry of Labour on 12 March 1990. In a decision of 18 April 1990, the Supreme Court of Justice informed the applicants that, according to section 18 of the fundamental law of amparo on constitutional rights and guarantees, two items were missing from their file: the name of the union's r presentative and the authorisation to exercise the corresponding action for amparo. They were asked to repair this oversight within 48 hours. It could only be inferred from the minutes of 6 March 1990 that there had in fact been a vote and that one representative (for the workers) had been appointed to the arbitration board, but the list of proposed workers was not attached to these minutes. On 6 June 1990 the Court declared irreceivable the writ for amparo submitted by Ernesto Rodríguez, who claimed to be Secretary-General of the trade union, and Pedro León Trujillo, President of the CGT, because the court deduced from the documents on file that there was a legitimacy conflict within the trade union, since two different executives claimed to be

representative. The court stipulated that the writ for amparo submitted refers to freedom of association, trade union democracy and the sovereignty of workers; consequently, "whoever claims such rights have been infringed must, obviously, be the representatives of the wronged trade union organisation". The Supreme Court of Justice considered that the conflict referred to in the ruling did indeed exist and that, as a result, "making a pronouncement in this case would imply the recognition of the legitimacy of those submitting a writ for amparo"; "it would therefore be inacceptable that the request for amparo should, either directly or indirectly, be used to determine who is the holder of a right, because the ruling handed down would be a component of this same right; since it is well known that this type of ruling must only be handed down with caution and merely state that there has been an infringement of constitutional rights and order that amendments be made".

C. The Committee's conclusions

43. The Committee notes that from the allegations and the Government's reply, it appears that the Occupational Trade Union of Drivers of Heavy Vehicles and Related Trades of the State of Bolivar (SUCHOGAND-BOLIVAR) has two executive committees both of which claim that they are lawful and that the executive recognised by the Ministry of Labour - at least as regards the collective agreement - is precisely the one disclaimed by the complainant organisation. According to the latter, the Ministry of Labour authorised a collective agreement that was detrimental to the workers, concluded between the unlawful executive committee and the transport enterprises working for the SIDOR enterprise, and refuses to recognise the lawful executive committee. The complainant organisation considers that Decree No. 795 of 2 March 1990, which put an end to the strike declared on 30 January 1990 by drivers who wanted a restoration of their wages system that had been altered by the illegal collective agreement, infringes the Conventions relating to freedom of association. On the whole, the Committee notes that the alleged events originated in the context of rivalry between sectors of the same trade union. It requests the Government to ensure that disputes within a trade union are resolved by a vote by the workers so that they themselves can elect the representatives of their own choosing.

44. As regards Decree No. 795 of 2 March 1990 which ordered the drivers of heavy vehicles (on strike since 30 January 1990) to return to work and subjected the dispute to compulsory arbitration, the Committee notes that the Government justifies this Decree on the grounds of the losses incurred by the Orinoco Iron and Steel Corporation and the harmful repercussions on the economic life of the country. However, at no time does the Government state that the strike in question failed to comply with the legal requirements or had repercussions on the life, personal safety or health of the population. Furthermore, the Government did not deny that the strike

organised by the lawful executive committee (lawful from the standpoint of the complainant organisation) was called for reasons related to work, namely to restore wage conditions that had been in force until the unlawful executive committee (unlawful from the standpoint of the complainant organisation) signed an alleged illegal collective agreement detrimental to the workers (by substituting a wage scale for the system whereby 20 per cent of the net transport load was reimbursed to workers, a system in force for more than 25 years).

45. In these circumstances, the Committee draws the Government's attention to the principle it has always upheld, to the effect that: "the substitution by legislative means of compulsory arbitration for the right to strike as a means of resolving labour disputes can only be justified in respect of essential services in the strict sense of the term (i.e. those services whose interruption would endanger the life, personal safety or health of the whole or part of the population); apart from such cases, it would be contrary to the right of workers' organisations to organise their activities and formulate their programmes." [See Digest of decisions and principles of the Freedom of Association Committee, 3rd edition, 1985, para. 387; see also 226th and 236th Report, Case No. 1190 (Colombia), paras. 288 and 144, respectively.] Given that in this case haulage services in the iron and steel sector are not included within the above-mentioned concept of essential services and, furthermore, that the strike only affected some drivers, the Committee must express its regret that the Government adopted Decree No. 795 to submit the dispute of the drivers of heavy vehicles on strike to compulsory arbitration. It requests the Government to take measures to ensure that, in the future, compulsory arbitration will only be used with respect to essential services in the strict sense of the term.

The Committee's recommendations

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

(a) The Committee requests the Government to ensure that disputes within a trade union are resolved by a vote by the workers so that they themselves can elect the representatives of their own choosing.

(b) The Committee regrets that the Government adopted Decree No. 795 to submit the dispute of the drivers of heavy vehicles on strike to compulsory arbitration and requests it to take measures to ensure that, in the future, compulsory arbitration will only be used with respect to essential services in the strict sense of the term.

Case No. 1540

COMPLAINT AGAINST THE GOVERNMENT OF THE UNITED KINGDOM PRESENTED BY THE NATIONAL UNION OF SEAMEN (NUS)

47. By a communication dated 29 June 1990 the National Union of Seamen (NUS) presented a complaint against the Government of the United Kingdom alleging violations of trade union rights. The Government sent its observations on those allegations in a communication of 16 January 1991.

48. The United Kingdom 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 legislative context

49. At common law strikes and most other forms of industrial action would constitute repudiatory breaches of the contracts of employment of the workers concerned. This means that, in principle, the employer could elect to treat the employment relationship as at an end without more ado. This rarely happens in practice. But it is not unusual, especially in the event of protracted disputes, for employers formally to notify striking workers that if they do not return to work by a specified date their employment will be regarded as terminated (in technical terms, this means that the employer "accepts" the "repudiatory breach" as terminating the contract). So far as the common law is concerned, an employer who exercised this option would be acting entirely within its legal rights.

50. The Industrial Relations Act, 1971 introduced the concept of "unfair dismissal" into British law for the first time. In simple terms, this legislation gave employees the right not to be "unfairly dismissed" by their employer. These protections were carried over into the Trade Union and Labour Relations Act, 1974, and are now to be found in the Employment Protection (Consolidation) Act, 1978 (EPCA), as amended.

51. Section 26 of the 1971 Act provided that where the reason or principal reason for a dismissal was the fact that an employee had taken part in a strike or other industrial action that dismissal was not to be regarded as "unfair" unless it was shown either that one or more employees of the same employer who also took part in the strike were not dismissed for taking part in it, or that one or more employees who were dismissed for taking part in it were offered re-engagement on the termination of the industrial action and that the

complainant employee had not been offered such re-engagement. In other words, if all of those who participated in a strike or other industrial action were dismissed, and not offered re-engagement, then those employees could not claim to have been unfairly dismissed within the terms of the legislation. However, if some participants in the strike or other industrial action were not dismissed, or were offered re-engagement having been dismissed, then those who were dismissed and who were not offered re-engagement could bring a claim for unfair dismissal. Section 25 of the Act provided a measure of protection for employees who were not offered re-engagement on the termination of a lock-out.

