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311th Report of the Committee on Freedom of Association

Case No. 1942
Report in which the Committee requests to be kept informed of developments

Complaint against the Government of China/Hong Kong Special Administrative Region presented by the Hong Kong Confederation of Trade Unions (HKCTU)

Allegations: Adoption of legislation contrary to freedom of association

235. In a communication of 1 November 1997, the Hong Kong Confederation of Trade Unions (HKCTU) submitted a complaint of violations of freedom of association against the Government of China/Hong Kong Special Administrative Region. The International Confederation of Free Trade Unions (ICFTU) associated itself with this complaint in a communication dated 9 December 1997.

236. The Government supplied its observations on the case in a communication dated 26 May 1998.

237. In a communication dated 6 June 1997, the Government of China stated that the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), would continue to apply with modifications and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), would continue to apply without modifications to the Hong Kong Special Administrative Region with effect from 1 July 1997.

A. The complainant's allegations

238. In its complaint, the Hong Kong Confederation of Trade Unions (HKCTU) contends that the Government of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China violated Conventions Nos. 87 and 98 through the repeal and amendment of three labour Ordinances which were passed by the Hong Kong Legislative Council on 26 June 1997 and which provided for the right to organize and to bargain collectively. During the first week of their operation, the HKSAR Government moved to halt the implementation of these newly passed Ordinances. The newly appointed Provisional Legislative Council passed the

government suspension bills on 18 July 1997. On 30 September 1997, the Executive Council of Hong Kong put forward a new amendment bill, which repealed two of the three Ordinances and amended the third. The new amendment bill was passed by the Provisional Legislative Council on 29 October 1997.

239. The HKCTU then proceeds to explain the background to its complaint. On 1 July 1997, the sovereignty of Hong Kong was handed over from the United Kingdom to the People's Republic of China which set up the Government of the Hong Kong Special Administrative Region (HKSAR). On the same day, the Chinese Government also dissolved the Hong Kong Legislative Council and replaced it with a Provisional Legislative Council; the latter body comprised members who were elected by a 400-member body, whose members were in turn selected by the Preparatory Committee set up by the Chinese Government before the handover of sovereignty.

240. The HKCTU points out that the Hong Kong Government passed the Bill of Rights in 1992, article 18 of which protects the freedom of association enjoyed by Hong Kong citizens. Moreover, at the 85th Session of the International Labour Conference, the ILO's Director-General received on 10 June 1997 notifications from the Government of China concerning the application or continued application to Hong Kong after 1 July 1997 of international labour Conventions. These notifications were registered as of 1 July 1997, and ensured the continued application to Hong Kong from that date of all the Conventions which were applicable to Hong Kong until that date under declarations made by the Government of the United Kingdom, except three which were specifically designed for non-metropolitan territories. In addition, the Chinese Government promulgated the Basic Law of the HKSAR in July 1997 (a copy of which is attached to the complaint). Article 39 of the Basic Law stipulates that:

> The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the international labour Conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.
> The rights and freedoms enjoyed by the Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this article.

241. The HKCTU goes on to say that on 26 June 1997 the Hong Kong Legislative Council passed three Ordinances, which provided for the rights guaranteed under Conventions Nos. 87 and 98. The three Ordinances were: Employees' Right to

Representation, Consultation and Collective Bargaining Ordinance, 1997; Employment (Amendment) (No. 4) Ordinance, 1997; and Trade Union (Amendment) (No. 2) Ordinance, 1997 (copies of the three are attached to the complaint). However, on 9 July 1997, the HKSAR Government put forward a bill, Legislative Provisions (Suspension of Operation) Ordinance No. 126 of 1997 (referred to as the 1997 Suspension Bill hitherto) (copy attached to the complaint), to suspend the implementation of the above-mentioned three Ordinances until 31 October 1997. The 1997 Suspension Bill was passed by the newly established Provisional Legislative Council on 15 July 1997. The HKSAR Government, in moving the 1997 Suspension Bill, announced that a review of the above-mentioned three Ordinances would be conducted, mainly with the Labour Advisory Board, and a deliberation on them would be made by 31 October 1997. After a series of meetings held with the Labour Advisory Board, the HKSAR Executive Council, on 30 September 1997, resolved to repeal the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance, 1997; the Employment (Amendment) (No. 4) Ordinance, 1997; and amended the Trade Union (Amendment) (No. 2) Ordinance, 1997. The HKSAR Government then gazetted the Employment and Labour Relations (Miscellaneous Amendments) Bill, 1997 (referred to as the 1997 Labour Relations Bill) on 9 October. The Provisional Legislative Council approved this Bill at its third reading on 29 October 1997. Under the 1997 Labour Relations Bill, the right of trade unions to engage employers in collective bargaining would be removed, the use of union funds for political purposes banned, and the appointment of union officials restricted. (The HKCTU encloses a table summarizing these Ordinances which is reproduced as Appendix I.)