52. Sections 25 and 26 of the 1971 Act formed the basis of section 62 of the EPCA which, as amended, remains in force.

53. Section 62 was amended by section 9 of the Employment Act, 1982:

- first, by providing that dismissed employees could establish discriminatory re-engagement only if one or more other workers had been offered re-engagement within three months of the date of the complainant's dismissal; and

- secondly, by providing that the group by reference to which discriminatory treatment could be established were those who were on strike at the date of the complainant's dismissal.

The effect of the first of these amendments was that discriminatory re-engagement was permissible, so long as the employer waited for three months after the dismissals before offering re-engagement to any of the strikers. The effect of the second amendment was to ensure that strikers who had returned to work during a strike could not be used as a reference group for workers who were subsequently dismissed for participating in that strike.

54. The 1978 Act was further amended by section 9 of the Employment Act, 1990 which inserted a new provision, section 62A, immediately after section 62. The purpose of this amendment was to withdraw the protection afforded by section 62 from workers who were dismissed because of their participation in an "unofficial strike or other unofficial industrial action". According to section 62A(2):

> A strike or other industrial action is unofficial in relation to an employee unless -
>
> (a) he is a member of a trade union and the action is authorised or endorsed by that union; or
>
> (b) he is not a member of a trade union but there are among those taking part in the industrial action members of a trade union by which the action has been authorised or endorsed.

Provided that a strike or other industrial action shall not be regarded as unofficial if none of those taking part in it are members of a trade union.

55. The insertion of section 62A also necessitated consequential amendment to section 62. The relevant portions of that section now state:

(1) The provisions of this section shall have effect in relation to an employee (the complainant) who claims that he has been unfairly dismissed by his employer where at the date of dismissal -

(a) the employer was conducting or instituting a lock-out; or

(b) the complainant was taking part in a strike or other industrial action.

(2) In such a case an industrial tribunal shall not determine whether the dismissal was fair or unfair unless it is shown -

(a) that one or more relevant employees of the same employer have not been dismissed, or

(b) that any such employee has, before the expiry of the period of three months beginning with that employee's date of dismissal, been offered re-engagement and that the complainant has not been offered re-engagement.

...

(4) In this section -

(a) "date of dismissal" means -

(i) where the employee's contract of employment was terminated by notice, the date on which the employer's notice was given; and

(ii) in any other case, the effective date of termination;

(b) "relevant employees" means -

(i) in relation to a lock-out, employees who were directly interested in the dispute in contemplation or furtherance of which the lock-out occurred; and

(ii) in relation to a strike or other industrial action, those employees at the establishment who

were taking part in the action at the complainant's date of dismissal;

"establishment", in sub-paragraph (ii) meaning that establishment of the employer at or from which the complainant works; and

(c) any reference to an offer of re-engagement is a reference to an offer (made either by the original employer or by a successor of that employer or an associated employer) to re-engage an employee, either in the job which he held immediately before the date of dismissal or in a different job which would be reasonably suitable in his case.

(5) The provisions of this section do not apply to an employee who by virtue of section 62A below has no right to complain of unfair dismissal; but nothing in that section affects the question of who are relevant employees in relation to an employee to whom the provisions of this section do apply.

B. The complainant's allegations

56. By its communication of 29 June 1990 the NUS seeks "a declaration that section 62 of the Employment Protection (Consolidation) Act, 1978, and amending legislation, is contrary to the Conventions and principles of the ILO and should be so condemned". It bases its criticisms of section 62 on the dismissal of 2,000 of its members in consequence of a dispute with one of the principal cross-channel ferry operators, P & O European Ferries (Dover), in 1987 and 1988.

The dispute

57. In December 1987 the company initiated discussions with the union in relation to the need to reorganise its operations in order to enable it to compete with the channel tunnel which was due to open in 1993. The union agreed to participate in these discussions on the basis of "grievance procedures", which had been agreed with the company in 1986.

58. On 4 December 1987, with no prior warning, and in total disregard of the grievance procedures, the company sent a letter to all employees advising them that there were to be significant revisions to existing collective agreements in order to achieve substantial reductions in labour costs whilst maintaining high standards of safety and operational efficiency. The letter gave three months' notice of this intention and set out three major objectives inviting comment upon them.

59. On 9 December 1987 the NUS responded expressing concern at the haste with which the company seemed to intend to bring in the changes. Further, on 11 December the NUS General Secretary wrote to P & O requesting that the 4 December notice be withdrawn so that open-ended discussions could take place. In mid-December 1987 preliminary discussions took place between the parties in relation to the three months' notice, without any resolution being reached.

60. In mid-January 1988 all NUS members were balloted as to whether negotiations should take place. The result of the ballot was in favour of negotiations. Meetings between the company and the NUS continued throughout January with little progress being made.

61. On 1 February 1988 despite an assurance from the NUS Local Branch Secretary that the members would not take action in support of an unrelated dispute between the NUS and another shipping company (the Isle of Man Steam Packet Company) P & O obtained injunctions restraining the union and its officials from inducing secondary action in support of NUS members in dispute with the Isle of Man Steam Packet Company. On 2 February, during the course of a meeting between the negotiating committee and the company, P & O notified all concerned of the injunctions and served them upon those respondents who were present at the meeting. Negotiations broke down and a ballot for strike action was taken resulting in an overwhelming majority in favour of such action. From 3 and 4 February 1988 there was a stoppage of work on the basis that due to the company's attitude negotiations had broken down. Some 2,000 members of the union were involved in this stoppage.

62. Negotiations for a return to work were entered into and continued until March with no success. On 15 March the company sent letters of dismissal to all ratings (i.e. seafarers) whilst at the same time offering re-employment on new terms and conditions drastically different from those currently in force. These terms became known as the "blue book". All ratings were given one week (until 23 March) to accept the new terms. In the meantime the independent Advisory Conciliation and Arbitration Service became involved and further negotiations took place with the result that the blue book proposals were withdrawn and new proposals known as the "red book" were drawn up.

63. On 14 April 1988 the red book terms were circulated to all ratings and were open for acceptance until 20 April. The majority of the NUS members had not accepted the red book offer by the deadline and on 25 April P & O began sending out dismissal papers to employees.

64. Throughout the month of June the company, following an extensive recruiting campaign of non-union labour, began to recommence the sailing of its various ferries while the official dispute and action continued. There was a gradual drift back to work of a minority of NUS members over the following months, during which time the company had resigned from the British Shipping Federation [which is the principal employer body for the industry]. It had continued to

recruit non-union labour, and had withdrawn NUS recognition for purposes of collective bargaining. The dispute between the union members and P & O was formally ended by the union on 9 June 1989.

65. According to the complainant, around 800 of the 2,000 workers who were dismissed in April 1988 had subsequently accepted the new terms and conditions offered by the company. The union had lodged unfair dismissal complaints on behalf of 1,025 of the approximately 1,200 members who had not been re-engaged.

66. The first of these cases to proceed to hearing involved a Mr. Byrne. In the course of preliminary argument the company argued that they had dismissed all of the striking employees, so that the industrial tribunal had no jurisdiction to hear the claim because of the effect of section 62(2)(a) of the EPCA. Mr. Byrne alleged that one "relevant employee" had not been dismissed. The company then asked that the employee in question be identified. Mr. Byrne refused to do so on the ground that the employer might then dismiss the individual concerned, thereby bringing itself within section 62(2)(a). Both the industrial tribunal and the Employment Appeal Tribunal ruled that the employer was not entitled to know the identity of the "relevant employee". This decision was reversed by the Court of Appeal, and Mr. Byrne was refused leave to appeal to the House of Lords. According to the complainant the effect of the decision of the Court of Appeal was that the company would be entitled at any time up to the conclusion of the hearing to ascertain the identity of the "relevant employee", whom it could then dismiss, and avail itself of the protection of section 62(2)(a). Although the complainant's communication is not entirely clear on this point, it appears that in the light of this ruling the union concluded that no useful purpose would be served by proceeding with their claims under the EPCA, and decided instead to bring the matter to the ILO.

The specific allegations

67. The complainant alleges that section 62 of the EPCA denies "due process of the law" to workers who are dismissed whilst taking industrial action. It therefore undermines the right to strike, and in consequence must be regarded as incompatible with the principles of freedom of association.

68. The 1982 amendments to section 62 are criticised on the grounds: (i) that they permit the employer to dismiss all workers who remain on strike even though some of their colleagues have returned to work. According to the complainant, this encourages employers to issue ultimata in situations such as that which arose in the P & O dispute; and (ii) the fact that selective re-engagement enables employees who have not been re-engaged to claim for unfair dismissal only if the re-engaged employees are taken back within three months of the dismissal.

69. The complainant also alleges that the proposals set out in the Employment Bill, 1989 which was then before the Parliament [now the Employment Act, 1990] would further erode such limited protection as was provided by section 62 of the EPCA by the addition of a new section 62A. These proposals were considered to be objectionable: (i) because they denied any protection against unfair dismissal to those who were dismissed because of their participation in "unofficial" strikes or other industrial action; (ii) because the question of whether action was "official" or "unofficial" was to be determined by reference to the facts at the time of the dismissal [section 62A(4)]. The complainant considers that this would "give rise to discretionary decisions by tribunals with no possibility of challenge on appeal"; (iii) because they interfered with trade union autonomy by creating a (rebuttable) presumption that industrial action had been authorised by a trade union in circumstances where it had been authorised by a lay official of that union, or by any group of persons of which an official of the union was a member [section 62A(3)]; and (iv) because it withheld protection against common law actions for damages and injunctions from industrial action taken wholly or in part to protest selective dismissals under section 62A [section 9(2) of the 1990 Act].

70. In support of its allegations, the complainant makes detailed reference to: (i) past decisions of the Committee, as noted in the Digest of decisions and principles of the Freedom of Association Committee, 3rd edition, 1985; (ii) ILO standard-setting instruments, including Conventions Nos. 87 and 98, and the Termination of Employment at the Initiative of the Employer Convention, 1981 (No. 158); (iii) criticisms of section 62 by the Committee of Experts on the Application of Conventions and Recommendations in 1989 (International Labour Conference, 76th Session, 1989, Report III (Part 4A), p. 240); and (iv) a number of international instruments concerning human rights including the Universal Declaration of Human Rights, 1948, the European Convention on Human Rights, 1950, the European Social Charter, 1961 and the International Covenant on Economic, Social and Cultural Rights, 1966.

C. The Government's reply

71. In its reply the Government states that it does not believe that anything in its general employment legislation - including section 62 and the related provisions of what is now the 1990 Employment Act - is incompatible with the guarantees afforded by ILO Conventions ratified by the United Kingdom. The Government is convinced that the NUS's claim of such incompatibility is unfounded, and submits that the complaint should be rejected by the Committee.

The dispute

72. The Government considers that the account of the dispute between NUS members and P & O is both one-sided and incomplete, and goes on to correct what it considers to be imbalances or omissions in that account. It is, for example, necessary to take account of the perceptions and motivations of the employer in relation to the matters which gave rise to the dispute. It is also important to bear in mind that the union and its members had freely chosen to engage in industrial action against P & O. They were perfectly entitled to do this. But they did have other options available to them. For example, the individual seamen could have resigned in the face of what they considered to be their employer's attempt unilaterally to change their terms and conditions of employment, and then have claimed that they had been "constructively dismissed" within the terms of the EPCA.

73. The Government also points out that the grievance procedures which were agreed between the NUS and the company were not legally enforceable as between the parties. It follows that the employer was not acting unlawfully in declining to adhere to the terms of those agreements. Similarly, the union would not have been acting unlawfully had it chosen to disregard the terms of the agreements. There is, therefore, "no reason why, in the circumstances, the union should have expected the employer to act as if the terms of the agreements were legally binding - especially if prevailing circumstances changed - but the complaint implies that this would have been a realistic assumption".

74. The Government observes that at first sight the complainant's reference to the employer's decision to seek an injunction to restrain unlawful "secondary" action appears to be irrelevant to the matter in hand. However, the complainant's later statement to the effect that the strike action had occurred "on the basis that due to the company's attitude negotiations had broken down" [the Government's emphasis] suggests to the Government that the principal reason for the strike action was that the employer had exercised its right to restrain potential breaches of the law of the land in connection with a different dispute.

Section 62 of the EPCA

75. As regards the general effect of section 62, the Government refers to its response to the 1989 observations of the Committee of Experts on the Application of Conventions and Recommendations in relation to section 62. (These observations had also been communicated to the Committee on Freedom of Association on 2 October 1989 in connection with Case No. 1439 (United Kingdom). [This complaint was withdrawn before it had been fully examined by the Committee - see 268th Report of the Committee, approved by the Governing Body at its 244th Session, November 1989, paragraph 9.] In particular, it points out that the law in the United Kingdom does provide some protection against dismissal for those who take or

organise industrial action, but that there are many, and substantial, differences between the structure of British labour law and that of other countries - for example: (i) British law specifically prevents a court ordering any striking employee, in any circumstances, to honour his contract of employment and return to work (section 16 of the Trade Union and Labour Relations Act, 1974). This applies even in situations which may be regarded as involving "the safety of the State" or "a state of siege". (ii) Statutory protection ("immunity") is available against legal proceedings which could otherwise be brought by employers or others to prevent or penalise a call to take industrial action which interferes with the performance of contracts (under section 13 of the 1974 Act). This protection is available regardlesss of whether the effects of the action are, or are not, in proportion to the nature of the claim or the issue in dispute; and (iii) British law has never included the concept that a worker taking industrial action should have some form of special protection from the consequences that may follow therefrom.