242. More specifically, the HKCTU explains that the Trade Union (Amendment) (No. 2) Ordinance, 1997 (referred to as the 1997 Trade Union Ordinance), provided for the removal of various restrictions on trade union rights in Hong Kong, imposed by the Trade Union Ordinance of 1989. The HKCTU contends that the decision of the Provisional Legislative Council to pass the 1997 Labour Relations Bill to amend the 1997 Trade Union Ordinance violates Convention No. 87 in the following manner. First of all, regarding the qualification of trade union officers, clauses 17(2) and 57 of the 1989 Trade Union Ordinance had required that all trade union officers be engaged in the "trade, industry, occupation" of their employing trade unions or trade union federations, unless with the written approval of the Trade Union Registrar. The 1997 Trade Union Ordinance removed the restriction on occupations and trades. The 1997 Labour Relations Bill, while lifting the restriction on the appointment of officers in a federation, re-establishes the restriction at the level of a first-level union, thereby

violating Article 3 of Convention No. 87. Secondly, with regard to the use of union funds, clause 34 of the 1989 Trade Union Ordinance had banned the use of union funds for any political purposes, "directly or indirectly", "within or without Hong Kong". Clause 33(1) also had required prior approval by the Governor for other usage of funds. Clause 33(1)(j) had banned financial contributions to overseas bodies without the prior approval of the Governor. The 1997 Trade Union Ordinance removed all restrictions on the utilization of funds and replaced prior approval by the Government with authorizations by the union's general meetings. The 1997 Labour Relations Bill reverts the restrictions stipulated under the 1989 Trade Union Ordinance, hence violating Convention No. 87.

243. The HKCTU further alleges that the adoption of the 1997 Labour Relations Bill by the HKSAR Government also constitutes a violation of Convention No. 98 for several reasons. With regard to Article 1 of the Convention, the HKCTU points out that for decades unionists had consistently failed to secure legal protection against discriminatory dismissal. Employees in Hong Kong were protected against anti-union discrimination by Part IVA of the Employment Ordinance (Cap. 57) which provided for criminal sanctions with a maximum fine of HK$100,000. For example, the Hong Kong Government failed in its attempt to press charges of criminal sanctions against the discriminatory dismissal of two employees by the New Bright Plastics Factory in 1988. Similar failure was repeated in 1994 with a dismissed unionist at Wellcome Co. Ltd. As a result of the extended industrial dispute and strikes with Cathay Pacific Airways, the Government undertook a review of industrial relations in Hong Kong in 1993. The end report prepared by the Education and Manpower Branch in October 1993 (Review of Industrial Relations System in Hong Kong, 1993) stated that:

> ... although the Government has from time to time received complaints from employees against their employers for anti-union discrimination, there has yet to be a successful prosecution case. Past experience has shown that it is difficult to prove such violations, as often other reasons are used as cover-up for the hidden discriminatory motive.

244. Four years after the review, the Government adopted the Employment (Amendment) (No. 3) Bill, 1997 which was passed by the Legislative Council on 17 June 1997; section 32A(1)(c)(i) provided for remedies by compensation and for reinstatement upon consent of both employers and employees for employees who were dismissed as a result of their participation in union activities. However, the HKCTU believed that the remedies provided under the Amendment Bill were

inadequate and hence submitted to the Legislative Council a Private Member Bill, Employment Ordinance Amendment (No. 4) Bill, 1997, which differed from the above-mentioned government bill in two major aspects: it provided protection not only against dismissal but also all other forms of detriment; in addition it provided for automatic reinstatement which would not be conditional upon mutual consent of both employers and employees. The Employment Ordinance Amendment (No. 4) Bill, 1997, was passed by the Legislative Council on 26 June 1997, granting all workers this new protection. Regrettably, the 1997 Labour Relations Bill, which repealed the above Ordinance, deprives workers in Hong Kong of adequate protection in scope and in remedy, and workers would only be protected against dismissal with compensation and without remedy of automatic reinstatement. In so doing, the HKSAR Government violated Article 1 of Convention No. 98.

245. The HKCTU further alleges that the repeal by the HKSAR Government of the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance, 1997, represents a blatant violation of its obligations under Article 4 of Convention No. 98. The Employees' Right to Representation, Consultation and Collective Bargaining Ordinance, 1997, provided for a procedure of recognition for all registered trade unions to be the bargaining representatives if the unions were able to organize more than 15 per cent of the workforce and show support, as certified by an independent arbitrator, of over half of the respective workforce. The Bill also provided for the recognition of trade unions which organized more than 15 per cent of the workforce in enterprises with a workforce of more than 20 people to be the consultation representative with the management over terms of employment. The HKCTU contends that the HKSAR Government's repeal of this Bill represents an adamant refusal to provide adequate and legal protection for workers' organizations to engage their employers in collective bargaining. The Government's move is a regression, reverting to the previous Government's practice of providing conciliation services by the Labour Department to facilitate negotiation between employers and employees (often individually) rather than workers' organizations (collectively). The repeal also reverts to the old practice of the absence of any procedures for recognition of trade unions as the collective bargaining representative.

246. The HKCTU explains that the Hong Kong Government has never paid any serious efforts to encourage collective bargaining. Other than its refusal to enact appropriate legislation, 22 years after ratifying Convention No. 98, the Hong Kong Government has only produced a one-page publicity pamphlet (1992) in its efforts to "promote" collective bargaining. The Government's active discouragement and refusal

to provide legal protection for collective bargaining have resulted in the marginal representation of trade unions in Hong Kong with very few workers covered by collective agreements. At enterprise level, only two companies presently endorse collective agreements. At industry level, there are general wage agreements in a very limited number of industries, such as some construction trades, printing and stevedore; but the agreements reached are not binding and very often not followed by the employers. Furthermore, the Hong Kong Government has consistently tried to argue that it has observed Article 4 of Convention No. 98 by its provision of conciliation service in labour disputes or promotion of consultation with employees by employers. In its paper to the Labour Advisory Board (LAB/LR4/97, under the paragraph on "Voluntary collective bargaining") (copy attached to the complaint), the concept of collective bargaining is interpreted by the Labour Department as:

> [w]orkplace negotiations in Hong Kong often take place informally on an ad hoc basis, and many of the labour relations problems are resolved through the conciliation service rendered by the Labour Department, often with trade unions playing an advisory and supportive role.

According to the HKCTU, the Government's promotion of "informal" and "ad hoc" contravenes the main gist of Convention No. 98, which calls for the promotion of collective bargaining. Furthermore, trade unions should play the role of a negotiation partner rather than just an "advisory and supportive role".

247. Moreover, contradicting the requirement of Article 4 of Convention No. 98, the "promotional activities" of the Labour Department are not aimed at collective bargaining:

> To promote harmonious labour-management relations in Hong Kong, the Labour Department organizes various activities at both territory and district levels. They aim at increasing public awareness towards effective human resource management practices, the requirement of various labour laws and the importance of cooperation between employers and employees.
> (LAB/LR4/97, under the paragraph on promotional activities of the Labour Department.) (Copy attached to the complaint.)

The HKCTU contends that the Government has failed to address the requirement of Convention No. 98 for employers to negotiate with trade unions or workers' organizations, which is the basis for collective bargaining, but instead has consistently

shown preference for "employee involvement" which is individual or optional in nature:

> Effective communication with the workforce is essential in well-managed companies ... This is why it is important to develop arrangements for employee involvement and voluntary negotiation at enterprise level (LAB/LR4/97, under the paragraph on the need to strengthen promotion of voluntary negotiation at enterprise level). (Copy attached to the complaint.)

The HKCTU asserts that the Hong Kong Government by its own admission is only keen to promote negotiation between employers and employees and bypasses trade unions in its promotional exercises. Its activities favour individual over collective agreements for two purposes: to weaken or eliminate the role of unions and to reduce employees' terms and conditions of employment.

248. The HKCTU maintains that, judging from over two decades of trade union experience, the only way to promote collective bargaining in Hong Kong is through legislative protection. Hence HKCTU General Secretary and Legislative Councillor Lee Cheuk Yan put forward a Private Member Bill, Employee's Rights to Representation, Consultation and Collective Bargaining Ordinance, which was successfully passed on 26 June 1997 and came into effect on 29 June 1997. However, after the change of sovereignty, the HKSAR Government enacted the 1997 Labour Relations Bill which repealed the above-mentioned Collective Bargaining Bill. The HKCTU asserts that the authorities have consistently argued against setting up machinery for collective bargaining in Hong Kong, in particular during the debate of the above Bills. For example, in the *Information Paper for the Panel on Manpower of the Provisional Legislative Council* (copy attached to the complaint), submitted by the Education and Manpower Bureau on 30 September 1997, the authorities state their objection to the enactment of legal provisions for collective bargaining. In his intervention during the 26 June 1997 Legislative Council debate on the 1997 Collective Bargaining Bill, the Secretary for Education and Manpower, Mr. Wong Wing-ping, launched a frontal attack on collective bargaining. He stated in particular that:

> The proposed Bill, if passed, will seriously affect the present harmonious labour relations. Firstly, when faced with trade unions enjoying statutory bargaining status, employers must exercise caution and have to seek legal consultation.

According to the HKCTU, it is evident that the Government's definition of "harmonious labour relations" hinges upon weak trade union organization and the absence of collective bargaining. Mr. Wong also claimed that collective bargaining would cause conflicts between unions and between members and non-members of trade unions. He argued that the procedure of collective bargaining would hinder the speedy settlement of disputes in contrast to the existing machinery of voluntary negotiation between labour and management. Mr. Wong concluded his address by reiterating that:

> ... the Bill, if passed, will change the present harmonious labour relations into confrontational, and thus deal a direct blow to Hong Kong's economy and its attractiveness to foreign investment, thereby reducing the employment opportunities; its adverse impact on the prosperity and stability of Hong Kong is incalculable. This is not in the interest of workers in Hong Kong.

The HKCTU contends that as a result of the absence of provisions on collective bargaining, many unions and employees' representatives have suffered from their employers' refusal to negotiate terms of employment or implement negotiation agreements. This has been the bitter experience of numerous major unions in Hong Kong, to name a few, the Hong Kong International Terminal Group Employees' General Union, Hong Kong Telephone Co. Ltd. Staff Association, Kowloon Motor Bus Co. Ltd. Staff Association, which have witnessed the failure of their employers' implementation of terms of employment or even willingness to negotiate these terms. In effect, despite the Government's official ratification of Convention No. 98, collective bargaining rights have not been protected nor provided for in Hong Kong.