76. As to the complainant's specific allegations relating to section 62, the Government states that:

(i) It does not accept that the 1982 amendments had the effect of encouraging employers to issue ultimata to workers who remain on strike after some workers have returned to work. It is entirely a matter for the employer to decide how to respond to particular events or actions in the context of an industrial dispute. This decision must be taken by reference not only to the relevant legislation, but also to the possible practical, economic and industrial consequences thereof.

(ii) By virtue of section 62 a complaint relating to the dismissal of an employee while taking industrial action in the P & O dispute could not be entertained by a tribunal unless the employer had failed to dismiss one or more of the other employees taking that action. In the view of the UK Government, the Court of Appeal judgement in P & O European Ferries (Dover) Ltd. v. Byrne simply follows from that principle. In particular, it must be right that, where there is an allegation that the employer has not dismissed one such employee, the employer is entitled to particulars of the allegation. If the employer then dismisses that remaining employee it may well face a complaint of unfair dismissal from that employee; but not to permit any such dismissal would put an unreasonable restraint on an employer's ability to decide whether to retain or dismiss any particular employee or employees.

(iii) Section 62 does not apply to dismissals that occur before or after industrial action. An employee who is dismissed for contemplating industrial action is able to complain of unfair dismissal, as is an employee who is dismissed after returning to work.

(iv) It agrees with the complainant that the assumptions which underpin section 62 are that the resolution of industrial disputes is best left to the parties themselves, and that courts and tribunals should not pass judgement on the substantive merits of disputes. It is right and proper, therefore, that section 62 does not take any account of whether the industrial action which resulted in the dismissal or failure to re-engage was reasonable or otherwise.

77. The Government does not believe that the various non-ILO treaties and Conventions referred to by the complainant are relevant to the Committee's consideration of this case. It then goes on to supply a detailed rebuttal of the complainant's arguments based on Articles 2, 3 and 8 of Convention No. 87, Article 1 of Convention No. 98 and Articles 4 and 8 of Convention No. 158. It also rejects the complainant's arguments based on past decisions of the Committee as noted in the Digest.

78. In particular, the Government asserts that those paragraphs [443 and 444] which suggest that it is contrary to the principles of freedom of association to dismiss or to refuse to re-employ trade unionists or union leaders for having participated in a strike have no application to provisions such as section 62 which apply only to dismissal during a strike or other industrial action. The Government reiterates that a worker who is dismissed for contemplating industrial action, or after a return to work, has a right to complain of unfair dismissal. The Government does not consider that employees taking part in industrial action are entitled to dismissal protection equivalent to that accorded to "taking part in trade union activities". British law has long recognised that such a proposition could not be accepted without allowing employees to embark on industrial action in the knowledge that their employer could never dismiss any of them without risking claims of unfair dismissal. The Government does not agree with the NUS's argument that paragraphs 443 and 444 of the Digest are to be interpreted as implying that workers must be given dismissal protection while they are taking industrial action because otherwise there is a failure to provide them with the protection required by Article 1 of Convention No. 98 against dismissal on the ground of their trade union activities. In the Government's view such an interpretation would run contrary to the express wording of Article 1(2)(b), since an employer who dismisses workers while they are on strike may be presumed not to have consented to this particular activity (i.e. the strike) taking place during working hours.

79. According to the Government, a further difficulty with the complainant's arguments relating to Article 1 of Convention No. 98 resides in the fact that workers who are taking industrial action in any particular case may or may not be members of a trade union, or some may be members and others may not. This seems impossible to reconcile with a submission that the effect of section 62 in removing jurisdiction from tribunals where employees are dismissed while taking

industrial action is to be seen as a failure to provide protection against dismissal on grounds of participation in trade union activities under Article 1.

80. The complainant's arguments based on Articles 4 and 8 of Convention No. 158 are irrelevant because that Convention has not been ratified by the United Kingdom.

The Employment Act, 1990

81. The Government agrees that the effect of the new section 62A which is inserted in the EPCA by section 9 of the 1990 Act is to ensure that there is no right to complain of unfair dismissal where an employee is dismissed while taking part in a strike or industrial action which is "unofficial" within the terms of section 26A(2). As such it constitutes part of a package of measures which were introduced in order to deter and discourage unofficial industrial action. Since these provisions were first introduced in the Parliament in 1989, and were not enacted until 1990, they could not have had any bearing upon the dispute between the NUS and P & O in 1987-88.

82. In order to place section 62A in context, the Government points out that the section: (i) does not apply where the industrial action is "official", i.e. has been called or otherwise endorsed by a trade union; (ii) does not render unofficial industrial action unlawful or fetter the freedom of employees to engage in such action; and (iii) does not prevent an employee from making a complaint of unfair dismissal if the dismissal occurs before the industrial action begins or after the employee concerned has ceased to take part in it.

83. As with section 62, the Government considers that section 62A cannot be shown to be incompatible with any provision of Conventions Nos. 87 or 98, and Convention No. 158 cannot be taken into account.

84. The Government rejects the complainant's allegations relating to the imputation to unions of liability for the actions of officials, and to the effect of section 62A(4). These latter allegations are said to be based upon a misconception as to the effect of that subsection. Under British law an industrial tribunal must both determine the facts of a case and apply the relevant law. Section 62A(4) means simply that if a complaint of unfair dismissal is brought by a person dismissed during industrial action and an issue is raised as to whether that action was authorised or endorsed by a trade union the tribunal must look at the factual situation at the date of the dismissal. The Government does not believe that issues arising under section 62A will be determined in any different way from other questions relating to whether a tribunal has jurisdiction to consider a complaint of unfair dismissal. Moreover, as with all unfair dismissal proceedings before an industrial tribunal, an appeal will

lie to the Employment Appeal Tribunal on any point of law arising in a decision of an industrial tribunal under the new section.

85. As concerns imputed liability, the Government points out that under British law a trade union may commit an actionable wrong ("tort") if it induces workers to take industrial action which interferes with the performance of their contracts of employment, where the inducement does not have "immunity". The amendments to section 15 of the Employment Act, 1982 made by section 6 of the 1990 Act simply identify those officials and bodies whose acts are to be taken to be the acts of the trade union for this purpose. These changes recognise and reflect the fact that, as far as ordinary union members and others who deal with a union are concerned, a call to industrial action made by any of the union's officials, or by committee members, will normally be seen as a call by the union itself. Acts of authorisation or endorsement of industrial action are, by definition, acts which affect parties other than the union itself, and for this reason it cannot be correct to argue that the new provisions relate solely to a union's internal affairs. In any case, a union may avoid such liability simply by repudiating the act of the official or decision-making body. All that the 1990 Act requires is that this decision be adequately communicated to those affected by the relevant act.