249. In conclusion, the HKCTU insists that, for the purpose of full compliance with Conventions Nos. 87 and 98, the HKSAR Government review its newly enacted Employment and Labour Relations (Miscellaneous Amendments) Bill, 1997, and revert its decision to repeal the laws providing for collective bargaining and trade union rights. The immediate implementation of the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance, 1997, the Employment (Amendment) (No. 4) Ordinance, 1997, and the Trade Union (Amendment) (No. 2) Ordinance, 1997, would ensure the effective implementation of Conventions Nos. 87 and 98 in Hong Kong.

B. The Government's reply

250. In its reply dated 26 May 1998, the Government indicates that the three labour-related Ordinances covered by the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997, are: (a) the Employment (Amendment) (No. 4) Ordinance, 1997, on anti-union discrimination in employment which was repealed; (b) the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance on collective bargaining which was repealed; and (c) the Trade Unions (Amendment) (No. 2) Ordinance, 1997, on regulation and control of trade union activities which was amended.

251. The Government points out that these three Ordinances originated from three Members' Bills (legislative proposals introduced by members of the legislature) and were rushed through during the final sitting of the previous Legislative Council of Hong Kong without due public consultation and full and proper scrutiny. They would have not only had long-term effects on the community, but also far-reaching implications on the labour relations system and the economy of Hong Kong. In fact, the hasty passage of these Ordinances had aroused grave concern from all quarters of the Hong Kong community including the local media. A number of newspaper editorials described this as a "highly irresponsible act". It was therefore only prudent and responsible for the HKSAR Government to carefully review these Ordinances and scrutinize properly their impact so as to ascertain whether the provisions were truly in the public interest. The suspension of these Ordinances allowed the HKSAR Government to complete the necessary review. To underline its commitment to completing the review as soon as practicable, the HKSAR Government set the deadline of 31 October 1997 as the expiry date of the suspension period. According to the Government, there is no question of a "roll-back" on labour rights and benefits as a result of the above decision. It has been the Government's long-established policy to progressively improve employees' rights and benefits in a way which is commensurate with the pace of Hong Kong's economic and social developments and which strikes a reasonable balance between the interests of employers and employees. Employees' rights and benefits in Hong Kong have been substantially and continuously improved in recent years.

252. In this particular case, the HKSAR Government carefully scrutinized and thoroughly reviewed all the three labour-related Ordinances in close consultation with the Labour Advisory Board (LAB). The LAB, as a tripartite consultation body, was

formed in 1946 to advise the Government on labour matters including the application of international labour standards. Employers and employees are each represented by six representatives. Five employee representatives are freely elected by registered employees' unions by secret ballot at biennial elections and five employer representatives are nominated by five major employer associations. The remaining employer and employee representatives are appointed by the Government. As the most representative and well-respected tripartite consultative body on labour matters in Hong Kong, the LAB has proved to be the cornerstone of Hong Kong's harmonious labour relations. It has an impressive and proven track record and has contributed greatly to improving labour rights and benefits in Hong Kong over the past five decades. The proposals to repeal two and amend one of the three labour-related Ordinances in question were drawn up on the basis of the recommendations of the LAB. As such, it represented a reasonable balance between the interests of employers and employees.

253. Turning to the specific allegation that Article 3 of Convention No. 87 was violated through the enactment of the Employment and Labour Relations (Miscellaneous Amendment) Ordinance, 1997, by retaining the restriction on the occupational background of trade union officers and on trade unions' participation in political activities, the Government recalls that Convention No. 87 was declared applicable with modifications in 1963 which is permitted under article 35 of the ILO Constitution. Hence, the Government has applied Convention No. 87 with modifications which include qualifications of trade union officers and restrictions on the use of union funds for political purposes. The modifications in respect of the occupational background of trade union officers and use of trade union funds are necessary safeguards to ensure the healthy development of trade unions in Hong Kong and to ensure that the role of trade unions are strictly confined to the promotion and protection of the interests of union members.

254. The Government indicates that section 17(2) of the Trade Unions Ordinance (TUO) stipulates that "no person shall, without the consent of the Registrar of Trade Unions, be an officer of a registered trade union unless he is ordinarily resident in Hong Kong and is or has been engaged in the trade concerned". The Registrar has been careful and flexible in exercising this power. During 1991-97, 14 applications under section 17(2) were received from unions. All of them were approved. Furthermore, the TUO only prohibits the use of trade union funds for political purposes rather than imposing a general prohibition on trade unions' participation in political activities. Sections 33A and 33B of the TUO permit the use of union funds

for defraying expenses incurred in connection with elections to the District Board, the Urban or Regional Council or the Legislative Council. It is noteworthy that the prohibition on the use of union funds for political purposes was supported by all LAB employee members when the provision was examined by the LAB in the context of the review of the three labour-related Ordinances in August 1997. Feedback from trade unions collected by the Registry of Trade Unions has also revealed that many trade union officers are of the view that local unions should concentrate on promoting workers' rights and benefits rather than becoming politicized in their activities. Finally, with the recent amendments to the TUO under the Employment and Labour Relations (Miscellaneous Amendment) Ordinance, 1997, the previous prohibitions on the formation of cross-industry federations were removed, while the restrictions regarding trade unions' affiliation with their foreign counterparts were relaxed. Trade unions of different industries, trades or occupations may now form federations, and trade unions may become members of organizations of workers and relevant professional organizations in foreign countries without seeking the prior approval from the HKSAR Government.

255. The Government then turns to the allegation that the protection and remedies provided under the Employment (Amendment) (No. 3) Ordinance, 1997, are inadequate and that the repeal of the Employment (Amendment) (No. 4) Ordinance, 1997, particularly the provision regarding automatic reinstatement which would not be conditional upon mutual consent of both employers and employees, has deprived unionists of the right to reinstatement and has hence violated Article 1 of Convention No. 98. The Government points out that Part IVA of the Employment Ordinance provides for protection of workers against acts of anti-union discrimination. Employers and employees are advised of the relevant provisions of the law through training courses, seminars and promotional visits by officers of the Labour Department. The HKSAR Government takes a serious view on all allegations of anti-union discrimination. The policy is to take out prosecution whenever a prima facie case can be established. As regards the two cases cited by the HKCTU involving New Bright Plastics Factory and Wellcome Co. Ltd., prosecutions were indeed taken out in both cases. However, the defendants were acquitted of the charges because the Court was unable to conclude from the evidence available whether the dismissals were by reason of the employees' union membership or participation in union activities or whether they were due to other causes such as poor work performance.

256. With regard to the repeal of the Employment (Amendment) (No. 4) Ordinance, 1997, the Government explains that the provisions of this Ordinance are substantially

similar to the provisions for employment protection in respect of unlawful dismissal on grounds of anti-union discrimination under the Employment (Amendment) (No. 3) Ordinance, 1997, which was proposed by the Government and which came into effect on 27 June 1997. The No. 3 Ordinance strengthened the protection of employees against unreasonable termination of employment, unreasonable variation of employment contract and unlawful dismissals. In respect of dismissals on the grounds of union discrimination, the major differences between the two (Amendment) Ordinances lie in the range of remedies. The No. 3 Ordinance provides for reinstatement/re-engagement subject to prior mutual consent between the employer and the employee, termination payments and award of compensation up to a maximum of HK$150,000 while those provided under the No. 4 Ordinance include reinstatement, promotion and other staffing arrangement without such mutual consent, as well as compensation for damages without any maximum limit. Thus, the No. 4 Ordinance was repealed because (a) similar protection was already provided for under the No. 3 Ordinance and (b) the concurrent operation of two sets of provisions providing for similar protection under the same Ordinance, i.e. the Employment Ordinance would create unnecessary confusion amongst employers, employees and the Labour Tribunal. Moreover, the repeal of the No. 4 Ordinance was unanimously agreed upon by all the employer and employee members of the LAB. The Government indicates that it has made a commitment to review the provisions on reinstatement under the No. 3 Ordinance -- the major area of difference between the above two Ordinances -- after it has come into effect for one year. This has the full support of the LAB.

257. With regard to the allegation that the repeal of the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance represents a blatant violation of the Government's obligation under Article 4 of Convention No. 98, the Government states that Article 4 contains two essential elements: action by the public authorities to promote collective bargaining, and the voluntary nature of negotiation, which implies autonomy of the parties. The provision of this Article does recognize that there can be wide variations in the circumstances of different countries and territories. It is clear that while the HKSAR Government should encourage employers and employees to negotiate on a voluntary basis, there is no question of the Convention creating an absolute obligation upon the HKSAR Government to impose collective bargaining by statute. Hence, in accordance with Article 4, the HKSAR Government has already taken measures appropriate to local conditions to encourage and promote negotiation between employers and employees or their respective organizations on a voluntary basis. The Labour Department has always encouraged the

formation of consultative machinery at the level of individual enterprises. A recent example of the success of such efforts is the case of an airline company which has successfully negotiated with its staff on relocation arrangements arising from the move of operation from Kai Tak International Airport to the new location at Chek Lap Kok. Efforts have also been made to encourage tripartite dialogue at the industry level. An example is the establishment of the catering trade tripartite group which has helped the trade to improve compliance with the Employment Ordinance and publish a code of labour relations practices for the trade. Where negotiations fail to resolve labour problems between an employer or firm with its employees, the Department has always played an active role as a conciliator to facilitate the parties involved to resolve their dispute speedily and amicably. In the process of negotiation, the parties are encouraged to conclude, where possible, a written agreement on the terms of settlement. Voluntary negotiation, underpinned by the Department's voluntary conciliation service, has served Hong Kong well for the past decades. The state of labour relations in Hong Kong has been remarkably harmonious. The average number of working days lost through labour disputes over the four years from 1994 to 1997 was only 0.44 day per 1,000 wage-earners and salaried employees -- one of the lowest in the world.

258. Furthermore, to encourage and promote voluntary negotiation and effective communication, the Labour Department organizes a wide range of activities such as conferences, seminars, training courses and visits. It also publishes free newsletters, pamphlets and leaflets which, among other things, aim at the promotion of the principles and concepts of voluntary negotiation and the importance of effective communication between employers and employees. For example, in the "Code of Labour Relations Practice" the Department advocates that trade unions have a "legitimate right to secure the best possible terms and conditions for the members" and "management should develop a healthy relationship with unions by consulting and cooperating with properly registered and representative unions". To underline the Government's commitment to promoting voluntary negotiation, a special team of experienced officers has been set up in the Labour Department in April 1998 to strengthen the promotion of voluntary negotiation and better communication between employers and employees.