86. The Government denies that the 1990 Act makes industrial action intended to protest the selective dismissal of unofficial strikers unlawful. What it does do is remove protection against common law liability from any such act. This is a necessary part of the package of measures in the Act which are intended to deter and discourage unofficial industrial action.

D. The Committee's conclusions

87. The allegations presented by the NUS (which as a result of a recent amalgamation is now part of the National Union of Rail and Maritime Workers) centre upon two basic issues: (i) the dismissal of 2,000 seamen in the course of an industrial dispute between the NUS and a major ferry operator in 1988; and (ii) the alleged lack of adequate remedies under British law for workers who are dismissed in the course of an industrial dispute. The complainant supports its allegations by means of detailed analysis of the relevant legislative provisions, and of the pertinent international standards and principles (including the jurisprudence of the Committee), together with an account of what it considers to be the salient features of the P & O dispute. The Government for its part has provided certain observations on the substance of the dispute, together with a detailed response to the complainant's analysis of the relevant legislative and international standards.

88. Notwithstanding the elaborate submissions which have been directed to it, the Committee considers that the issues raised by this case are essentially very simple. In the course of an industrial dispute with the company seamen employed by it voted to go on strike. Some time after the strike began the company wrote to each of the strikers warning that if they did not return to work on the proffered terms their employment would be treated as at an end. It appears that some 800 of the strikers accepted re-employment on the terms offered by the company. The remaining 1,200 refused, apparently because the terms offered were greatly inferior to those which had prevailed before the strike began. The complainant then sought to initiate unfair dismissal proceedings on behalf of some 1,025 of its members who had not been re-engaged. These endeavours were unsuccessful.

89. The Committee does not consider that it is necessary to express any view as to the merits of the original dispute between the complainant and its members on the one hand, and the company on the other. Nor would it be appropriate for the Committee to express any view as to the correctness or otherwise, in terms of United Kingdom law, of the decisions of the various judicial authorities which have considered the unfair dismissal cases brought against the company by members of the NUS. It is, however, both necessary and appropriate for the Committee to express a view as to: (i) whether it is compatible with the principles of freedom of association for workers who are engaged in a legitimate exercise of the right to strike to be dismissed by their employer; (ii) whether conformity with the principles of freedom of association is in any way affected by the offer of re-engagement to dismissed strikers upon terms that are markedly less favourable than those which operated prior to the dispute; and (iii) whether the provisions of the EPCA, as amended, afford adequate protection to workers who lose their employment in consequence of their participation in strikes or other industrial action.

90. As both the complainant and the Government point out, the Committee has consistently taken the view 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 [Digest, para. 444]. The Government seems to suggest that conformity with this principle requires that workers not be dismissed after the conclusion of a strike on account of their participation therein, but that it does not apply to dismissals during a strike, as was the case in this instance. The Committee considers that this view cannot be sustained. Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should also be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or to penalise the exercise of the right to strike. Applying these principles to the facts of the present case, the Committee can only conclude that the

dismissal of 2,000 members of the complainant union in April 1988 was not compatible with the principles of freedom of association.

91. The Committee also considers that the subsequent offer of re-employment on less favourable terms and conditions has no bearing upon whether the original dismissals were compatible with the principles. What is relevant is that 2,000 workers were dismissed because they had taken strike action against their employer, and had refused to return to work on the terms offered. The subsequent offer of re-engagement on less favourable terms than had prevailed hitherto cannot alter the fact of, or the motivation for, those dismissals.

92. As regards section 62 of the EPCA, the Committee notes that in 1989 the Committee of Experts on the Application of Conventions and Recommendations directed certain observations to the Government in relation to this provision:

> The Committee considers that it is inconsistent with the right to strike as guaranteed by Articles 3, 8 and 10 of the Convention (No. 87) for an employer to be permitted to refuse to reinstate some or all of its employees at the conclusion of a strike, lock-out or other industrial action without those employees having the right to challenge the fairness of that dismissal before an independent court or tribunal.
>
> ...
>
> It is clear ... that the common law does not accord workers who have been dismissed in connection with a strike, lock-out or other form of industrial action the right to present a complaint against that dismissal to a court or other authority independent of the parties concerned. The same is true of statutory provision relating to unfair dismissal - subject to the limited measure of protection which is afforded to those who are subjected to "discriminatory dismissal" within the meaning of section 62 of the Employment Protection (Consolidation) Act, 1978 (as amended by section 9 of the 1982 Act). The Committee considers that this latter provision does not provide adequate protection for the purposes of the Convention: (i) because it still permits an employer to dismiss an entire workforce, even where the employer has initiated a lock-out or has provoked a strike through entirely unreasonable behaviour; and (ii) because an employer can rehire on a discriminatory basis so long as there is a gap of three months between the dismissal of the "victimised" workers and the rehiring. Consequently, the Committee asks the Government to introduce legislative protection against dismissal, and other forms of discriminatory treatment such as demotion or withdrawal of accrued rights, in connection with strikes and other industrial action so as to give effect to the principles set out above.

93. In its response to these observations, which it has incorporated in its reply to the allegations in the present case, the

Government states that the law in the United Kingdom does provide some degree of protection in relation to those who take or organise industrial action. But it then goes on to point to several differences between the structure of British labour law and that of other countries. These differences include: (i) the fact that it is impossible under British law for any worker to be ordered back to work by a court in any circumstances; (ii) the fact that workers and unions enjoy a measure of legislative protection against common law liability in respect of industrial action; and (iii) that British law had never included the concept that a worker taking industrial action should have some form of special protection from the consequences that may follow therefrom.

94. Like the Committee of Experts, the Committee recognises the EPCA does indeed provide a measure of protection against dismissal on the grounds of participation in strikes or other industrial action. However, it also considers that the degree of protection provided by that legislation is not such as to satisfy the requirements of the principles of freedom of association. It is necessary, therefore, that the EPCA be amended to give effective protection to workers who have been dismissed for having participated in a strike and in particular to enable workers who are dismissed in the course of, or at the conclusion of, a strike or other industrial action to challenge their dismissal before a judicial authority.

95. Both the complainant and the Government made a number of submissions in relation to what is now the Employment Act, 1990. In particular, the complainant alleges that section 62A of the EPCA, which was added to the 1978 Act by section 9 of the 1990 Act, further narrows the scope of the limited protection provided by section 62 of the EPCA. The Government does not deny this, but claims that this measure was justified by reference to the need to deter and discourage unofficial industrial action.

96. The Committee notes that the provisions of the 1990 Act had no bearing upon the dispute between NUS and P & O which is the principal focus of the complainant's allegations: (i) because the legislation was not in force at the relevant time; and (ii) because it would have had no bearing upon the dispute even if it has been operative since there was no suggestion that the strike which began in February 1988 had been "unofficial" in character. Nevertheless, section 62A does appear to narrow the scope of protections which the Committee has already determined to be inadequate in terms of respect for the principles of freedom of association. Accordingly, it calls upon the Government to introduce suitable amendments to bring section 62A of the EPCA into full conformity with the principles of freedom of association.

97. The issues raised by the complainant's allegations clearly bear upon the effect given to Conventions Nos. 87 and 98 in the United Kingdom. Accordingly, the Committee draws its conclusions in this case to the attention of the Committee of Experts.

The Committee's recommendations

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

(a) That the relevant legislation in the United Kingdom should be amended to give effective protection to workers who have been dismissed for having participated in a strike and in particular to enable workers who are dismissed in the course of, or at the conclusion of, a strike or other industrial action to challenge their dismissal before a judicial authority.

(b) That the Committee's conclusions in this case be drawn to the attention of the Committee of Experts on the Application of Conventions and Recommendations.

Case No. 1547

COMPLAINT AGAINST THE GOVERNMENT OF CANADA/BRITISH COLUMBIA PRESENTED BY THE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS (CAUT)

99. In communications dated 11 September and 16 October 1990, the Canadian Association of University Teachers (CAUT) submitted a complaint against the Government of Canada/British Columbia, alleging violations of ILO standards on freedom of association. The Federal Government transmitted, in a letter dated 11 January 1991, the observations made by the government of British Columbia.

100. 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), or the Labour Relations (Public Service) Convention, 1978 (No. 151).

A. The complainant's allegations

101. The CAUT submits that the provisions of the University Act of British Columbia, specifically section 80, are in direct contravention with ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise Convention, 1948, since they remove its members from the ambit of the Industrial Relations Act of British Columbia.

102. Section 80 of the University Act reads as follows:

> The Industrial Relations Act does not apply to the relationship of employer and employee between a university and its faculty members.

The complainant alleges that the above provision directly contravenes Article 2 of Convention No. 87, in that it prevents university faculty from exercising their right to organise, if they so wished, under the provisions of the Industrial Relations Act. In addition, Article 3 has been breached as well, in as much as faculty associations are restricted in organising their administration and formulating their programmes, and the authorities are interfering with the otherwise lawful activities of employee organisations. Finally, Article 8(2) which requires 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" has also been violated. Of Canada's ten provinces, only British Columbia has this sort of regressive legislation.

103. In its communication of 16 October 1990, the CAUT stresses that its complaint is based on the fact that the legislation is a violation of international labour standards, and not that particular actions of the Government constitute such a violation. It adds that the legislation has considerable impact. At the time it was passed (1977), there was a relatively insignificant involvement in collective bargaining by faculty members across Canada; in the 13 years since its introduction, the situation has changed markedly in all of those provinces except British Columbia. In Canada's other nine provinces faculty members are entitled to engage in collective bargaining under provincial labour legislation. Faculty members at most of Canada's universities have exercised that option so that it is now clearly the predominant mechanism by which faculty members regulate their employment relationship in Canada. The one clear exception is British Columbia, where the legislation prohibits the freedom of faculty members to associate and engage in collective bargaining under a legislative framework. For example, faculty members at the four universities in Alberta, at the two universities in Saskatchewan and at the four universities in Manitoba engage in collective bargaining under the respective provincial legislations. In Ontario, faculty members at the majority of that province's 15 universities likewise engage in collective bargaining under the provincial legislation; the situation is similar in Quebec and the four Atlantic provinces.

104. The complainant also points out that a distinction is drawn within the province of British Columbia between the teaching staff in the universities and teaching staff in the community colleges; the latter can and do engage in collective bargaining under provincial legislation. Finally, the complainant states that the provincial organisation of the faculty associations in the British Columbia universities, the Confederation of University Faculty Associations of British Columbia (CUFA, which is a member of CAUT), has repeatedly requested that the provincial government introduce legislation to

repeal this provision, to no avail. The complainant estimates that some 3,000 faculty members have been denied their right to freedom of association and to engage in collective bargaining because of this restriction in the legislation.

B. The Government's reply

105. The provincial government submits in substance that section 80 is an appropriate and necessary feature of the University Act, given the unique functioning relationships that are in existence between the universities and their faculty members, and that this section does not violate those important freedom of association principles enunciated in Convention No. 87 of the ILO. Section 80 neither prevents the faculty associations from organising, nor prohibits them from participating in meaningful collective bargaining.

106. As regards the faculty-university relationship, the Government states that the basic reason for the section 80 exclusion is the unique and distinctive relationships that exist between the parties, both historically, and at the present time. The model of faculty-university relationships which exist in British Columbia is based on four basic premises:

(a) collegiality/joint management, whereby there exists a shared responsibility for the day-to-day affairs of the university;

(b) the concept of tenure, which ensures that faculty members have the basic job security necessary to enable them to make an independent contribution to the university and to their profession;

(c) academic freedom, or a right to an independence of thought and action, which allows individual faculty the freedom they require to make a contribution to the university, to the academic community as a whole and to society; and

(d) pursuit of excellence, which is a long-standing and underlying goal of both the university and its faculty members.

The combination of these four premises makes the university structure unique, and provides the principal differences which exist in these institutions, with respect to the faculty-university relationships, and between the more traditional employer-employee relationship that exists elsewhere.

107. University faculty do have a significant involvement in making the key ongoing decisions as to the day-to-day and the long-term operation of the university. This collegial style of university operation is legislatively mandated, by provisions of the

University Act which create the structure and duties of the University Board of Governors and of the Senate, to include major faculty participation. The composition of the Senate ensures faculty control of the Senate, as faculty have two times as many faculty members as "administrators". In addition, peer review is an essential ingredient in assessing the performance of academic colleagues; it is the judgement of peers that carries the most weight in all merit issues. The Government considers that this existing co-operative university model would not be well-suited to, and in fact might be inconsistent with, the application of the adversarial employer/employee model which the Industrial Relations Act is structured to govern. Similarly, the Government considers that the freedom and independence of thought and action that has been the traditional hallmark of the university environment could seriously suffer if the collective rule of the majority principles of the Industrial Relations Act, were to apply. Faculty do have a substantial independence in conducting their academic and research pursuits and in managing their own resources. This important attribute of the universities is best maintained under the present structures.

108. Secondly, the Government stresses that the University Act in no way impinges on faculty members' rights or freedom to form associations or to participate in meaningful collective bargaining. This fact is substantially borne out by the evidence that each of the three universities within British Columbia does have well-established faculty associations (listed as such in the Ministry of Labour Directory of Labour Organisations) and that they do engage in meaningful negotiations with their respective universities with regard to salaries and working conditions. While recognising that their exclusion from the Industrial Relations Act does prohibit the formal certification of these groups under that Act, the Government stresses that this lack of a formal certification procedure does not restrict the individual faculty member's basic freedoms of association as outlined in Articles 2 and 3 of Convention No. 87. That is, they are not in any way prohibited from establishing organisations of their own choosing, nor does the Government intervene in any way with the constitution, rules or operations of these organisations.