259. The Government denies that it is only keen to promote negotiation between employers and employees and bypasses trade unions, as alleged in the complaint. The HKSAR Government has always recognized the positive and useful role of trade unions in labour relations. It encourages the involvement of industry unions in

tripartite dialogues at the industry level and of enterprise unions (where one exists) in joint negotiations at the enterprise level. In fact, many major labour disputes were successfully resolved through the conciliation efforts of the Labour Department with the active involvement of employees' unions. Some recent notable examples include the sudden closure of Yaohan Department Store and the China Motor Bus dispute in which an industry union and an enterprise union were respectively involved. They both played a useful role in bringing about an amicable settlement of their disputes with management. Finally, the allegation that the Government had "launched a frontal attack on collective bargaining" during the debate over the legislation on collective bargaining is unfounded. In fact, throughout the debate, the Government had made it clear that it fully supported collective bargaining on a voluntary basis and had elaborated only on the reasons why the imposition of collective bargaining by statute was not desirable for Hong Kong.

260. In conclusion, there is no question of the HKSAR Government breaching Conventions Nos. 87 and 98 as a result of the enactment of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997. The Government has applied Convention No. 87 with modifications since 1963 (allowed under the ILO Constitution) and Convention No. 98 in full since 1975. Hence, the decision to repeal two and amend one of the three labour-related Ordinances was in the best overall interests of the community and had taken full account of Hong Kong's socio-economic developments.

C. The Committee's conclusions

261. *The Committee notes that the allegations in this case concern the repeal and/or amendment of three labour-related Ordinances by the Government of the Hong Kong Special Administrative Region (HKSAR) through its enactment of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997 (referred to as the ELRO hereinafter), certain provisions of which are contrary to the requirements of Conventions Nos. 87 and 98. While not denying that the three labour-related Ordinances were in effect repealed and/or amended by the ELRO, the HKSAR Government contends that the latter Ordinance complies fully with these Conventions.*

262. *With regard to the specific allegation that Article 3 of Convention No. 87 was violated through the enactment of the ELRO by retaining the restriction on the occupational background of trade union officers and on the use of union funds for political purposes, the Government states that since Convention No. 87 was declared applicable with modifications which cover the issues of qualifications of trade union officers and the use of union funds for political purposes, it is justified in applying the Convention which such modifications. At the very outset and in this respect, the Committee would remind the Government that the mandate of the Committee consists in determining whether any given legislation or practice complies with the* ***principles of freedom of association and collective bargaining*** *laid down in the relevant Conventions [see* ***Digest of decisions and principles of the Freedom of Association Committee****, 4th edition, 1996, para. 6] independently of the ratification or non-ratification of these Conventions. The Committee therefore proposes to examine whether the legislation complained of is in conformity with freedom of association principles in keeping with its mandate.*

263. *Concerning the issue of restrictions on the eligibility of union officials to stand for office, the Committee notes in effect that section 5 of the ELRO amends the Trade Union (Amendment) (No. 2) Ordinance, 1997, by reintroducing the occupational requirement for persons wishing to stand for trade union office. In this respect, the Committee would recall that the determination of conditions of eligibility of union office is a matter that should be left to the discretion of union by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right by trade union organizations [see 309th Report, Case No. 1865 (Republic of Korea), paras. 153 and 160(xi)]. The Committee therefore requests the Government to repeal section 5 of the ELRO restricting union office to persons actually employed in the trade, industry or occupation of the trade union concerned.*

264. *With regard to alleged government restrictions on the use of union funds, the Committee notes that the 1989 Trade Union Ordinance contained two sets of restrictions which were repealed by the Trade Union (Amendment) (No. 2) Ordinance, 1997, and subsequently reintroduced by the ELRO. Section 8 of the ELRO subjects financial contributions to trade unions or similar organizations abroad as well as the use of union funds for any other purposes than those enumerated in section 33(1) of the Trade Union Ordinance of 1989 to the "approval of the Chief Executive". Section 9 of the ELRO contains a blanket prohibition on the use of union funds for any political purpose. In its reply, the Government confines itself to addressing the latter allegation, indicating that restrictions on the use of union funds for political purposes are necessary safeguards to ensure the healthy development of trade unions in Hong Kong. The Committee has stated on previous occasions that provisions which give the authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes for normal and lawful trade union purposes are incompatible with the principles of freedom of association [see* ***Digest****, op. cit., para. 438]. The Committee therefore considers that section 8 of the ELRO which gives the Chief Executive the authority to impose restrictions on the use of union funds is incompatible with the right of workers' organizations to organize their administration without interference by the public authorities; this right includes the autonomy and financial independence of these organizations. It requests the Government to take the necessary steps to repeal section 8. Similarly, with regard to the blanket prohibition established by section 9 on the use of union funds for any political purpose, the Committee would remind the Government that provisions imposing a general prohibition on political activities by trade unions for the promotion of their specific objectives are contrary to the principles of freedom of association provided that trade unions do not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests [see* ***Digest****, op. cit., paras. 452 and 454]. The Committee considers that it would be difficult, if not impossible, for unions to engage in political activities in practice in the face of a legislatively imposed ban on the use of union funds for any political purpose. It therefore requests the Government to take steps to repeal section 9 of the ELRO as well.*

265. *The Committee notes that, according to the complainant, the adoption of the ELRO also constitutes a violation of Convention No. 98 for several reasons. With regard to Article 1 of Convention No. 98, the complainant points out that since the protection and the remedies provided under the Employment (Amendment) (No. 3) Ordinance, 1997, which was proposed by the Government were inadequate, the Employment (Amendment) (No. 4) Ordinance, 1997, which granted workers a better*

protection against all acts of anti-union discrimination, was subsequently adopted by the Legislative Council; however, the latter Ordinance was repealed by the ELRO. The Government contends that similar protection was provided for under the No. 3 Ordinance and the No. 4 Ordinance and the latter was repealed to avoid confusion amongst employers, employees and the Labour Tribunal, brought about by the concurrent operation of two sets of provisions providing for similar protection under the Employment Ordinance.