109. As regards the collective bargaining process itself, the Government considers that section 80 of the University Act is not restrictive and does permit the parties freely to negotiate items of their own choosing and in a manner they feel is appropriate, which is borne out by recent and past experience.

C. The Committee's conclusions

110. The complainant alleges in this case that the exclusion mentioned in section 80 of the University Act violates Articles 2, 3 and 8(2) of Convention No. 87, since university faculty members cannot exercise their right to organise under the Industrial Relations Act,

their associations are restricted in organising their administration and formulating their programmes, and the authorities are interfering with their otherwise lawful activities. The Provincial Government replies that this exclusion is justified in view of the unique relationship which exists between universities and faculty; it adds that, in practice, faculty members have the right freely to establish organisations of their own choosing without any intervention by the authorities, and that they do engage in meaningful collective bargaining.

111. While it may be true that in past and recent years, university faculty associations in fact existed and have been able to bargain freely, as the Provincial Government submits, the Committee notes the emphasis put by the CAUT in its communication of 16 October 1990, namely "... that the legislation [section 80 of the University Act] is a violation of international labour standards and not that particular actions of the British Columbia Government pursuant to its legislation constitute such a violation".

112. The Committee cannot but observe that section 80 of the University Act (R.S.B.C., c. 419) clearly excludes university teachers from the ambit of the Industrial Relations Act (Labour Code; 1979, R.S.B.C., c. 212; as amended by the Industrial Relations Reform Act; 1987, S.B.C., c. 24). As the Provincial Government readily admits, their associations cannot be considered as "trade unions" or certified as "bargaining agents" within the meaning of article 1 of the Industrial Relations Act, even though they are listed as faculty associations in the Directory of Labour Organisations. Consequently, these workers and their associations are not legally entitled by statute to the various traditional union rights and protections flowing from that Act and granted to all other workers and their organisations, such as: recognition as trade union, s. 1; certification as bargaining agent, ss. 39-60; collective bargaining procedures, ss. 61-78; right to strike, picketing, ss. 79-92; arbitration procedures, ss. 93-113; etc.

113. Concerning the rationale for the section 80 exclusion, the Provincial Government argues essentially that the unique relationship between the parties explains and justifies a departure from the adversarial model found in the Industrial Relations Act. The CAUT, the CUFA and the associations concerned obviously do not share that opinion, nor do they agree with the Government that they are allowed freely to bargain collectively. Whatever the situation may be in practice (the conflicting statements are not substantiated by evidence on either side), the fact remains that the exclusion established by section 80 of the University Act, in addition to leaving the labour relations regime of university faculty members in a legal vacuum from the statutory point of view, creates a distinction based on professional occupation between university teachers and other workers, which is not compatible with the clear wording of Article 2 of Convention No. 87: "Workers ... without distinction whatsoever ... shall have the right to establish ... organisations of their own choosing ...". The Committee therefore considers that section 80 of

the University Act is not in conformity with the principles of freedom of association and should be repealed.

The Committee's recommendations

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

(a) The Committee considers that section 80 of the University Act, which excludes university faculty members from the ambit of the Industrial Relations Act, is inconsistent with the principles of freedom of association and should be repealed. To this end, it requests the federal Government to transmit this recommendation to the Government of British Columbia.

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

Case No. 1548

COMPLAINTS AGAINST THE GOVERNMENT OF PERU
PRESENTED BY
- THE GENERAL CONFEDERATION OF PERUVIAN WORKERS (CGTP)
- THE FEDERATION OF PERUVIAN LIGHT AND POWER WORKERS (FTLFP)
- THE UNION OF EMPLOYEES OF ELECTROLIMA (SEE)
- THE CONFEDERATION OF PERUVIAN WORKERS (CTP) AND
- THE NATIONAL CO-ORDINATING COMMITTEE OF GRASS-ROOTS TRADE UNION ORGANISATIONS (CNOSB)

115. The complaints are contained in communications from the General Confederation of Peruvian Workers (CGTP) (September 1990), the Federation of Peruvian Light and Power Workers (FTLFP) (3 September 1990), the Trade Union of Employees of Electrolima (SEE) (3 September 1990), the Confederation of Peruvian Workers (CTP) (21 September 1990) and the National Co-ordinating Committee of Grass-roots Trade Union Organisations (CNOSB) (15 October 1990). The International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL), in communications dated 26 September 1990 and 9 November 1990 respectively, gave their support to the complaints made by the CTP and the CNOSB. The Government replied by a communication dated 10 October 1990.

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

A. The complainants' allegations

117. The complainants allege that the Government which took office in July 1990 issued without any co-ordination or consultation with the trade union organisations several decrees which from 1 August introduced important restrictions in wage increases, suspended the application of collective agreements and imposed limitations on the free exercise of the right to collective bargaining. They thus infringed the provisions of Convention No. 98 with very drastic consequences on the conditions of work and life of the workers.

118. Specifically, the complainants object to the following pieces of legislation: Supreme Decrees Nos. 057-90-TR; 056-90-TR; 107-90-PCM; 105-90-PCM and 058-90-TR, the text of which appears in the Annex to this case. The complainants allege that the Supreme Decrees provide: (1) that state undertakings and state bodies shall grant as from 1 August 1990 an increase in remunerations equal to 100 per cent of the ordinary remuneration and collateral payments received on 31 July 1990 and that the increase may not exceed I/. 75,000,000 per month (Supreme Decree No. 107-90-PCM) and that such undertakings and bodies may not grant other wage increases until 31 December 1990, even if they have been fixed by collective agreement (Supreme Decree No. 057-90-TR); (2) that between 1 August and 31 December 1990 state undertakings and state bodies which conclude collective agreements must observe the limits established by a supreme decree (Supreme Decree No. 107-90-PCM); (3) the suspension, until 31 December 1990, both in the private and public sectors, of the granting of advance payments, loans or credit which can be deducted from length of service compensation entitlements or compensation funds, as provided for by legislation or collective agreement, with the exception of those specifically allocated for housing purposes (Supreme Decrees Nos. 056-90-TR and 107-90-PCM); (4) that from 1 August 1990, if the administrative authority must settle the conclusion of collective agreements in the private sector (failing agreement between the parties), the said authority shall take into account the criteria established in the economic and labour report issued by the Directorate General of Labour Economy and Productivity on the basis of documentation presented by the undertaking and the studies carried out (Supreme Decree No. 058-90-TR).

B. The Government's reply

119. The Government which took office on 28 July 1990 states in its communication dated 10 October 1990 that it introduced an Economic Stabilisation Programme in order to eradicate the causes of inflation which had been seriously affecting the various sectors of national activity, particularly those with the lowest incomes. In accordance with this stabilisation programme, several emergency Supreme Decrees were issued.