266. *The Committee, for its part, notes first of all that while section 32A(1)(c)(i) of the No. 3 Ordinance provides for protection against dismissal of workers on grounds of union activities, section 21D of Ordinance No. 4 provided for protection against dismissal as well as all other forms of detriment. The Committee would remind the Government that protection against acts of anti-union discrimination should cover not only dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker [see* ***Digest****, op. cit., para. 695]. Similarly, the Committee notes that section 32(N)(3) of Ordinance No. 3 stipulates that the court or Labour Tribunal may make an order for reinstatement only if both the employer and employee concerned agree thereto, whereas section 21H(2)(c) of Ordinance No. 4 authorized the Labour Tribunal to make an order for reinstatement even without such prior mutual consent. In the Committee's view, it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities [see* ***Digest****, op. cit., para. 707]. The Committee believes that the above scenario is likely to ensue under the terms set out in section 32(N)(3) of Ordinance No. 3 since it is difficult to envisage that the requirement of prior mutual consent contained therein will be easily forthcoming if the true reason for dismissal is based on anti-union motives. This is partly acknowledged by the Government itself in its "Review of Industrial Relations System in Hong Kong" published in October 1993 in which it is stated, inter alia, that:*

> *... although the Government has from time to time received complaints from employees against their employers for anti-union discrimination, ... it is difficult to prove such violations,* ***as often other reasons are used as cover-up for the hidden discriminatory motive*** *[emphasis added].*

267. *In this respect, the Committee takes due note of the Government's statement that it is committed to reviewing the provisions on reinstatement under the No. 3 Ordinance, which commitment has the full support of the Labour Advisory Board (LAB). In the light of the principles enunciated in the preceding paragraph and in order to bring its legislation into complete conformity with the principles on freedom of association relating to protection against acts of anti-union discrimination, the Committee requests the Government to review the Employment (Amendment) (No. 3) Ordinance, 1997, with a view to ensuring that provision is made in the legislation for: (i) protection against all acts of anti-union discrimination; and (ii) the possibility of the right to reinstatement which would not be conditional upon the prior mutual consent of both the employer and the employee concerned.*

268. *The Committee notes that the last series of allegations centre around the repeal by the Government of the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance of 1997 which, according to the complainant, provided adequate and legal protection for workers' organizations to engage their employers in collective bargaining. This repeal allegedly represents a regression to the old practice of the absence of any procedures for recognition of trade unions as the collective bargaining representative. The Committee notes in effect that section 12 of the above Ordinance defined a representative trade union to be one which was able to organize more than 15 per cent of the workforce and show support, as certified by an independent arbitrator, of over half the respective workforce. Moreover, section 15 of the same Ordinance laid down procedures for the recognition by employers of representative trade unions for purposes of collective bargaining. The Committee notes the Government's statement that it fully supports collective bargaining on a voluntary basis but that Convention No. 98 does not create an obligation to impose collective bargaining by statute. As a result, the above Ordinance was repealed and a number of measures appropriate to local conditions were taken to encourage and promote negotiation between employers and employees or their respective organizations on a voluntary basis including the provision of the Labour Department's conciliation service. Furthermore, the Government emphasizes that in order to encourage and promote voluntary negotiation, the Labour Department organizes a wide range of activities such as conferences, seminars, training courses and visits.*

269. *The Committee would recall that it has always taken the view that nothing in Article 4 of Convention No. 98 places a duty on the Government to enforce collective bargaining by compulsory means with a given organization; such an intervention*

*would clearly alter the nature of bargaining [see **Digest**, op. cit., para. 846]. On the other hand, it has also taken the view that employers, including governmental authorities in the capacity of employers, should recognize for collective bargaining purposes the organizations representative of the workers employed by them [**Digest**, op. cit., para. 821]. In this regard, the Committee notes the complainant's assertion (to which the Government does not reply) that the absence of legal protection for collective bargaining has resulted in the marginal representation of trade unions in Hong Kong with only very few workers covered by collective agreements in a very limited number of industries, such as some construction trades, printing and stevedore; but the agreements reached are not binding and very often not followed by the employers. Furthermore, the Government does not comment on the concrete examples given by the complainant on the experience of certain major organizations in Hong Kong -- such as the Hong Kong International Terminal Group Employees' General Union, the Hong Kong Telephone Co. Ltd. Staff Association, and the Kowloon Motor Bus Co. Ltd. Staff Association -- which have witnessed their employers' refusal to negotiate terms of employment or alternatively to implement agreements that have been negotiated. Finally, in response to the allegation that the Government had "launched a frontal attack on collective bargaining" during the debate over the adoption of the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance of 1997, the Government merely indicates that this allegation is unfounded. The Committee notes, however, from the information provided by the complainant that during the Legislative Council debate on the 1997 Collective Bargaining Bill, one of the reasons put forward by the Secretary for Education and Manpower for not adopting the Collective Bargaining Bill was that:*