120. Supreme Decree No. 057-90-TR dated 17 August 1990 stipulates that undertakings covered by Act No. 24948 (respecting state workers and workers employed in state bodies subject to the labour regulations applicable in the private sector) may not until 31 December 1990 grant wage increases, irrespective of their denomination, system, form or periodicity or which have been fixed by unilateral decision of the employer or in pursuance of collective agreements. It stipulates that the State shall be responsible for regulating increases deemed necessary during the stated period. This Supreme Decree covers only workers in state undertakings and state bodies subject to the labour regulations of the private sector. That is to say it does not apply to workers in private undertakings whose collective agreements shall remain in force, without any restriction; furthermore, as regards collective agreements which come into force from 1 August 1990, Supreme Decree No. 058-90-TR dated 17 August 1990 establishes freedom of collective bargaining so that employers and workers may freely negotiate increases in remuneration, wage protection clauses and working conditions. Supreme Decree No. 057-90-TR was issued with a view to establishing specific limits to indiscriminate wage increases in state undertakings and state bodies, most of which produce basic or essential goods and services.

121. As a supplementary measure to Supreme Decree No. 057-90-TR, Supreme Decree No. 107-90-PCM dated 24 August 1990 was promulgated. It fixes the amount of the increase for the month of August 1990 at 100 per cent of the ordinary remuneration and collateral payments received by workers on 31 July 1990, up to I/. 75,000,000 a month. This increase is to be included in the calculation of all the rights and benefits of workers, including compensation payments for length of service.

122. Furthermore, it was recently established in Supreme Decree No. 121-90-PCM dated 28 September 1990 that as regards collective agreements which come into force during the period up to 31 December 1990, the directors, representatives or managers of undertakings or bodies may negotiate wage increments, conditions of work and collateral payments without exceeding the limits established by the National Development Corporation (CONADE) and CONAFI for non-financial or financial state undertakings, respectively. In the same way, for those collective agreements in force and concluded subject to the provisions of Supreme Decrees Nos. 025-88-TR and 005-90-TR, the additional wage increments shall be applied in accordance with their own terms, provided that they do not exceed the limits established by CONADE and CONAFI, as the case may be.

123. The third transitional provision of Supreme Decree 056-90-TR dated 17 August 1990 and which refers to workers in private undertakings suspends up to 31 December 1990 the granting of advance payments, loans or credit which could be deducted from length of service compensation entitlements or compensation funds as provided by legislation or collective agreement, with the exception of those specifically granted for housing purposes, in accordance with the legal regulations in force in this respect. Subsequently, section 7

of Supreme Decree No. 107-90-PCM extended this restriction to workers in state undertakings and state bodies. Supreme Decree No. 056-90-TR was issued in recognition of the fact that workers subject to the labour regulations of the private sector, in accordance with their collective agreements, can apply for loans or advance payments to be deducted from the compensation fund or reserve, which by law is held by the employer until the worker leaves his employment permanently. These loans or advance payments may, in normal economic circumstances, be reasonable and allowable, but in an inflationary period are not justified because when withdrawals are made from the compensation fund payment is made without interest. It should be pointed out that the sums withdrawn in this way do not have a cancellation effect, i.e. if there is a new increase in remuneration workers can then apply for a further sum, which means that they obtain resources from the assets of the undertaking. This new provision is designed to protect not only the assets of undertakings but also public interest in the case, for example, of banking institutions.

124. The above-mentioned emergency Supreme Decrees were issued under article 211(20) of the Political Constitution which empowers the President of the Republic to adopt extraordinary measures in economic and financial matters when so required by the national interest and with the obligation of reporting to Congress. Under comparative legislation and doctrine the extraordinary measures issued by the Executive in the event of need are designated emergency decrees. In the case law of the country, the Supreme Court has in a number of resolutions established the validity of Supreme Decrees issued by the Executive in pursuance of article 211(20) of the Political Constitution. However, in order to be valid such decrees must embody the constitutive characteristics of such texts which are as follows: (1) the measures should have only temporary force given the extraordinary reasons which make it necessary to issue them; (2) the extraordinary measures should refer directly and necessarily to an economic and financial matter; (3) such measures can be issued only if they are reported to Congress. For the Supreme Court of Peru, such Supreme Decrees have the force of law and furthermore they may for this reason not only amend on a temporary basis legislation, but also contracts established between parties. This is what has happened when for reasons of social and public interest limits were established by the emergency Supreme Decrees referred to in the present case on increases negotiated in collective agreements and when restrictive measures were applied to the granting of compensatory advance payments up to 31 December 1990.

125. The emergency Supreme Decrees in question should be subject to the criteria established in similar cases by the Committee on Freedom of Association, namely that "... If, as part of the stabilisation policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards." Thus the Government claims that the emergency

Supreme Decrees are exceptional measures applicable only to workers in state undertakings and state bodies who receive very high remuneration; they are applicable for a specific period ending on 31 December 1990 and they are accompanied by specific guarantees and the granting of increases up to a specific limit.

C. The Committee's conclusions

126. The Committee notes that in this case the complainant organisations have objected to the contents of a series of emergency Supreme Decrees issued by the Government concerning remuneration within the framework of an Economic Stabilisation Programme. Specifically, the complainant organisations allege that these Decrees were issued without consulting the trade union organisations and that they violate the provisions of Convention No. 98 regarding collective bargaining, with very serious consequences for workers who in August 1990 were faced with an inflation rate of 397 per cent. In its reply the Government has stated that the Decrees in question comply with the National Constitution and that their purpose is to eradicate the causes of inflation, that they are temporary and that they conform to the principles established by the Committee on Freedom of Association regarding restrictions imposed on collective bargaining.

127. The Committee notes that the Supreme Decrees in question provide: (1) that state undertakings and state bodies shall grant as from 1 August 1990 an increase in remunerations equal to 100 per cent of the ordinary remuneration and collateral payments received on 31 July 1990 and that the increase may not exceed I/. 75,000,000 per month (Supreme Decree No. 107-90-PCM) and that such undertakings and bodies may not grant other wage increases until 31 December 1990, even if they have been fixed by collective agreement (Supreme Decree No. 057-90-TR); (2) that between 1 August and 31 December 1990 state undertakings and state bodies which conclude collective agreements must observe the limits established by a supreme decree (Supreme Decree No. 107-90-PCM); (3) the suspension, until 31 December 1990, both in the private and public sectors, of the granting of advance payments, loans or credit which can be deducted from length of service compensation entitlements or compensation funds, as provided for by legislation or collective agreement, with the exception of those specifically allocated for housing purposes (Supreme Decrees Nos. 056-90-TR and 107-90-PCM); (4) that from 1 August 1990, if the administrative authority must settle the conclusion of collective agreements in the private sector (failing agreement between the parties), the said authority shall take into account the criteria established in the economic and labour report issued by the Directorate General of Labour Economy and Productivity on the basis of documentation presented by the undertaking and the studies carried out (Supreme Decree No. 058-90-TR).