> *... the Bill, if passed, will change the present harmonious labour relations into confrontational, and thus deal a direct blow to Hong Kong's economy and its attractiveness to foreign investment, thereby reducing the employment opportunities; its adverse impact on the prosperity and stability of Hong Kong is incalculable. This is not in the interest of workers in Hong Kong.*

*The Committee considers that the above reason for not adopting provisions to promote collective bargaining is in contradiction with the obligation incumbent upon the Government under Article 4 of Convention No. 98. Furthermore, it runs contrary to the principle that the right to bargain freely with **employers** with respect to conditions of work constitutes an essential element in freedom of association, and **trade unions** should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade*

*unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes [**Digest**, op. cit., para. 782]. The Committee further notes that another objection to the enactment of legal provisions for collective bargaining put forward by the Secretary for Education and Manpower during the debate was that collective bargaining would cause conflicts between unions and between members and non-members of trade unions which would hinder the speedy settlement of disputes in contrast to the existing machinery of voluntary negotiation between labour and management. The Committee has stated on previous occasions that precisely in order to encourage the harmonious development of collective bargaining and to avoid disputes, it should always be the practice to follow, where they exist, the procedures laid down for the designation of the most representative unions for collective bargaining purposes when it is not clear by which unions the workers wish to be represented. In the absence of such procedures, the authorities, where appropriate, should examine the possibility of laying down objective rules in this respect [**Digest**, op. cit., para. 838].*

***270.** In the light of the principles enunciated in the preceding paragraph, it is the Committee's view that the case at hand furnishes a clear illustration of the appropriateness of adopting provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes. Regretting that the Government chose to repeal the Employees' Right to Representation, Consultation and Collective Bargaining Ordinance of 1997 which contained provisions to that end, the Committee would request the Government to give serious consideration to the adoption of appropriate provisions which respect freedom of association principles in the near future.*

The Committee's recommendations

271. 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 steps to repeal section 5 of the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997 (ELRO), which restricts union office to persons actually employed in the trade, industry or occupation of the trade union concerned.

(b) The Committee requests the Government to take the necessary steps to repeal: (i) section 8 of the ELRO which subjects the use of union funds in certain instances to the approval of the Chief Executive of Hong Kong; and (ii) section 9 of the ELRO which institutes a blanket prohibition on the use of union funds for any political purpose.

(c) The Committee requests the Government to review the Employment (Amendment) (No. 3) Ordinance, 1997, with a view to ensuring that provision is made in legislation for: (i) protection against all acts of anti-union discrimination; and (ii) the possibility of the right to reinstatement which would not be conditional upon the prior mutual consent thereto of both the employer and the employee concerned.

(d) The Committee requests the Government, in the near future, to give serious consideration to the adoption of legislative provisions laying down objective procedures for determining the representative status of trade unions for collective bargaining purposes which respect freedom of association principles.

(e) The Committee requests the Government to keep it informed of measures taken to give effect to the above recommendations.

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

Appendix I
Summary of three controversial labour laws in Hong Kong, 1997, provided by the HKCTU

Name of ordinance	Before June 1997 Amendments	June 1997 Legislative Council Amendments	October 1997 Provisional Legislative Council Amendment
Trade Union (Amendment) (No.2) Ordinance, 1997	1. Bans use of union funds for political purposes. 2. Restricts federation of cross-sectoral unions. 3. Government prior approval required for association of local unions to overseas bodies. 4. Bans the election of persons from outside the enterprise or sector on the executive committee of unions and union federations. 5. Age limit of union officials restricted at 21.	1. Removal of government restriction on the use of union funds. 2. Removal of restriction on the federation of cross-sectoral unions. 3. Removal of the requirement of government approval for the international affiliation of trade unions. 4. Removal of ban on the election of persons from outside the enterprise or sector on the executive committee of unions and union federations. 5. Lowers the age limit of union officials from 21 to 18.	1. Bans use of union funds for political purposes. 2. Allows cross-sectoral union federations. 3. Allows free association to overseas trade unions. 4. Removal of ban on the election of persons from outside the enterprise or sector on the executive committee of federations; but ban retained for unions. 5. Lowers the age limit of union officials from 21 to 18.
Employment (Amendment) (No.4) Ordinance 1997	In case of dismissal of employees due to their union activities, they are entitled to compensation payment.	In case of dismissal of employees due to their union activities, they can demand reinstatement or fair compensation.	In case of dismissal of employees due to their union activities, they are entitled to compensation payment.
Employees' Right to Representation, Consultation and Collective Bargaining Ordinance	No legal stipulation nor protection.	1. Representation: All registered trade unions of all enterprises have the right to be the bargaining representatives. 2. Consultation: unions which organize more than 15% of the workforce of enterprises with over 20 employees have the right to be the consultation representative with the management. 3. Collective bargaining: unions which organize more than 15% of the workforce enterprises	No legal stipulation nor protection.

with over 50 employees, when authorized by over half of the workforce, have the right to be bargaining representative with the management.